

# RULE MAKING ACTIVITIES

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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.

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Sanitation Requirements for Poultry Dealers and Poultry Transporters

**I.D. No.** AAM-35-04-00013-E  
**Filing No.** 911  
**Filing date:** Aug. 13, 2004  
**Effective date:** Aug. 16, 2004

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

**Action taken:** Amendment of Part 45 of Title 1 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The amendments to Part 45 will expand and strengthen the Department's avian influenza control program by requiring a poultry dealer or poultry transporter holding a valid domestic animal health permit who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market, to maintain a facility such that it can be cleaned and disinfected on a year round basis, to possess and utilize a mechanical crate

washer to clean and disinfect crates between uses on a year round basis, to use an all-season truck or vehicle wash facility to clean and disinfect trucks or vehicles between uses on a year round basis and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. The amendments also clarify the requirement that the certificate of veterinary inspection shall remain with DAHP holder (*i.e.* poultry dealer or poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 45.6[(c)] (a) No live poultry more than seven days old shall be moved into a *live* poultry market other than [directly from source flocks] *by a poultry dealer or poultry transporter holding a valid domestic animal*

*health permit and from flocks* which meet the requirements of subdivision [(a)] (b) of this section.

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

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

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

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

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

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

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

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

(v) *the date of the movement of such poultry into the market;*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) the type of poultry being moved;

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 10, 2004.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

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

Section 18 of the Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

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

Section 72 of the Law also provides that whenever a communicable disease affecting domestic animals shall exist or be brought into this State, the Commissioner shall take measures promptly to suppress the same and to prevent such disease from spreading.

##### 2. Legislative objectives:

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

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

poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

##### 3. Needs and benefits:

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4. Costs:

##### (a) Costs to regulated parties:

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

##### (b) Costs to the agency, state and local governments: None.

##### (c) Source:

Costs are based upon observations of business practices in the industry as well as outreach with regulated parties.

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

#### 7. Duplication:

None.

#### 8. Alternatives:

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

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

#### 9. Federal standards:

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

#### 10. Compliance schedule:

Immediate compliance by the industry is expected.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

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

The amendments will have no impact upon local governments.

#### 2. Compliance requirements:

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

The amendments will have no impact upon local governments.

#### 3. Professional services:

None.

#### 4. Compliance costs:

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

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

5. Economic and technological feasibility:

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

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

The amendments will have no impact upon local governments.

6. Minimizing adverse impact:

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

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

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

The amendments will have no impact upon local governments.

7. Small business and local government participation:

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

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

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas:

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

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

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

5. Rural area participation:

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

**Job Impact Statement**

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

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

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

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## Banking Department

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

#### Change of Individual Designated to Receive Process

I.D. No. BNK-35-04-00003-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 Supervisory Procedure FB 105 of Title 3 NYCRR.

**Statutory authority:** Banking Law, section 200

**Subject:** Procedure for a foreign banking corporation for a change of manager, representative or individual designated to receive process.

**Purpose:** To eliminate the current requirement that a litigation affidavit and resume must be submitted when a foreign banking corporation changes the individual designated to receive process. Also, the position of deputy manager was added to the title of FB 105 to make it consistent with positions mentioned in the regulation itself.

**Text of proposed rule:**

SUPERVISORY PROCEDURE FB 105 PROCEDURE FOR A FOREIGN BANKING CORPORATION FOR A CHANGE OF MANAGER, DEPUTY MANAGER, REPRESENTATIVE OR INDIVIDUAL DESIGNATED TO RECEIVE PROCESS

(Statutory authority: Banking Law § 200)

§ 105.1 General Information.

A foreign banking corporation maintaining a New York State-licensed branch, agency or representative office that proposes to change its manager, deputy manager, representative or individual designated to receive process, shall submit a letter to the superintendent indicating the name(s) of the individual(s) to whom such change is being made.

§ 105.2 Documents required.

The letter shall be accompanied by:

(a) A certified copy of the resolution of the foreign banking corporation's board of directors (accompanied by a translation into English if applicable) sworn to before a United States Consular Official (or accompanied by an apostille):

(1) authorizing designation of the person who is to be in charge of the business and affairs of the branch or agency, or named as the representative of the bank, and/or authorizing designation of the officer to whom process may be forwarded by the Superintendent of Banks; or

(2) evidencing that the board of directors has designated a person in the bank who is authorized to appoint persons to the position of general manager, deputy general manager, representative of the bank, or officer to whom process may be forwarded by the Superintendent of Banks, accompanied by a certificate (in English), signed by the person designated in the resolution, appointing an individual to such position[.];

(b) Certificate of designation, specifying the name and address of the officer to whom process may be forwarded by the superintendent if different (form available from superintendent)[.];

(c) *With respect to the manager, deputy manager and/or representative:*

(1) A litigation affidavit executed by the new individual (form available from superintendent)[.]; and

[(d)] (2) A brief resume of the new individual, disclosing his or her educational and business background.

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

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

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

#### Consensus Rule Making Determination

The Department has determined that no person is likely to object to the proposed amendment to FB 105. The amendment will eliminate the current requirement that a litigation affidavit and resume must be submitted by a foreign banking corporation for a change in the individual designated to receive process. This will lessen the burden on these institutions when making such a change.

#### Job Impact Statement

The purpose of the proposed amendment to FB 105 is to eliminate the current requirement that a litigation affidavit and resume must be submitted when a foreign banking corporation changes the individual designated to receive process. Accordingly, a job impact statement is not submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

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

#### Public Access of Banking Department Records Under the Freedom of Information Law

I.D. No. BNK-35-04-00012-P

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

**Proposed action:** This is a consensus rule making to repeal Supervisory Procedure G 106 and add a new Supervisory Procedure G 106 to Title 3 NYCRR.

**Statutory authority:** Public Officer's Law, section 87 *et seq.*

**Subject:** Public access of Banking Department records under the Freedom of Information Law.

**Purpose:** To more closely follow the Freedom of Information Law and outline and provide clarity with respect to the department's FOIL procedures for public access to records.

**Text of proposed rule:** Supervisory Procedure G 106 is repealed and a new G 106 is added to read as follows:

**SUPERVISORY PROCEDURE G 106**

**PUBLIC ACCESS TO BANKING DEPARTMENT RECORDS**  
(Statutory authority: New York Public Officers Law, § 87 & § 89, Banking Law § 12 & § 36.10)

§ 106.1 Definitions.

*When used in this Supervisory Procedure:*

(a) "Person" shall include individuals and commercial enterprises.

(b) "Interested Parties" shall mean the person requesting the record, the person who requested the exception and the committee on public access to records.

(c) "POL" shall mean New York Public Officers Law.

(d) "CPLR" shall mean the New York Civil Practice Law and Rules.

§ 106.2 Times and places when records are available.

Persons seeking access to the records of the Banking Department made available by POL § 87 *et seq.* (Freedom of Information Law), should submit a written request for photocopies of such records or should submit a written request to inspect such records during regular business hours on regular working days at the Banking Department's New York City office located as set forth in Supervisory Procedure G1. The written request may be submitted by regular mail, by facsimile or by email.

§ 106.3 Records Access Officer.

The Secretary of the Banking Board is the Records Access Officer for the Banking Department and shall be responsible for coordinating the Department's response to requests for records. The Records Access Office is located in the New York City office of the Banking Department as set forth in Supervisory Procedure G1.

§ 106.4 Fees and payment for copies or reproductions.

The Banking Department charge shall be 25 cents per page for copies up to 9 x 14 inches, or the actual cost of reproducing any other type of record. Each requestor is entitled to ten free copies on an annual basis.

Based on the circumstances of each request, the Banking Department may:

- (a) Require payment prior to processing a request, or
- (b) Require payment prior to releasing a completed request, or
- (c) Waive any applicable fees.

Waivers of fees will be granted on a case-by-case basis and will be decided based upon the circumstances surrounding each request. Organizations or entities are not entitled to a blanket waiver of all their FOIL requests.

§ 106.5 Procedures for gaining access to records.

A person seeking access to Banking Department records shall follow the procedures as set forth below:

(a) A request must be made in writing and shall reasonably describe the records sought. To the extent possible, a request shall supply dates, file designations and any other identifying information that may assist the Banking Department in locating the desired documents.

(b) If a person seeks to review records that are in the possession and control of the Banking Department, an appointment must be arranged through the Records Access Officer. The review of such records shall take place during regular business hours and on regular business days. There is no fee imposed for viewing records. However, the Banking Department may charge 25 cents per page for those records that need to be redacted prior to review.

(c) If access to records is neither granted nor denied within five business days after receiving the request, the Banking Department shall issue a written acknowledgment of the receipt of the request and shall provide a statement as to the approximate date when the request will either be granted or denied. This date will be an estimate based on all the attendant circumstances that are reasonably foreseeable at the time that the request is received.

§ 106.6 Denial of access to records and the right to appeal.

(a) Any denial of access to records shall be communicated in writing to the requestor. Such writing shall state the reasons for the denial and shall advise the applicant of the right to appeal.

(b) Except for records covered by POL § 89(5), any requestor who is denied access to any departmental records may, within 30 days of such denial, appeal to the Superintendent or an authorized representative of the Superintendent. Within 10 business days from the receipt of the appeal, the Superintendent shall render a decision upholding or reversing the denial and the appellant will be advised in writing as to the reasons for the denial. The action of the Superintendent is subject to judicial review as provided in Article 78 CPLR.

(c) Any denials or appeals concerning records that may be withheld from public disclosure as trade secrets under POL § 87(2)(d), in which a request is made to exempt such records or portions thereof from public disclosure pursuant to § 89(5)(d), shall be subject to the following provisions of section 106.7.

§ 106.7 Trade Secret/Competitive Harm Exemption.

(a) A commercial enterprise that submits records to the Banking Department may request pursuant to POL § 89(5) that such records or portions thereof be exempted from public disclosure as trade secrets under POL § 87(2)(d). This section gives the Banking Department the authority to deny access to records that are trade secrets, or are maintained for the regulation of the commercial enterprise, which if disclosed would cause substantial injury to the competitive position of the enterprise. In order to obtain the protection afforded by this section, a person that submits records to the Banking Department, may at the time of submission, request that the Banking Department except such information from disclosure pursuant to § 87(2)(d). The request shall be in writing and shall state the reasons for claiming the exemption.

(b) If a request for confidentiality is made pursuant to POL § 89(5)(a)(1), then the following procedures as set forth in POL § 89(5) shall apply:

(1) The Banking Department may at any time, request additional written justification in support of the said exemption. It then shall notify the commercial enterprise requesting said exemption that it must respond within 10 business days from the date the Banking Department requests such information. POL § 89(5)(b)(2).

(2) Within seven business days of receiving this response, the Banking Department shall issue a written determination granting, continuing or terminating the exemption and the reasons therefore. This determination

shall be in writing and shall be served on all interested parties. POL § 89(5)(b)(3).

(3) Within seven business days of receiving a notice of the written denial of an exemption or access to a record, an appeal may be filed with the Superintendent of Banks. POL § 89(5)(c)(1).

(4) The appeal shall be determined by the Superintendent of Banks, within 10 business days of the receipt of the appeal. A written notice of the determination will be given to all interested parties along with the reasons therefor. POL § 89(5)(c)(2).

(5) A proceeding to review an adverse determination by the Banking Department may be brought under Article 78 of the CPLR. Such proceeding must be commenced in New York Supreme Court, within 15-days after the Superintendent of Banks serves the written notice of the decision on the interested parties. POL § 89(5)(d).

(6) All records submitted to the Banking Department shall continue to be exempt from disclosure pending the 15-day appeal period. POL § 89(5)(a)(3).

§ 106.8 Confidential Communications.

Reports of examinations and investigations, including correspondence and memoranda arising out of such, are deemed to be confidential material by the Banking Department pursuant to New York Banking Law § 36(10). Access to these records may be denied under the provisions of POL § 87(2)(a).

**Text of proposed rule and any required statements and analyses may be obtained from:** Sam L. Abram, Secretary to the Banking Board, Banking Department, One State St., 6th Fl., New York, NY 10004-1417, (212) 709-1642, e-mail: sam.abram@banking.state.ny.us

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

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

**Consensus Rule Making Determination**

The Department has determined that no person is likely to object to the proposed amendments to Supervisory Procedure G 106. The amendments will simply clarify the existing Freedom of Information Law and Department's procedures in responding to Freedom of Information Law requests.

**Job Impact Statement**

The purpose of the proposed rule is to amend Supervisory Procedure G 106 to update the Banking Department's procedures for handling a request for the Department's records under the Freedom of Information Law. Accordingly, a job impact statement is not submitted because it is apparent from the nature and purpose of the rule that it will not have an appreciable and/or substantive adverse impact on jobs and employment opportunities.

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## Department of Civil Service

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00004-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the New York State Thruway Authority.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the New York State Thruway Authority, by increasing the number of positions of Special Assistant from 2 to 3.

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

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

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

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

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00005-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the State University of New York.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the State University of New York under the subheading "Central Administration," by increasing the number of positions of Secretary from 6 to 7.

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

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

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

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

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00006-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Civil Service.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Civil Service, by adding thereto the position of Special Counsel.

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

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

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

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

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00007-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office for Technology," by decreasing the number of positions of Secretary from 2 to 1 and by increasing the number of positions of Special Assistant from 2 to 3.

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

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

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

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

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00008-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Mental Hygiene.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by adding thereto the position of Affirmative Action Administrator 4 (1).

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

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

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

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

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-35-04-00009-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by deleting therefrom the position of Advocacy Specialist 2 (1) and by adding thereto the positions of Advocacy Specialist 2 (1) and Advocacy Specialist 4 (1) and, in the Executive Department under the subheading "Commission on Quality of Care for the Mentally Disabled," by deleting therefrom the positions of Advocacy Specialist 1 (4) and

φ Advocacy Specialist 2 (2) and by adding thereto the positions of Advocacy Specialist 1 (4) and Advocacy Specialist 2 (2).

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

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

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

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

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

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## New York State Energy Research and Development Authority

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

#### Minimum Energy Efficiency Standards

**I.D. No.** ERD-35-04-00011-P

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

**Proposed action:** Addition of section 506.4(f)-(m); repeal of section 506.6 and addition of new section 506.6 to Title 21 NYCRR.

**Statutory authority:** Energy Law, section 5-108-a; and Public Authority Law, section 1855(4)

**Subject:** Minimum energy efficiency standards for energy using products purchased by or for the State and State agencies.

**Purpose:** To establish minimum energy efficient standards.

**Substance of proposed rule (Full text is posted at the following State website: [nyserda.org](http://nyserda.org)):** Section 506.4 Minimum Energy Efficiency Standards defines the various energy using products and sets the minimum efficiency standards.

Electric motors are defined and standards are set for open and totally enclosed fan cooled (TEFC) electric motors. At varying specified levels of horsepower from 1 to 500, the minimum nominal full load efficiency for open motors at 3600 rpm ranges from 77.0 to 95.8, at 1800 rpm ranges from 85.5 to 96.2, and at 1200 rpm ranges from 82.5 to 96.2 and for TEFC motors at 3600 rpm ranges from 77.0 to 95.8, at 1800 rpm ranges from 85.5 to 96.2, and at 1200 rpm ranges from 82.5 to 95.8. These levels are the same levels identified in the NEMA Premium TM Efficiency Electric Motors Program. The efficiency of electric motors are determined in accordance with the procedures set forth in 10 Code of Federal Regulations (CFR) Part 431, Subpart B, Section 431.24.

Residential water heaters are defined and standards are set for electric storage water heaters, gas-fired storage water heaters, oil-fired water heaters, and gas-fired instantaneous water heaters. The minimum energy factor for electric storage water heaters is  $0.97 - 0.00132 \times \text{Volume}$ ; gas-fired storage water heaters is  $0.67 - 0.0019 \times \text{Volume}$ ; oil-fired water heaters is  $0.59 - 0.0019 \times \text{Volume}$ ; and gas-fired instantaneous water heaters is  $0.62 - 0.0019 \times \text{Volume}$ . The minimum efficiency standards for residential water heaters are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix E.

Commercial water heaters are defined and standards are set for electric storage water heaters, gas-fired storage water heaters, oil-fired water heaters, and gas instantaneous water heaters and oil instantaneous water heaters. The standards for thermal efficiency and standby losses are as follows: electric storage water heaters maximum standby loss is  $0.3 + 27/V$ ; gas-fired storage water heaters minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; oil-fired water heaters minimum thermal efficiency is 78% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; gas fired instantaneous water heaters with storage

capacity of less than 10 gallons minimum thermal efficiency is 80% and storage capacity of equal to or greater than 10 gallons minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; and oil instantaneous water heaters with volume size of less than 10 gallons minimum thermal efficiency is 80% and volume size equal to or greater than 10 gallons minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+100 (\text{sqrt}Vr)$ . The minimum efficiency standards for commercial water heaters are determined in accordance with the test procedures set forth in ANSI Z21.10.3-1998.

Residential refrigerators and refrigerator-freezers which volume does not exceed 39 cubic feet (1104 liters) and freezers which total refrigerated volume does not exceed 30 cubic feet (850 liters) are defined and standards are set for automatic defrost units and compact refrigerators. The maximum annual energy use in kWh/yr for automatic defrost units with top-mounted and side-mounted freezer with and without Through-The-Door (TTD) ice and different defrost systems for compact refrigerators is determined by formulas and ranges from  $0.90 (10.7 AV + 299)$  to  $0.90 (10.1 AV + 406)$ , where AV stands for adjusted volume. The minimum efficiency standards for residential refrigerator-freezers are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix A1 and B1.

Commercial refrigeration is defined and standards are set for reach-in cabinet freezers and reach-in refrigerators. The maximum annual energy use in kWh/day for reach-in cabinet freezer is determined by the formula  $0.40V + 1.38$  and reach-in refrigerator is determined by the formula  $0.10V + 2.04$ , where V stands for volume. The minimum efficiency standards for commercial refrigerators and freezers are determined in accordance with the test procedures set forth in ASHRAE 117.

Luminaire is defined and standards are set for recessed, plastic wrap-around, strip lights, and industrial types. The minimum luminaire efficacy ratings (LER) for 1, 2, 3, or 4 lamps range from 41 to 70. The LER are determined in accordance with the test procedures set forth in NEMA LE5-2001.

Compact fluorescent lamp (CFL) is defined and standards are set for bare bulbs, covered lamp with no reflectors, and reflector type. The minimum lumens per Watt (LPW) range from 33 to 60. The minimum efficiency standards for compact fluorescent lamps are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix R.

Mercury vapor luminaires and lamps are defined and are prohibited from being purchased.

Section 506.6 lists the materials referenced in the additional regulations and indicates where copies of the references may be found.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mitchell Khosrova, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203, (518) 862-1090, ext. 3380, e-mail: mk2@nyserda.org

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

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

#### Regulatory Impact Statement

1. Statutory Authority: Energy Law Section 5-108-a requires the Authority to promulgate minimum energy efficiency standards for appliances and energy using products purchased by or for the State or any agency thereof; Public Authorities Law Section 1855(4) authorizes the Authority to promulgate rules and regulations; and the State Administrative Procedures Act Section 102 generally authorizes the promulgation of rules and regulations.

2. Legislative Objectives: The legislature has declared that the New York State Energy Research and Development Authority, in consultation with the Commissioner of the Office of General Services, should promulgate minimum energy efficiency standards for appliances and energy using products purchased by or for the State, based on cost-effectiveness criteria.

3. Needs and Benefits: The State of New York spends over \$320 million annually in energy costs. One way to ensure that those costs are kept as low as reasonably possible, is to set minimum efficiency standards for appliances and energy-using products that are purchased by the State. As an additional benefit, the State, through its purchasing power, can influence appliance manufacturers' efficiency standards, and set a positive example for private industry and consumers. Accordingly, the purpose of the proposed regulations is to establish minimum energy efficiency standards for appliances and energy using products purchased by or for the State or any agency thereof. The standards are designed to achieve cost effective savings to the maximum extent practicable, taking into account market availability.

4. Costs: Energy Law Section 5-108-a requires the promulgation of minimum energy efficiency standards for certain energy using products purchased by or for the State or any agency thereof. Section 5-108-a requires the Authority to establish the standards in consultation with the Commissioner of the Office of General Services (OGS). Standards for electric motors, water heaters, refrigerators, freezers, refrigerator-freezers, lamps and luminaires are to be established.

In carrying out its responsibilities, the Authority established an Advisory Committee to provide input and guidance. The Advisory Committee consists of representatives from industry trade associations, energy-efficiency and environmental advocate organizations, and OGS and other State agencies who will be subject to the standards once they are promulgated. Specific organizations on the Committee include: Association of Home Appliance Manufacturers, Air Conditioning and Refrigeration Institute, Consortium for Energy Efficiency, National Electrical Manufacturers Association, Gas Appliance Manufacturers Association, New York State Dormitory Authority, State University Construction Fund, Northeast Energy Efficiency Partnerships, Inc., Natural Resources Defense Council, and the U.S. Department of Energy. While the standards were being developed, the Committee met four times and also discussed issues and provided guidance through an Authority established listserv.

In determining what standards should be established for electric motors, water heaters, refrigerators, freezers, refrigerator-freezers, lamps and luminaires, a combination of individuals from the Authority, its Contractor, and its Advisory Committee (together, the "Group") contacted various major State agencies including the State University of New York ("SUNY") and others. These agencies assisted in identifying the types of these energy using products that they typically purchased as commodity purchases or for new construction or substantial renovation projects and should be covered by Section 5-108-a. The minimum efficiency standards were then established using this and other information as described below.

In setting the standards, the Group reviewed the various sizes and types of products, their availability, and determined life cycle costs based upon equipment prices, annual operating hours, unit energy consumption, useful life, electric operating costs, and discount rates.

Once the Group determined the types of products that should be covered, it researched other existing government and industry standards that apply to such products, the various sizes of such products in the marketplace, and the number of manufacturers. To determine the cost-effectiveness of the products, the Group reviewed life-cycle costs of the various products taking into account, when appropriate, such factors as the efficiency of the product, replacement labor costs, annual operating hours, life hours, electricity costs, and discount rates.

Based on the availability analyses and the life-cycle cost results, the Authority, in consultation with OGS, determined the energy efficiency minimum standards.

The Group was unsuccessful in identifying a central or comprehensive data base from which to determine how many of the covered products were purchased by or on behalf of the State. In some cases, purchases were made through OGS, but in other cases, the State agency makes its own purchases directly. Detailed records were not available which indicated the level of energy efficiency of the products being purchase. The Group was also unable to identify related sales information from manufacturer's of the covered products. In addition, since Energy Law Section 5-108-a required the Authority to consider cost-effectiveness and market availability in establishing the standards, an analysis based on cost of the product alone was not appropriate. Accordingly, the Group concluded that estimating a range of cost savings for each covered product was appropriate.

Based upon the analyses conducted, the Group believes that, by purchasing products that meet the proposed minimum energy efficiency standards, the State is expected to save in the range of 6% of the costs typically spent over the life of energy-efficient motors, 1% to 1.8% (over 1%) of the cost typically spent over the life of water heaters, up to 3.2% over the life of refrigerators, freezers and refrigerator-freezers, 3% to 7% of the cost typically spent over the life of lamps, and 1% to 19% of the cost typically spent over the life of fluorescent luminaires.

5. Local Government Mandates: None.

6. Paperwork: State agencies will be required to document the procedure used when purchasing an appliance or energy using product that does not meet the minimum energy efficient standard, but the regulations allows them to incorporate this requirement into existing record keeping procedures.

7. Duplication: To the extent a new building or a substantial renovation of an existing building may be subject to the State Energy Conservation Construction Code, there may be some duplication.

8. Alternatives: In carrying out its responsibilities, the Authority established an Advisory Committee to provide input and guidance. Specific organizations on the Committee include: Association of Home Appliance Manufacturers, Air Conditioning and Refrigeration Institute, Consortium for Energy Efficiency, National Electrical Manufacturers Association, Gas Appliance Manufacturers Association, New York State Dormitory Authority, New York State Office of General Services, State University Construction Fund, Northeast Energy Efficiency Partnerships, Inc., Natural Resources Defense Council, and the U.S. Department of Energy. While the standards were being developed, the Committee met four times and also discussed issues and provided guidance through an Authority-established "listserv". The private sector members of the Group provided valuable information on product availability and helped the Group resolve technical compatibility issues with respect to various building systems and designs.

Together, the Group, contacted various major State agencies. Input from these State agencies was solicited in identifying the types of energy using products that they typically purchased as commodity purchases or for new construction or substantial renovation projects and should be covered by Section 5-108-a. The minimum efficiency standards were then established using this and other information as described below.

In setting the standards, the Group reviewed the various sizes and types of products, their availability, and determined life cycle costs based upon equipment prices, annual operating hours, unit energy consumption, useful life, electric operating costs, and discount rates. When appropriate, the Group researched other existing government and industry standards that apply to such products, the various sizes of such products in the marketplace, and the number of manufacturers. To determine the cost-effectiveness of the products, the Group reviewed life-cycle costs of the various products taking into account, when appropriate, such factors as the efficiency of the product, replacement labor costs, annual operating hours, life hours, electricity costs, and discount rates.

For example, in setting the seasonal energy efficiency rating ("SEER") for residential packaged air conditioners and heat pumps, the Group considered products at a 12 SEER, a 13 SEER, and a 14 SEER. The Group determined to set the minimum energy efficiency standard at the 12 SEER level, after concluding that there were limited supplies of product for air conditions that met the 13 SEER and limited supplies of product for heat pumps that met the 14 SEER.

After consideration of the above factors for the various products, the Authority, in consultation with OGS, determined the energy efficiency minimum standards.

9. Federal Standards: There are no applicable federal standards to State agency purchases.

10. Compliance Schedule: The Authority will implement the regulations as soon as they are made final.

#### **Regulatory Flexibility Analysis**

The proposed regulations prescribe standards that must be followed by State agencies in procuring appliances and energy using equipment, there should be no direct effect on small businesses and local governments.

#### **Rural Area Flexibility Analysis**

Since the proposed regulations prescribe standards that must be followed by State agencies in procuring appliances and energy using equipment, there should be no effect on rural areas.

#### **Job Impact Statement**

There should be no impact on jobs since the regulations merely prescribes the energy efficient level of appliances and energy using products that may be purchased by State agencies.

## Department of Environmental Conservation

### EMERGENCY RULE MAKING

#### Acid Deposition Reduction Budget Trading Programs for NO<sub>x</sub> and SO<sub>2</sub>

**I.D. No.** ENV-35-04-00024-E

**Filing No.** 914

**Filing date:** Aug. 17, 2004

**Effective date:** Aug. 17, 2004

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

**Action taken:** Addition of Parts 237, 238 and amendment of Part 200 of Title 6 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** During February 2002, the Department proposed to establish the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Part 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program, and to revise 6 NYCRR Part 200, General Provisions. The goal of the ADRP was to require fossil fuel-fired electric generators in New York to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid deposition. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under sections 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. sections 7651 - 7651o. As ultimately adopted, the ADRP directed that these SO<sub>2</sub> reductions be phased in beginning January 1, 2005 through 2007 (Phase 1) and January 1, 2008 (Phase 2). In addition, the ozone season reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season (under 6 NYCRR Part 204) were to be extended to the non-ozone season and thus be in place year-round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. The Department adopted the ADRP regulations on April 15, 2003.

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

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

In order to forestall the loss of the public health and environmental benefits that were to be realized during the first year of implementation of the ADRP as originally scheduled, the Department is promulgating these emergency regulations. The control periods (the yearly regulatory compliance periods) are scheduled to commence on October 1, 2004 and January 1, 2005, under the Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, 6 NYCRR Part 237, and the Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program, 6 NYCRR Part 238, respectively. Had the Department undertaken only a conventional notice-and-comment rulemaking pursuant to SAPA section 202.1 in order to reinstate the ADRP, the public health and environmental benefits that would have occurred for the first control periods under the regulations would certainly be lost because the rulemaking process would not conclude until well after the control periods were scheduled to commence. Because of concerns about the need for the ADRP regulations to be consistent and compatible with, among other things, the operation of the ozone season NO<sub>x</sub> Budget Trading Program established at 6 NYCRR Part 204 and emissions monitoring protocols, any failure to implement the ADRP programs by the aforementioned dates would delay implementation of the programs for at least one full year.

Based on data showing 2002 emissions from affected sources, the Department has estimated that an additional 35,000 tons per year of SO<sub>2</sub> (from 2005 through 2007 and 100,000 tons per year beginning 2008) and 6,000 tons per year of NO<sub>x</sub> will be released into the atmosphere in the absence of the timely implementation of the regulatory caps of the respective programs. The NO<sub>x</sub> emissions reductions are equivalent to removing over 300,000 cars from New York State's roads. The SO<sub>2</sub> emissions reductions are equivalent to eliminating all of the SO<sub>2</sub> emissions from households heated primarily with oil in New York State (2.33 million). These emissions of SO<sub>2</sub> and NO<sub>x</sub> contribute to an array of environmental and public health harms in New York.

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

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

PM is derived either from combustion material that has volatilized and then condenses to form primary PM or precursor gases reacting in the atmosphere to form secondary PM. SO<sub>2</sub> and NO<sub>x</sub> react in the atmosphere to create sulfates and nitrates, a secondary form of PM. Fossil fuel-fired electric generators, affected sources under the ADRP, are significant emitters of SO<sub>2</sub> and NO<sub>x</sub>. Implementation of the ADRP will have immediate positive impacts on public health due to the reduction in the formation of the secondary PM, including most importantly PM<sub>2.5</sub>. It should be noted that PM<sub>2.5</sub> has been identified as a non-threshold pollutant. See *Whitman v. American Trucking Associations*, 531 U.S. 457, 475 (2001). In other words, health effects are possible from exposure to PM<sub>2.5</sub> at levels below the standard established by EPA. The Department notes that it would be detrimental to public health and welfare to proceed solely through the rulemaking process of SAPA section 202.1 and lose one or more control periods.

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

On December 29, 2003, the Department issued Commissioner's Policy 33, *Assessing and Mitigating Impacts of Fine Particulate Matter Emissions (the PM<sub>2.5</sub> Policy)*. The PM<sub>2.5</sub> Policy provides guidance on the project-specific assessment of the PM<sub>2.5</sub> impacts of the siting of new stationary sources of air pollution and details when mitigation of such impacts may be necessary. The Department established the PM<sub>2.5</sub> Policy for purposes of guiding the review of an application for a permit or major permit modification under the State Environmental Quality Review Act, ECL sections 8-0101-8-0117. The ADRP will serve to complement the PM<sub>2.5</sub> Policy in

that the ADRP will reduce PM<sub>2.5</sub> emissions from existing power plants - emissions that previously have gone unaddressed.

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

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

Methylmercury bioaccumulates in the food chain as humans and other mammals consume mercury-contaminated organisms, particularly fish. Methylmercury in fish poses a real risk for fish-eating mammals and birds such as otters, mink, bald eagles, kingfishers, ospreys and the common loon. Mercury residues in some of these species have been close to, and in some instances greater than, concentrations associated with observed toxic effects. Humans are most likely to be exposed to methylmercury through fish consumption. Young children and developing fetuses are particularly sensitive to methylmercury exposure, as demonstrated in both animal studies and accidental human poisonings. In the Minamata, Japan episode, human fatalities and devastating neurological damage were associated with the daily consumption of fish contaminated with high levels of methylmercury.<sup>5</sup> Children of women exposed to relatively high levels of methylmercury during pregnancy have exhibited a variety of abnormalities, including delayed onset of walking and talking, cerebral palsy and reduced neurological test scores. Children exposed to far lower levels of methylmercury in the womb have exhibited delays and deficits in learning ability. In addition, children exposed after birth potentially are more sensitive to the toxic effects of methylmercury than adults, because their nervous systems are still developing.<sup>6</sup> The National Research Council recently concluded the population at highest risk is the offspring of women of child-bearing age who consume large amounts of fish and seafood during their pregnancy.<sup>7</sup> Because of the bioaccumulation of methylmercury in freshwater fish, thousands of water bodies nationwide, including all of the Great Lakes and their connecting waters, have fish consumption advisories. In New York State, numerous bodies of freshwater across the State have advisories or bans on consuming fish.

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

As a result of the controls implemented to comply with this regulation, mercury emissions from electricity generators will be reduced. The vast majority of the coal burned in the State is bituminous coal and the amount of mercury captured by a given control technology is better for bituminous coal. In addition to existing particulate controls, several coal burning facilities in the State are likely to install flue gas desulfurization equipment and post-combustion NO<sub>x</sub> controls to comply with the ADRP. The range of mercury reductions from coal-fired units with flue gas desulfurization combined with either or both particulate and post-combustion NO<sub>x</sub> controls ranges from 48 to 98 percent.<sup>10</sup> To protect the health of New York's residents and to reduce the number of impaired water bodies, the Department is implementing these regulations on an emergency basis to maintain

the mercury co-benefit that will be gained from the combinations of control equipment needed by affected sources to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions.

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

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

Acid deposition also impairs tree growth in several ways. Acidic cloud water in higher elevations may increase the susceptibility of the red spruce to winter injury, while acid deposition has been stripping forest soils of vital nutrients necessary for forest productivity. Inputs to soils of sulfates from SO<sub>2</sub> and nitrates from NO<sub>x</sub> cause a depletion of base cations such as, calcium, magnesium, potassium and sodium that naturally exist in soils. These metals are components of soil which originate from rocks and minerals and are essential for healthy growing forests. The depletion of base cations from soils has been linked to increased mortality and reduced growth of red spruce. Acid deposition, in combination with natural stress factors has resulted in reduced growth and viability of red spruce across the high-elevation part of its range.<sup>11</sup>

Deposition of NO<sub>x</sub> to surface waters contributes directly to the widespread accelerated eutrophication of coastal waters and estuaries. Nitrogen is the nutrient that determines the amount of algae growth. The deposition of NO<sub>x</sub> results in accelerated algae and aquatic plant growth causing adverse ecological effects and economic impacts that range from nuisance alga blooms to oxygen depletion and fish kills.<sup>12</sup> This is true for Long Island Sound which experiences hypoxia (low dissolved oxygen levels) in bottom waters during late summer (July - September). This results in use impairments, including a decrease in bathing area quality, an increase in unhealthy areas for aquatic marine life, an increase in mortality of sensitive organisms, poor water clarity for scuba divers, a reduction in commercial and sport fishing values, a reduction in wildlife habitat value, degradation of sea grass beds, impacts on tourism and real estate, and poorer aesthetics. Atmospheric deposition represents over 16 percent of the in-basin nitrogen loading and nearly 11 percent of the total nitrogen loading to Long Island Sound.<sup>13</sup> Part 237 will reduce nitrogen loading to surface waters. This will aid in mitigating the eutrophication of coastal waters and estuaries, including Long Island Sound which has recently experienced alga blooms and increased hypoxia conditions.

National treasures, including the Washington Monument, have been impacted by acid deposition. Wet and dry deposited particles contribute to the corrosion of metals, stone and paint on buildings, statues and cars. Structural and automotive corrosion has not only resulted in increased maintenance (cleaning) and material costs (acid resistant paints) but also in significant losses in terms of what value society places on the fine details

of a statue that are lost forever due to acid rain. It is the continued degradation to these recreation areas, national forests, scenic views, and the continued damage to and corrosion of historic structures and buildings that call for the immediate adoption of these regulations. As noted above, each control season that is lost results in the loading of an additional 35,000 tons of SO<sub>2</sub> and 6,000 tons of NO<sub>x</sub> into the atmosphere that further harms the State's natural and historic landmarks.

In addition, while a few affected sources challenged the original promulgation of Part 237, Part 238, and Part 200, the great majority did not. All affected sources had previously had reason to expect that the ADRP programs would begin on October 1, 2004 (Part 237) and January 1, 2005 (Part 238). All affected sources had received their allocations under the programs and have already submitted applications for required permit modifications under both programs. Some affected sources submitted applications for the distribution of early reduction allowances under Part 237. For the majority of affected sources that had planned for the timely implementation of the ADRP, the loss of one or more control periods will disrupt compliance plans including the installation of emissions control devices. Installation of emissions control devices results in the generation of excess allowances that may be sold to then recoup some of the costs of installation. Early emissions reductions may qualify a source for the award of early reduction allowances. With the loss of one or more of the initial control periods, sources that had been making good faith efforts to comply by restricting emissions will be unfairly penalized by not being able to recover some of the capital investment for control equipment. These complying sources are also placed at an economic disadvantage in relation to those affected sources that have opposed the regulations and done nothing to comply.

As noted above, any delay in implementation of the ADRP would continue to negatively impact public health and the general welfare in New York. Failure to obtain the reductions from the first control periods under the ADRP (October 1, 2004 for NO<sub>x</sub> and January 1, 2005 for SO<sub>2</sub>) will have negative impacts on public health from the secondary formation of PM<sub>2.5</sub> and, will result in the continued degradation of the State's water bodies as a result of mercury, nitrate, and sulfate deposition. The emissions that result from the loss of the first control periods will continue to negatively impact regional haze, high elevation forests, as well as coastal waters and estuaries. In addition, the mercury reduction co-benefits mentioned above would be lost. For these reasons, emergency adoption is necessary for the preservation of the public health, safety and general public welfare and that compliance with the normal regulatory process would be contrary to public interest.

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

<sup>2</sup> PM<sub>2.5</sub> refers to any particulate matter with a mass median diameter of less than 2.5 microns.

<sup>3</sup> *The Particulate-Related Health Benefits of Reducing Power Plant Emissions*, Abt Associates Inc., October 2000.

<sup>4</sup> New York State Department of Environmental Conservation. 2003. Mercury Emissions Inventory for 2002. Division of Air Resources. Bureau of Air Quality Analysis and Research.

<sup>5</sup> "Tsubaki, T., and Irukayama, K. (eds.) *Minamata Disease*. Kodansha Ltd. Tokyo: Elsevier Scientific Pub. Co., Amsterdam. 1977.

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

<sup>7</sup> *Toxicological Effects of Methylmercury*, National Research Council, National Academy Press, Washington, DC, Copyright 2000.

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

<sup>9</sup> New York State Department of Health. *Chemicals in Sportfish and Game 2004-2005*.

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

<sup>11</sup> National Acid Precipitation Assessment Program Biennial Report to Congress: An Integrated Assessment, 1998.

<sup>12</sup> *Nitrogen Oxides: Impacts on Public Health and the Environment*, U.S. Environmental Protection Agency, August 1997.

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

**Subject:** Acid disposition reduction budget trading programs for NO<sub>x</sub> and SO<sub>2</sub>.

**Purpose:** To reduce emissions of NO<sub>x</sub> and SO<sub>2</sub> from fossil fuel-fired electric generating sources statewide to protect the sensitive ecosystems in the Northeast from the damaging effects of acid deposition.

**Substance of emergency rule:** Part 237 establishes the Acid Deposition Reduction (ADR) NO<sub>x</sub> Budget Trading Program and Part 238 establishes the ADR SO<sub>2</sub> Budget Trading Program. These programs are designed to reduce acid deposition in New York State by limiting emissions of NO<sub>x</sub> during the non-ozone season and SO<sub>2</sub> year-round from fossil-fuel fired electricity generating units.

Parts 237 and 238 establish emission budgets for NO<sub>x</sub> and SO<sub>2</sub>, respectively. Parts 237 and 238 establish trading programs by creating and allocating allowances that are limited authorizations to emit up to one ton of NO<sub>x</sub> or SO<sub>2</sub> in the respective control periods or any control period thereafter. Affected units are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

For Part 237, the first control period commences on October 1, 2004 and concludes on April 30, 2005. Subsequent control periods begin on October 1 and conclude on April 30 the next calendar year. Part 237 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Part 238 runs from January 1 to December 31 starting in 2005. Part 238 applies to units that are defined as affected units under the SO<sub>2</sub> portion of Title IV of the Clean Air Act, the federal acid rain program.

Part 237 includes limited exemption provisions that allow units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. All units at a single source may apply for a limited exemption of Part 237 if they accept an emission limitation restricting NO<sub>x</sub> emissions from the source during a control period to 25 tons or less. A limited exemption is also available to units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit. Units that shutdown will no longer be considered NO<sub>x</sub> or SO<sub>2</sub> budget units and shall no longer be subject to Parts 237 and 238.

Part 237 requires each NO<sub>x</sub> budget unit to have a NO<sub>x</sub> authorized account representative (AAR) who shall be responsible for, among other things, complying with the NO<sub>x</sub> budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. Similarly for Part 238, each SO<sub>2</sub> budget unit needs to have an SO<sub>2</sub> AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate NO<sub>x</sub> or SO<sub>2</sub> AAR to perform the above duties.

The NO<sub>x</sub> AAR shall submit a complete NO<sub>x</sub> budget permit application to the Department by the later of October 1, 2004 or 12 months before the date on which the NO<sub>x</sub> budget unit commences operation. The NO<sub>x</sub> AAR shall submit to the Department a compliance certification report for each control period by June 30 immediately following the relevant control period. The SO<sub>2</sub> AAR shall submit a complete SO<sub>2</sub> budget application by the later of October 1, 2004 or 12 months before the date on which the SO<sub>2</sub> budget unit commences operation and a compliance certification report for each control period by March 1 immediately following the relevant control period.

The Statewide ADR NO<sub>x</sub> Trading Program Budget is 39,908 tons for each control period. By September 1, 2004, the Department will make the NO<sub>x</sub> allowance allocations for the 2004-05, 2005-06, 2006-07 and 2007-08 control periods. By September 1 of each subsequent year, the Department will make the NO<sub>x</sub> allowance allocations for the control period that commences in the year three years after the deadline for submission.

The Department will determine the number of NO<sub>x</sub> allowances to be allocated to each NO<sub>x</sub> budget unit by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three most recent control periods, for which data is available by 0.15 pounds per million Btu (first round calculation); (2) determining the allocation factor by dividing 92 percent of the Statewide NO<sub>x</sub> budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 92 percent portion of the Statewide NO<sub>x</sub> budget.

The Statewide SO<sub>2</sub> trading program budget is 197,046 tons for the 2005 through 2007 control periods and 131,364 tons for each control period starting in 2008. By September 1, 2004, the Department will make the SO<sub>2</sub> allowance allocations for the 2005, 2006 and 2007 control periods. By January 1 of each year thereafter, the Department will make the SO<sub>2</sub> allocations for the control period in the year that is three years after the year of submission.

The Department will determine the number of SO<sub>2</sub> allowances to be allocated to each SO<sub>2</sub> budget unit in 2005, 2006, and 2007 by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three preceding control periods by the lesser of either 0.9 pounds per million Btu for coal units or 0.45 pounds per million Btu for non-coal units and the highest actual annual average emission rate from 1998 to 2001 (first round calculation); (2) determining the allocation factor by dividing 94 percent of the Statewide SO<sub>2</sub> budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 94 percent portion of the Statewide SO<sub>2</sub> budget. For the 2008 and beyond control periods, SO<sub>2</sub> allocations will be made in the same manner as above except the first round calculation will be made using 0.6 pounds per million Btu for coal and 0.3 pounds per million Btu for fuels other than coal.

For both Parts 237 and 238, new units will be allocated from set-aside accounts which consist of five percent of the Statewide NO<sub>x</sub> budget and three percent of Statewide SO<sub>2</sub> budget. The NO<sub>x</sub> AAR and SO<sub>2</sub> AAR of the new unit may submit a written request to the Department to reserve for the new unit allowances in an amount no greater than the unit's control period potential to emit. For Part 237, the request must be made prior to October 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For Part 238, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For both Parts 237 and 238, the unit must have all of its required permits for the Department to consider these requests.

The Department will set-aside three percent of both the Statewide NO<sub>x</sub> and SO<sub>2</sub> budgets for energy efficiency and renewable energy projects. The Department will award allowances to projects that reduce Statewide NO<sub>x</sub> and SO<sub>2</sub> emissions through end-use efficiency measures, renewable energy generation, in-plant efficiency measures or that generate electricity more efficiently than the average heat rate in the State. End-use efficiency and renewable energy projects have priority in reserving award of these allowances.

For both the new unit and energy efficiency and renewable energy set-asides, if more than one project requests allowances from the set-aside and the number requested exceeds the number in the set-aside account, the Department will reserve allowances in the order in which approvable requests were submitted. Requests will be considered to be simultaneous if received in the same calendar quarter. Should approvable requests in excess of the set-aside be submitted in the same quarter, the Department will reserve allowances to each project in an amount proportional to the allowances requested. Unused set-aside allowances will flowback to the NO<sub>x</sub> and SO<sub>2</sub> budget units in proportion to their original allocation.

The Department may award supplemental allowances to specific NO<sub>x</sub> or SO<sub>2</sub> budget units for NO<sub>x</sub> or SO<sub>2</sub> reductions achieved at an upwind source. The NO<sub>x</sub> budget unit has until December 31 each year to submit its application for the immediately prior control period. The SO<sub>2</sub> budget unit has until July 1 each year to submit its application for the immediately prior control period. The upwind source must be located in a State that the Administrator has approved revisions to that State's implementation plan (SIP) mandated by the EPA NO<sub>x</sub> SIP Call. The Department will award one supplemental allowance for every three tons of emission reductions at the

upwind unit. The number of supplemental allowances that may be awarded for each control period is limited to a set percentage of either the Statewide NO<sub>x</sub> or SO<sub>2</sub> budgets. The percentage starts at 10 percent for the first control period, then decreases to 8 percent for the second control period, 6 percent for the third control period, 5 percent for the fourth control period and 4 percent for each subsequent control period. Supplemental allowances will be awarded in the order in which complete and approvable applications are submitted. Supplemental allowances must be used for compliance within two control periods after award.

The Department will award early reduction allowances to NO<sub>x</sub> and SO<sub>2</sub> budget units that achieve reductions beyond a specified emission rate (0.15 pounds NO<sub>x</sub> per million Btu, 0.9 pounds SO<sub>2</sub> per million for coal units and 0.45 pounds SO<sub>2</sub> per million Btu for non-coal units), permitted allowable emissions and the actual average emission rate for the 1999-2000 and 2000-01 control periods for NO<sub>x</sub> and the 2000 and 2001 control periods for SO<sub>2</sub>. NO<sub>x</sub> budget units may apply for early reduction allowances for reductions achieved during the 2001-02, 2002-03 and 2003-04 control periods. SO<sub>2</sub> budget units may apply for early reduction allowances for reductions achieved during the 2002, 2003 and 2004 control periods. NO<sub>x</sub> budget units must apply for early reductions allowances by September 1, 2004 and SO<sub>2</sub> budget units must apply by May 1, 2005. Early reduction allowances may only be used for the first two control periods for both the NO<sub>x</sub> and SO<sub>2</sub> ADR Programs.

The Department will establish one NO<sub>x</sub> and one SO<sub>2</sub> compliance account for each NO<sub>x</sub> and SO<sub>2</sub> budget unit and one NO<sub>x</sub> and one SO<sub>2</sub> overdraft account for each source with two or more NO<sub>x</sub> or SO<sub>2</sub> budget units. Allocations will be made into compliance accounts and deductions of allowances for compliance purposes will be made from compliance account and overdraft accounts. Allowances may be held without discount until deducted for compliance, except those created as supplemental or early reduction allowances. The NO<sub>x</sub> or SO<sub>2</sub> AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the unit's budget emissions limitation for the control period immediately preceding, NO<sub>x</sub> allowances must be submitted for recordation in a unit's compliance account or the source's overdraft account by midnight of September 30 and SO<sub>2</sub> allowances must be submitted for recordation by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions the Department will deduct from the unit's compliance account or the source's overdraft account, allocated for a subsequent control period, allowances equal to three times the unit's excess emissions.

In the case of electric grid reliability emergency, NO<sub>x</sub> or SO<sub>2</sub> budget units may use for compliance purposes allowances allocated for future control periods. The Department must receive by the allowance transfer deadline a certification from the New York State Department of Public Service that the unit is located in an area that experienced one or more electric system reliability emergencies during the control period stating the starting and ending times of each emergency. The Department must receive from the NO<sub>x</sub> or the SO<sub>2</sub> AAR a statement of intent to use future control period allowances and a report detailing the number of NO<sub>x</sub> or SO<sub>2</sub> tons emitted during each electric grid reliability emergency. The number of future year allowances is limited to the number of tons emitted during certified emergencies. The Department will deduct allowances pursuant to the first in, first out protocols in the regulations.

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

Units that are not NO<sub>x</sub> budget units may qualify to become a NO<sub>x</sub> budget opt-in unit. A unit may become a NO<sub>x</sub> budget opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a NO<sub>x</sub> budget unit. Opt-in units receive NO<sub>x</sub> allowance allocations by May 31 for each control period based on the lesser of its baseline heat input or heat input for the previous control period multiplied by the lesser of its baseline NO<sub>x</sub> emission rate or the most stringent applicable NO<sub>x</sub> emission limitation. Opt-in units may withdraw from the program.

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt 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 November 14, 2004.

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

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

### Summary of Regulatory Impact Statement

#### STATUTORY AUTHORITY

On October 14, 1999, Governor Pataki announced that fossil fuel-fired electric generators in New York would be required to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid rain. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651 - 7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program.

In order to comply with the Governor's announcement, the Department of Environmental Conservation (the Department) is proposing to establish the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Part 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program, and to revise 6 NYCRR Part 200, General Provisions.

The promulgation of Parts 237 and 238 and attendant revisions to Part 200 are authorized by the following provisions of State law: Environmental Conservation Law (ECL) §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0311, Energy Laws §§ 3-101 and 3-103. The legislative objectives underlying the above statutory authority are essentially directed toward protecting the environment and public health while assuring a safe, dependable and economical supply of energy to the people of the State.

The main chemical contaminants in the air pollution that contribute to the formation of acid rain are SO<sub>2</sub> and NO<sub>x</sub>. Acid rain usually forms in clouds where SO<sub>2</sub> and NO<sub>x</sub> chemically react with water, oxygen and oxidants to form a mild solution of sulfuric and nitric acid. These forms of acid rain are sometimes collectively referred to as wet deposition. Half of acidity in the atmosphere falls to the earth's surface as dry deposition (gases and dry particles). These acidic particles and gases are carried by the prevailing winds and deposited onto cars, buildings, homes, trees and the earth's surface (sometimes hundreds of miles from the source and across state and national borders). The combination of dry and wet deposited acid is called acid deposition.

Acid deposition causes acidification of lakes and streams and has resulted in damage to plant species at high elevations (for example, red spruce trees above 2,000 feet in elevation). Prior to falling to earth as dry or wet deposition, SO<sub>2</sub> and NO<sub>x</sub> gases, as well as their particulate forms, sulfates and nitrates, contribute to visibility degradation and impact public health.

One of the areas most affected by acid deposition is New York's Adirondack Park. Many of the Adirondack's lakes have an acid neutralizing capacity of less than zero, which means that they are no longer able to neutralize any acid entering the lake. Some of these lakes have been found to suffer from chronic acidity (constant levels of low pH). Approximately 26% of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification.

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

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

<sup>3</sup>PM<sub>2.5</sub> refers to any particulate matter with a mass median diameter of less than 2.5 microns.

However, because of the loss of soil buffering capacity and the lack of a cap on annual national NO<sub>x</sub> emissions, pH levels in the most acid lakes have not changed. Scientists have predicted that without further reductions in SO<sub>2</sub> and NO<sub>x</sub> the number of acidic waters in sensitive ecosystems will remain high or dramatically worsen.

Studies done by the federal government to date show that even with the emission reductions called for in the Title IV program, sensitive areas in the Adirondacks will continue to degrade. The 1998 National Acidic Deposition Assessment Program (NAPAP) report - 'Biennial Report to Congress: An Integrated Assessment' found that 24 percent of Adirondack lakes are seriously acidic and nearly 50 percent are sensitive to acidic deposition. In October 1995, EPA issued the - 'Acid Deposition Standard Feasibility Study: Report to Congress'. Both the October 1995 EPA report and NAPAP report concluded that, to realize the protection of sensitive ecosystems, additional reductions of SO<sub>2</sub> and NO<sub>x</sub> emissions in the range of 40-50 percent or more were needed.

The Hubbard Brook Research Foundation, a leading authority on acid rain and forest ecosystems, has concluded that sensitive areas in the Adirondacks need an 80 percent reduction in SO<sub>2</sub> emissions to have biological recovery within the next fifty years.<sup>1</sup> The Department believes, in order to effectuate recovery in the Adirondacks, these additional reductions are required on the national level. The Department has been, and will continue to, advocate for and participate in the development of federal programs that are needed to achieve these reductions. At this time, however, the Department is implementing reductions that it believes are technically and economically feasible in the near term across the State.

In accordance with the Clean Air Act (CAA) sections 108 and 109, which govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS), EPA is to list pollutants that may reasonably be anticipated to endanger public health or welfare and to issue air quality criteria for them. The air quality criteria are to reflect the latest scientific information useful in indicating the kind and extent of all exposure-related effects on both public health and welfare expected from the presence of the pollutant in ambient air. In April 1996, EPA released the Air Quality Criteria for Particulate Matter (PM)<sup>22</sup>, which in turn resulted in the revision to the NAAQS and establishment of thresholds for PM<sub>2.5</sub><sup>3</sup>. During June 2004, EPA identified individual counties in New York State that EPA intends to designate as nonattainment for the PM<sub>2.5</sub> NAAQS. More than 12.4 million New Yorkers, 65% of the entire State population, reside within the counties that EPA proposes to designate as nonattainment with the health based PM<sub>2.5</sub> NAAQS.

PM is derived either from combustion material that has volatilized and then condenses to form primary PM or precursor gases reacting in the atmosphere to form secondary PM. SO<sub>2</sub> and NO<sub>x</sub> react in the atmosphere to create sulfates and nitrates, a secondary form of PM. Fossil fuel-fired electric generators, affected sources under the ADRP, are significant emitters of SO<sub>2</sub> and NO<sub>x</sub>. Implementation of the ADRP will have immediate positive impacts on public health due to the reduction in the formation of the secondary PM including, most importantly, PM<sub>2.5</sub>. In an analysis of epidemiology studies completed to date, evidence exists that shows a statistically significant association between outdoor concentrations of sulfate aerosols, PM<sub>2.5</sub>, or both and the following human health effects: premature mortality, chronic respiratory disease, hospital emissions, aggravation of asthma symptoms, restricted activity days, and acute respiratory symptoms.<sup>4</sup>

Deposition of NO<sub>x</sub> to surface waters contributes directly to the widespread accelerated eutrophication of coastal waters and estuaries. This is true for Long Island Sound which experiences hypoxia (low dissolved oxygen levels) in bottom waters during late summer (July - September). Atmospheric deposition represents over 16 percent of the in-basin nitrogen

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

loading and nearly 11 percent of the total nitrogen loading to Long Island Sound.<sup>5</sup>

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

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

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

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

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan. Based on the projected SO<sub>2</sub> emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed (32,000/184,000). With respect to NO<sub>x</sub> emissions, in the "No Additional Construction" scenario, annual NO<sub>x</sub> emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO<sub>x</sub> cap of 70,000 tons by

2,200 tons, or about 3 percent. This result suggests that the impacts on NO<sub>x</sub> compliance costs, while not negligible, are not expected to be substantial.

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

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

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

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

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

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

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

<sup>8</sup>New York State Department of Health. 'Chemicals in Sportfish and Game' 2004-2005.

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

<sup>6</sup>New York State Department of Environmental Conservation. 2003. Mercury Emissions Inventory for 2002. Division of Air Resources. Bureau of Air Quality Analysis and Research.

In carrying out its statutory obligation to assess all relevant technical and scientific factors in developing an appropriate control program that is most cost-effective, the Department determined that emissions cap-and-trade programs that are characterized by unencumbered trading of allowances are the most appropriate programs for the control SO<sub>2</sub> and NO<sub>x</sub> emissions from the subject sources.

#### **Regulatory Flexibility Analysis**

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

##### **1. Effects on Small Businesses and Local Governments.**

No small businesses will be directly affected by the adoption of new Parts 237 and 238 and the amendments to Part 200.

One local government is affected by the programs. The Jamestown Board of Public Utilities (JBPU), a municipally owned utility, owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of the ADRP, 40 CFR Part 75. Therefore, no additional monitoring costs will be incurred as a result of implementation of the ADRP. The costs associated with the ADRP will be dictated by how JBPU decides to comply with the provisions of the regulation.

##### **2. Compliance Requirements.** The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the ADRP, as described below.

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO<sub>2</sub> subject unit shall submit to the Department a complete SO<sub>2</sub> Budget permit application, by October, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO<sub>2</sub> allowances available for compliance deductions, as of the SO<sub>2</sub> allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO<sub>x</sub> trading program unit shall submit to the Department a complete NO<sub>x</sub> Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO<sub>x</sub> allowances available for compliance deductions, as of the NO<sub>x</sub> allowance transfer deadline (midnight of Sep-

tember 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO<sub>x</sub> emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

##### **3. Professional Services.** The one local government affected by the ADRP, the JBPU, may need to hire outside professional consultants to comply with new Parts 237 and 238 and the amendments to Part 200. This work would likely be associated with any analyses needed to determine the optimal manner in which to comply with the regulations. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

##### **4. Compliance Costs.** The JBPU will need to either limit emissions at the SACGS to no more than its allowance allocations under Parts 237 and 238 or purchase allowances equal to the number of tons emitted in excess of the number of allowances initially allocated to it. Given the highly variable nature of control equipment cost, the Department limited the analysis of control costs to the purchase of allowances to comply with the program and assumed that costs of allowances will be \$500 per ton for SO<sub>2</sub> and \$2000 per ton for NO<sub>x</sub>. The Department estimated allocations for SACGS and subtracted those allocations from 2000 facility emissions. The estimated cost for purchasing allowances was determined to be approximately \$1.5 million annually. However, these costs are based on the facility as it existed in 2000 and not on the facility as it exists today.

In 2001, a new natural gas-fired turbine was added to SACGS. This new unit emits significantly less SO<sub>2</sub> and NO<sub>x</sub> than the older coal units and its utilization offers JBPU a significant amount of flexibility to comply with this regulation. The operation of the new unit could allow the facility to meet its SO<sub>2</sub> and NO<sub>x</sub> obligations either without or with significantly fewer controls at any of the coal units. To operate within the estimated 2005 and 2008 allocations the new natural gas-fired turbine would need to operate at 40 and 50 percent capacity, respectively. By operating this unit at these levels, SACGS will be below its estimated NO<sub>x</sub> allocations. There are additional costs associated with the operation of the natural gas-fired turbine. The JBPU will experience additional fuel costs as a result of the price difference between natural gas and coal. It is expected that these costs will be somewhat lower than the costs of purchasing allowances and even permit the JBPU to sell excess allowances. The JBPU has a range of compliance options open to it and can use the operational flexibility it has at the SACGS and the flexibility inherent under a cap and trade program to comply with the regulations.

Increased operation of the natural gas-fired turbine would also provide a short term option to SACGS as a means for lowering SO<sub>2</sub> emissions at the facility. While this might provide a short term alternative to controlling SO<sub>2</sub> emissions from the coal units, any benefits gained would eventually diminish because the allocation methodology in Part 238 (i.e., oil and gas are allocated at 0.3 lbs/mmbtu compared to coal at 0.6 lbs/mmbtu in 2008). The shift in heat input from coal to gas will eventually lead to reduced allocations. Depending on the difference between allocations and actual emissions from the facility once this allocation change occurs, JBPU might have to purchase allowances or control emissions to comply.

JBPU also has the ability to change the physical characteristics of its older coal boilers pursuant to section 237-1.5, "Shutdown or change in physical characteristics of a NO<sub>x</sub> budget unit," and no longer be subject to the requirements of Part 237. This would eliminate the need for the new unit to offset NO<sub>x</sub> emissions from the coal units and allow JBPU to sell all its excess NO<sub>x</sub> allowances on the market. JBPU has worked with the Department's permitting staff and has completed changes to its coal units and the generators associated with them to reduce the nameplate capacity of the units below the 25 MW applicability threshold in Part 237.

##### **5. Minimizing Adverse Impact.** The promulgation of new Parts 237 and 238 and the amendments to Part 200 do not directly affect small businesses. One local government is affected by the ADRP - the JBPU. The ADRP constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the ADRP in such a manner, the Department has attempted to minimize the adverse economic impacts of the program on the JBPU.

The Department considered establishing differing compliance or reporting requirements or timetables that take into account the resources

available to small businesses and local governments. The Department determined that the provisions included in the regulations provide sufficient flexibility for compliance to the JBPU, as well as the other sources affected by the program. The Department chose not to use different allocation methodologies for the JBPU. The Department also considered the specifics in the situation of the JBPU in determining not to use separate allocation methodologies. The allocation formulae in Part 238 provide allowances to coal units at twice the rate applicable to non-coal units. This allocation procedure (albeit not designed to minimize impacts to JBPU specifically) mitigates the impacts the program will have on the SACGS.

The Department also considered exempting the SACGS from the rule, but did not because of the amount of emissions generated at the facility and the contribution of these emissions to acid deposition in New York State. In 2001, SACGS emitted 3,223 tons of SO<sub>2</sub>. This was the 12th highest total of SO<sub>2</sub> emissions out of the approximately 38 facilities in New York State that will be SO<sub>2</sub> budget sources under Part 238. SACGS emitted SO<sub>2</sub> at a rate of 2.65 pounds per million Btu. This is the 5th highest SO<sub>2</sub> emission rate and nearly 3.5 times the average of the approximately 38 affected New York State facilities (0.76 pounds/mmBtu). NO<sub>x</sub> emissions at SACGS were 507 tons in 2001. This was the 23rd highest total of NO<sub>x</sub> emissions out of approximately 69 facilities in New York State that will be NO<sub>x</sub> Budget sources under Part 237. SACGS emitted NO<sub>x</sub> at a rate of 0.42 pounds per million Btu. This is the 4th highest NO<sub>x</sub> emission rate and nearly twice the average of the approximately 69 affected New York State facilities (0.23 pounds/mmBtu).

In considering whether to exempt JBPU from these regulations, the Department evaluated the impact this exemption would have on the other sources included in the program. Reducing SO<sub>2</sub> emissions at SACGS to the level of allocation ("expected SO<sub>2</sub> reductions" = actual emissions - 0.9 pounds per million Btu × greatest heat input in the past 3 years) represents a reduction of about 2,200 tons or about 1.75 percent of the total SO<sub>2</sub> reductions expected from the program. The 2,200 tons of "expected SO<sub>2</sub> reductions" represent about 4 percent of the emissions and 13.5 percent of the "expected SO<sub>2</sub> reductions" from the largest SO<sub>2</sub> source in the State. Therefore, exempting SACGS from the ADRP would result in a significant burden to the other affected sources in the State by forcing them to make up this amount of SO<sub>2</sub> emission reductions.

The Department also considered the impact on the most sensitive areas in the State. While the combined contribution of all sources in New York State represents about 20 percent of the total sulfate deposition in New York State,<sup>1</sup> emission reductions from within New York State are crucial to meeting either the 40 to 50 percent reduction in sulfur and nitrogen deposition needed to return the condition in the Adirondack lakes to the levels observed in the mid-1980's<sup>2</sup> or the 80 percent reduction needed for significant improvements in chemical conditions to change watersheds similar to the Hubbard Brook Experimental Forest from acidic to non-acidic in 20 to 25 years in order to support biological recovery in 50 years.<sup>3</sup> In other words, the Department deems the emission reductions from the SACGS important to the ability to adequately address the acid deposition problem in New York State.

Under 6 NYCRR Part 204, NO<sub>x</sub> Budget Trading Program, the SACGS was given a specific allocation for each year as opposed to being included in the formulaic allocation procedures. This is different than how SACGS will be allocated under the ADRP. To determine the allocation procedures for Part 204, the Department convened a series of allocation workshops which resulted in an agreed upon allowance allocation procedure with all of the affected parties. This agreed upon procedure treated SACGS differently than the remainder of the sources through the allocation of a specific number of allowances prior to the remaining sources being allocated through the formulae. The Department felt it was proper to allocate SACGS differently because the allocation was based on a broad consensus among the affected parties. In this rule making, the Department did not convene such an allocation process because the intervening deregulation of the electricity generating industry put sources into a more competitive position and the prospect for an agreed upon allocation procedure was deemed to be remote. Instead, the Department devised an allocation procedure that it deemed fair and equitable to all affected sources. This procedure did not include a separate allocation mechanism for any one particular source. In other words, all affected electric generators were treated the same.

<sup>1</sup>'The Sulfur Deposition Control Program,' New York State Department of Environmental Conservation, June 1985.

<sup>2</sup>'Acid Deposition Feasibility Study: Report to Congress', U.S. EPA, EPA 430-R-95-001a, October 1995.

Due to the widely different emission profiles between coal burning and non-coal burning units, the Department did not adopt a fuel neutral allowance allocation procedure under Part 238. Adoption of a fuel neutral methodology would have resulted in a pronounced bias against coal burning units. Coal burning units remain vital to the reliability of the State's electric grid and enhance fuel diversity. Having a fuel diverse electric generating system provides the State with a more competitive electricity generation market that is less susceptible to variations in the price of a particular fuel. Although SACGS has a natural gas fired unit that offers it flexibility in complying with the regulation, it also has several coal burning units that are allocated under the coal specific allowance allocation formulae in the SO<sub>2</sub> portion of the ADRP.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the ADRP with interested parties and provided input in the development of the allocation methodologies contained in new Parts 237 and 238 and the amendments to Part 200.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the ADRP: Control NO<sub>x</sub> and SO<sub>2</sub> emissions from the facility, increase operation of the low emitting new natural gas-fired turbine, or purchase allowances. There are NO<sub>x</sub> and SO<sub>2</sub> control technology options available to the SACGS. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

#### **Summary of Rural Area Flexibility Analysis**

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant CAA sections and the federal monitoring regulations applicable to the Program (40 CFR Part 75).

#### **TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED**

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

#### **REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS**

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, recordkeeping and compliance requirements detailed below.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO<sub>x</sub> trading program unit shall submit to the Department a complete NO<sub>x</sub> Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

<sup>3</sup>'Acid Rain Revisited: advances in scientific understanding since the passage of the 1970 and 1990 Clean Air Act Amendments'. Hubbard Brook Research Foundation. Science Links Publication. Vol. 1 No. 1. 2001.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO<sub>x</sub> allowances available for compliance deductions, as of the NO<sub>x</sub> allowance transfer deadline (midnight of September 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO<sub>x</sub> emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO<sub>2</sub> subject unit shall submit to the Department a complete SO<sub>2</sub> Budget permit application, by October 1, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO<sub>2</sub> allowances available for compliance deductions, as of the SO<sub>2</sub> allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

#### COSTS

In the past, with a regulated electric utility industry, the capital cost of the emission control equipment required by the new regulation would have been added to the utility's rate base and recovered through increased electricity rates. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures.

The Department sought input from NYSEERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSEERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately \$430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation. New York's rail system provides a valuable service to businesses throughout the state. The Department does not anticipate significant losses in coal transportation services in New York as a result of this proposal. The modeled percentage reduction in coal generation is within the range of annual fluctuations caused by other factors and is not anticipated to have a major impact on the freight

system. The use of unit trains further protects the system from these fluctuations because other products are not coupled with coal.

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSEERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO<sub>2</sub> emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed (32,000/184,000). With respect to NO<sub>x</sub> emissions, in the "No Additional Construction" scenario, annual NO<sub>x</sub> emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO<sub>x</sub> cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO<sub>x</sub> compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSEERDA was reasonable.

#### MINIMIZING ADVERSE IMPACT

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. In actuality, since one of the goals of the program is to reduce the impacts of acid rain on the Adirondacks, some of the most rural areas in the State will receive an environmental benefit from the further reduction in acid rain precursors associated with these regulations. The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the program to all sources on a statewide basis.

#### RURAL AREA PARTICIPATION

Since the announcement of the ADRP in October of 1999, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

#### Summary of Job Impact Statement

1. Nature of Impact: The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program).

The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

The ADRP will have both adverse and beneficial impacts on job and employment opportunities. Electricity generators will incur costs related to the emissions controls needed to comply with the regulations and, based on the modeling used by the Department, this will translate into increased electricity prices. Based on the modeling used by the Department, the ADRP may have a corresponding negative impact on employment. There are also positive impacts related to the implementation of the ADRP, including jobs created through the construction of control devices and appurtenances needed to comply with the regulations and the additional electricity generation needed to meet increased demand. It is also expected that the travel and tourism industry will benefit from reductions in acid deposition and commensurate improvements in visibility.

#### 2. Categories and Numbers Affected:

The Department sought input from NYSERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately \$430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation. New York's rail system provides a valuable service to businesses throughout the state. The Department does not anticipate significant losses in coal transportation services in New York as a result of this proposal. The modeled percentage reduction in coal generation is within the range of annual fluctuations caused by other factors and is not anticipated to have a major impact on the freight system. The use of unit trains further protects the system from these fluctuations because other products are not coupled with coal.

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO<sub>2</sub> emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result

in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed (32,000/184,000). With respect to NO<sub>x</sub> emissions, in the "No Additional Construction" scenario, annual NO<sub>x</sub> emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO<sub>x</sub> cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO<sub>x</sub> compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSERDA was reasonable.

Regulatory flexibility provisions built into the ADRP could not be analyzed as this is beyond the scope of the MAPS model. Specifically, these provisions are allowance banking, early reduction allowances and out-of-state source reductions. Each of these allows sources additional flexibility which lead to lower compliance costs. The allowance banking provisions permit sources to retain unused allowances for compliance obligations that will arise in the future. This flexibility permits sources to deal with the natural variations in generation between control periods and, in the case of a phased program (Part 238), allows full credit for reductions in the first phase to carry over to the second more stringent phase. Early reduction allowances are created when a source reduces emissions prior to the start of the programs. The Department has included provisions to allow for the creation of early reduction allowances at a 50 percent discount for those reductions that are greater than the target collective emission rate of the program but are below an historic baseline or rate. Full credit will be given for all reductions below the collective target emission rate of the program before the first year of implementation. This gives a generator with a source that is inexpensive to control the ability to create additional allowances which either may be expended for compliance purposes in the future or may be sold in the allowance market. The program also provides that demonstrated emissions reductions from sources located in 10 upwind States can be used as the basis for awarding up to 10 percent of the annual NO<sub>x</sub> and SO<sub>2</sub> budgets in the first year of the programs (declining to 8 percent in the second year, 6 percent in the third, 5 percent in the fourth and to 4 percent in the fifth year and beyond). The upwind reductions provisions act as a mechanism which allows any generator subject to the program to pursue less expensive emission reductions in upwind states to create additional allowances which will result in some decrease in allowance prices generally. The Department is not able to quantify the relative impact of the above flexibility provisions except to say that they are expected to reduce the overall cost of compliance with the regulation.

The ADRP will have some positive impact on employment. Generator companies will need to purchase control equipment and construct the facilities to house this equipment. The total capital expenditures as provided by the generators indicated capital investments of approximately \$430 million were necessary to comply with the regulations. While the above discussion clearly demonstrates that the Department believes that these costs are over-estimated, for discussion purposes these costs are cited to assess the relative impact on employment. Total capital expenditures include the costs for emissions control equipment, construction materials, labor and design. Each of these activities should have positive impacts on employment in New York. However, because of the lack of detailed information provided to the Department regarding these costs it is impossible to estimate the actual number of jobs that will be created by this capital expenditure. Still, based on United States Department of Commerce Bureau of Economic Analysis statistics for New York State in 1999, the Department calculated 11.7 jobs (14.3 construction jobs) are created for every \$1 million spent (Total non-farm jobs/Total non-farm gross state product). If half of the capital investments made to comply with the regulations could be applied to the New York Gross State Product, then these expenditures would be expected to result in an estimated 2,515 jobs.

The MAPS modeling predicts increased generation from firing natural gas. This increase will likely necessitate increased operation of existing natural gas transmission capacity and the construction of new natural gas transmission capacity. While the quantification of the additional capacity is beyond the scope of the analysis performed for this effort, the additional natural gas transmission can be expected to increase employment opportunities in both the construction and operation facets.

The ADRP will also have a positive impact on the travel and tourism industry. Mitigation of the devastating effects of acid rain will aid in keeping New York State as a preferred vacation destination. In addition to reducing acid deposition, these regulations will also assist in the reduction of primary and secondary formation of fine particulate matter that plays a prominent role in regional haze. Because of regional haze, rural and urban vistas of New York are often obscured which reduces the desirability of travel in and around the State. While it is not possible to quantify the economic or the employment impact of these regulations, it is clear that their implementation will make New York State an even more attractive vacation destination.

3. Regions of adverse impact: The MAPS modeling predicts that the statewide average increase in wholesale electricity prices will be 5.4 percent. The greatest impacts will be in Buffalo, Rochester and Long Island with increases of 6, 9 and 16 percent, respectively. It can be expected that if any negative employment impacts result from this program, these areas will experience it. It is important to recognize the wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. The proportion of retail price comprised by the wholesale price is highly variable and cannot be precisely known, but might be expected to be in the range of one-third to one-half. As a result the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage of wholesale prices. The increase in wholesale electricity price and the commensurate increase in retail price assumes that the generators will react to the program as indicated in their responses to the DPS and install controls and otherwise over-control emissions as predicted by the MAPS model. Over-compliance to the extent predicted by the MAPS model is based on the generators' responses and is an unlikely scenario because of the economics of controlling beyond the levels called for in the ADRP.

4. Minimizing Adverse Impact: The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the ADRP through an allowance based cap and trade system, the Department has attempted to minimize the adverse economic impacts including the adverse employment impacts of the program.

5. Self-Employment Opportunities: Not applicable.

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Acid Deposition Reduction Budget Trading Programs for NO<sub>x</sub> and SO<sub>2</sub>

I.D. No. ENV-35-04-00024-P

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

**Proposed action:** Addition of Parts 237 and 238 and amendment of Part 200 of Title 6 NYCRR.

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

**Subject:** Acid deposition reduction budget trading programs for NO<sub>x</sub> and SO<sub>2</sub>.

**Purpose:** To reduce emissions of NO<sub>x</sub> and SO<sub>2</sub> from fossil fuel-fired electric generating sources statewide to protect the sensitive ecosystems in the Northeast from the damaging effects of acid deposition.

**Public hearing(s) will be held at:** 9:00 a.m., Oct. 12, 2004 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rms. 129A and 129B, Albany, NY; 11:00 a.m., Oct. 13, 2004 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; 11:00 a.m., Oct. 14, 2004 at Department of Environmental Conservation, Region 5, Conference Rm., 1115 Rte. 86, Ray Brook, NY; and 11:00 a.m., Oct. 15, 2004 at Department of Environmental Conservation, Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, 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.

**Summary of Substance of proposed rule (Full text is posted at the following State website: [www.dec.state.ny.us](http://www.dec.state.ny.us)):** Part 237 establishes the Acid Deposition Reduction (ADR) NO<sub>x</sub> Budget Trading Program and Part 238 establishes the ADR SO<sub>2</sub> Budget Trading Program. These programs are designed to reduce acid deposition in New York State by limiting emissions of NO<sub>x</sub> during the non-ozone season and SO<sub>2</sub> year-round from fossil-fuel fired electricity generating units.

Parts 237 and 238 establish emission budgets for NO<sub>x</sub> and SO<sub>2</sub>, respectively. Parts 237 and 238 establish trading programs by creating and allocating allowances that are limited authorizations to emit up to one ton of NO<sub>x</sub> or SO<sub>2</sub> in the respective control periods or any control period thereafter. Affected units are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

For Part 237, the first control period commences on October 1, 2004 and concludes on April 30, 2005. Subsequent control periods begin on October 1 and conclude on April 30 the next calendar year. Part 237 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Part 238 runs from January 1 to December 31 starting in 2005. Part 238 applies to units that are defined as affected units under the SO<sub>2</sub> portion of Title IV of the Clean Air Act, the federal acid rain program.

Part 237 includes limited exemption provisions that allow units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. All units at a single source may apply for a limited exemption of Part 237 if they accept an emission limitation restricting NO<sub>x</sub> emissions from the source during a control period to 25 tons or less. A limited exemption is also available to units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit. Units that shutdown will no longer be considered NO<sub>x</sub> or SO<sub>2</sub> budget units and shall no longer be subject to Parts 237 and 238.

Part 237 requires each NO<sub>x</sub> budget unit to have a NO<sub>x</sub> authorized account representative (AAR) who shall be responsible for, among other things, complying with the NO<sub>x</sub> budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. Similarly for Part 238, each SO<sub>2</sub> budget unit needs to have an SO<sub>2</sub> AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate NO<sub>x</sub> or SO<sub>2</sub> AAR to perform the above duties.

The NO<sub>x</sub> AAR shall submit a complete NO<sub>x</sub> budget permit application to the Department by the later of October 1, 2004 or 12 months before the date on which the NO<sub>x</sub> budget unit commences operation. The NO<sub>x</sub> AAR shall submit to the Department a compliance certification report for each control period by June 30 immediately following the relevant control period. The SO<sub>2</sub> AAR shall submit a complete SO<sub>2</sub> budget application by the later of October 1, 2004 or 12 months before the date on which the SO<sub>2</sub> budget unit commences operation and a compliance certification report for each control period by March 1 immediately following the relevant control period.

The Statewide ADR NO<sub>x</sub> Trading Program Budget is 39,908 tons for each control period. By September 1, 2004, the Department will make the NO<sub>x</sub> allowance allocations for the 2004-05, 2005-06, 2006-07 and 2007-08 control periods. By September 1 of each subsequent year, the Department will make the NO<sub>x</sub> allowance allocations for the control period that commences in the year three years after the deadline for submission.

The Department will determine the number of NO<sub>x</sub> allowances to be allocated to each NO<sub>x</sub> budget unit by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three most recent control periods, for which data is available by 0.15 pounds per million Btu (first round calculation); (2) determining the allocation factor by dividing 92 percent of the Statewide NO<sub>x</sub> budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional

share of any additional allowances remaining in the 92 percent portion of the Statewide NO<sub>x</sub> budget.

The Statewide SO<sub>2</sub> trading program budget is 197,046 tons for the 2005 through 2007 control periods and 131,364 tons for each control period starting in 2008. By September 1, 2004, the Department will make the SO<sub>2</sub> allowance allocations for the 2005, 2006 and 2007 control periods. By January 1 of each year thereafter, the Department will make the SO<sub>2</sub> allocations for the control period in the year that is three years after the year of submission.

The Department will determine the number of SO<sub>2</sub> allowances to be allocated to each SO<sub>2</sub> budget unit in 2005, 2006, and 2007 by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three preceding control periods by the lesser of either 0.9 pounds per million Btu for coal units or 0.45 pounds per million Btu for non-coal units and the highest actual annual average emission rate from 1998 to 2001 (first round calculation); (2) determining the allocation factor by dividing 94 percent of the Statewide SO<sub>2</sub> budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 94 percent portion of the Statewide SO<sub>2</sub> budget. For the 2008 and beyond control periods, SO<sub>2</sub> allocations will be made in the same manner as above except the first round calculation will be made using 0.6 pounds per million Btu for coal and 0.3 pounds per million Btu for fuels other than coal.

For both Parts 237 and 238, new units will be allocated from set-aside accounts which consist of five percent of the Statewide NO<sub>x</sub> budget and three percent of Statewide SO<sub>2</sub> budget. The NO<sub>x</sub> AAR and SO<sub>2</sub> AAR of the new unit may submit a written request to the Department to reserve for the new unit allowances in an amount no greater than the unit's control period potential to emit. For Part 237, the request must be made prior to October 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For Part 238, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For both Parts 237 and 238, the unit must have all of its required permits for the Department to consider these requests.

The Department will set-aside three percent of both the Statewide NO<sub>x</sub> and SO<sub>2</sub> budgets for energy efficiency and renewable energy projects. The Department will award allowances to projects that reduce Statewide NO<sub>x</sub> and SO<sub>2</sub> emissions through end-use efficiency measures, renewable energy generation, in-plant efficiency measures or that generate electricity more efficiently than the average heat rate in the State. End-use efficiency and renewable energy projects have priority in reserving award of these allowances.

For both the new unit and energy efficiency and renewable energy set-asides, if more than one project requests allowances from the set-aside and the number requested exceeds the number in the set-aside account, the Department will reserve allowances in the order in which approvable requests were submitted. Requests will be considered to be simultaneous if received in the same calendar quarter. Should approvable requests in excess of the set-aside be submitted in the same quarter, the Department will reserve allowances to each project in an amount proportional to the allowances requested. Unused set-aside allowances will flowback to the NO<sub>x</sub> and SO<sub>2</sub> budget units in proportion to their original allocation.

The Department may award supplemental allowances to specific NO<sub>x</sub> or SO<sub>2</sub> budget units for NO<sub>x</sub> or SO<sub>2</sub> reductions achieved at an upwind source. The NO<sub>x</sub> budget unit has until December 31 each year to submit its application for the immediately prior control period. The SO<sub>2</sub> budget unit has until July 1 each year to submit its application for the immediately prior control period. The upwind source must be located in a State that the Administrator has approved revisions to that State's implementation plan (SIP) mandated by the EPA NO<sub>x</sub> SIP Call. The Department will award one supplemental allowance for every three tons of emission reductions at the upwind unit. The number of supplemental allowances that may be awarded for each control period is limited to a set percentage of either the Statewide NO<sub>x</sub> or SO<sub>2</sub> budgets. The percentage starts at 10 percent for the first control period, then decreases to 8 percent for the second control period, 6 percent for the third control period, 5 percent for the fourth control period and 4 percent for each subsequent control period. Supplemental allowances will be awarded in the order in which complete and approvable applications are submitted. Supplemental allowances must be used for compliance within two control periods after award.

The Department will award early reduction allowances to NO<sub>x</sub> and SO<sub>2</sub> budget units that achieve reductions beyond a specified emission rate (0.15 pounds NO<sub>x</sub> per million Btu, 0.9 pounds SO<sub>2</sub> per million for coal units and 0.45 pounds SO<sub>2</sub> per million Btu for non-coal units), permitted allowable emissions and the actual average emission rate for the 1999-2000 and 2000-01 control periods for NO<sub>x</sub> and the 2000 and 2001 control periods for SO<sub>2</sub>. NO<sub>x</sub> budget units may apply for early reduction allowances for reductions achieved during the 2001-02, 2002-03 and 2003-04 control periods. SO<sub>2</sub> budget units may apply for early reduction allowances for reductions achieved during the 2002, 2003 and 2004 control periods. NO<sub>x</sub> budget units must apply for early reductions allowances by September 1, 2004 and SO<sub>2</sub> budget units must apply by May 1, 2005. Early reduction allowances may only be used for the first two control periods for both the NO<sub>x</sub> and SO<sub>2</sub> ADR Programs.

The Department will establish one NO<sub>x</sub> and one SO<sub>2</sub> compliance account for each NO<sub>x</sub> and SO<sub>2</sub> budget unit and one NO<sub>x</sub> and one SO<sub>2</sub> overdraft account for each source with two or more NO<sub>x</sub> or SO<sub>2</sub> budget units. Allocations will be made into compliance accounts and deductions of allowances for compliance purposes will be made from compliance account and overdraft accounts. Allowances may be held without discount until deducted for compliance, except those created as supplemental or early reduction allowances. The NO<sub>x</sub> or SO<sub>2</sub> AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the unit's budget emissions limitation for the control period immediately preceding, NO<sub>x</sub> allowances must be submitted for recordation in a unit's compliance account or the source's overdraft account by midnight of September 30 and SO<sub>2</sub> allowances must be submitted for recordation by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions the Department will deduct from the unit's compliance account or the source's overdraft account, allocated for a subsequent control period, allowances equal to three times the unit's excess emissions.

In the case of electric grid reliability emergency, NO<sub>x</sub> or SO<sub>2</sub> budget units may use for compliance purposes allowances allocated for future control periods. The Department must receive by the allowance transfer deadline a certification from the New York State Department of Public Service that the unit is located in an area that experienced one or more electric system reliability emergencies during the control period stating the starting and ending times of each emergency. The Department must receive from the NO<sub>x</sub> or the SO<sub>2</sub> AAR a statement of intent to use future control period allowances and a report detailing the number of NO<sub>x</sub> or SO<sub>2</sub> tons emitted during each electric grid reliability emergency. The number of future year allowances is limited to the number of tons emitted during certified emergencies. The Department will deduct allowances pursuant to the first in, first out protocols in the regulations.

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

Units that are not NO<sub>x</sub> budget units may qualify to become a NO<sub>x</sub> budget opt-in unit. A unit may become a NO<sub>x</sub> budget opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a NO<sub>x</sub> budget unit. Opt-in units receive NO<sub>x</sub> allowance allocations by May 31 for each control period based on the lesser of its baseline heat input or heat input for the previous control period multiplied by the lesser of its baseline NO<sub>x</sub> emission rate or the most stringent applicable NO<sub>x</sub> emission limitation. Opt-in units may withdraw from the program.

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

**Text of proposed rule and any required statements and analyses may be obtained from:** Michael P. Sheehan, P.E., Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: mpsheeha@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 last scheduled public hearing.

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

**This action was not under consideration at the time this agency's regulatory agenda was submitted.**

**Summary of Regulatory Impact Statement**

## STATUTORY AUTHORITY

On October 14, 1999, Governor Pataki announced that fossil fuel-fired electric generators in New York would be required to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid rain. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651 - 7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program.

In order to comply with the Governor's announcement, the Department of Environmental Conservation (the Department) is proposing to establish the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Part 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program, and to revise 6 NYCRR Part 200, General Provisions.

The promulgation of Parts 237 and 238 and attendant revisions to Part 200 are authorized by the following provisions of State law: Environmental Conservation Law (ECL) §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0311, Energy Laws §§ 3-101 and 3-103. The legislative objectives underlying the above statutory authority are essentially directed toward protecting the environment and public health while assuring a safe, dependable and economical supply of energy to the people of the State.

The main chemical contaminants in the air pollution that contribute to the formation of acid rain are SO<sub>2</sub> and NO<sub>x</sub>. Acid rain usually forms in clouds where SO<sub>2</sub> and NO<sub>x</sub> chemically react with water, oxygen and oxidants to form a mild solution of sulfuric and nitric acid. These forms of acid rain are sometimes collectively referred to as wet deposition. Half of acidity in the atmosphere falls to the earth's surface as dry deposition (gases and dry particles). These acidic particles and gases are carried by the prevailing winds and deposited onto cars, buildings, homes, trees and the earth's surface (sometimes hundreds of miles from the source and across state and national borders). The combination of dry and wet deposited acid is called acid deposition.

Acid deposition causes acidification of lakes and streams and has resulted in damage to plant species at high elevations (for example, red spruce trees above 2,000 feet in elevation). Prior to falling to earth as dry or wet deposition, SO<sub>2</sub> and NO<sub>x</sub> gases, as well as their particulate forms, sulfates and nitrates, contribute to visibility degradation and impact public health.

One of the areas most affected by acid deposition is New York's Adirondack Park. Many of the Adirondack's lakes have an acid neutralizing capacity of less than zero, which means that they are no longer able to neutralize any acid entering the lake. Some of these lakes have been found to suffer from chronic acidity (constant levels of low pH). Approximately 26% of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification. However, because of the loss of soil buffering capacity and the lack of a cap on annual national NO<sub>x</sub> emissions, pH levels in the most acid lakes

have not changed. Scientists have predicted that without further reductions in SO<sub>2</sub> and NO<sub>x</sub> the number of acidic waters in sensitive ecosystems will remain high or dramatically worsen.

Studies done by the federal government to date show that even with the emission reductions called for in the Title IV program, sensitive areas in the Adirondacks will continue to degrade. The 1998 National Acidic Deposition Assessment Program (NAPAP) report - 'Biennial Report to Congress: An Integrated Assessment' found that 24 percent of Adirondack lakes are seriously acidic and nearly 50 percent are sensitive to acidic deposition. In October 1995, EPA issued the - 'Acid Deposition Standard Feasibility Study: Report to Congress'. Both the October 1995 EPA report and NAPAP report concluded that, to realize the protection of sensitive ecosystems, additional reductions of SO<sub>2</sub> and NO<sub>x</sub> emissions in the range of 40-50 percent or more were needed.

The Hubbard Brook Research Foundation, a leading authority on acid rain and forest ecosystems, has concluded that sensitive areas in the Adirondacks need an 80 percent reduction in SO<sub>2</sub> emissions to have biological recovery within the next fifty years.<sup>1</sup> The Department believes, in order to effectuate recovery in the Adirondacks, these additional reductions are required on the national level. The Department has been, and will continue to, advocate for and participate in the development of federal programs that are needed to achieve these reductions. At this time, however, the Department is implementing reductions that it believes are technically and economically feasible in the near term across the State.

In accordance with the Clean Air Act (CAA) sections 108 and 109, which govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS), EPA is to list pollutants that may reasonably be anticipated to endanger public health or welfare and to issue air quality criteria for them. The air quality criteria are to reflect the latest scientific information useful in indicating the kind and extent of all exposure-related effects on both public health and welfare expected from the presence of the pollutant in ambient air. In April 1996, EPA released the Air Quality Criteria for Particulate Matter (PM)<sup>22</sup>, which in turn resulted in the revision to the NAAQS and establishment of thresholds for PM<sub>2.5</sub><sup>3</sup>. During June 2004, EPA identified individual counties in New York State that EPA intends to designate as nonattainment for the PM<sub>2.5</sub> NAAQS. More than 12.4 million New Yorkers, 65% of the entire State population, reside within the counties that EPA proposes to designate as nonattainment with the health based PM<sub>2.5</sub> NAAQS.

PM is derived either from combustion material that has volatilized and then condenses to form primary PM or precursor gases reacting in the atmosphere to form secondary PM. SO<sub>2</sub> and NO<sub>x</sub> react in the atmosphere to create sulfates and nitrates, a secondary form of PM. Fossil fuel-fired electric generators, affected sources under the ADRP, are significant emitters of SO<sub>2</sub> and NO<sub>x</sub>. Implementation of the ADRP will have immediate positive impacts on public health due to the reduction in the formation of the secondary PM including, most importantly, PM<sub>2.5</sub>. In an analysis of epidemiology studies completed to date, evidence exists that shows a statistically significant association between outdoor concentrations of sulfate aerosols, PM<sub>2.5</sub>, or both and the following human health effects: premature mortality, chronic respiratory disease, hospital admissions, aggravation of asthma symptoms, restricted activity days, and acute respiratory symptoms.<sup>4</sup>

Deposition of NO<sub>x</sub> to surface waters contributes directly to the widespread accelerated eutrophication of coastal waters and estuaries. This is

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

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

<sup>3</sup>PM<sub>2.5</sub> refers to any particulate matter with a mass median diameter of less than 2.5 microns.

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

true for Long Island Sound which experiences hypoxia (low dissolved oxygen levels) in bottom waters during late summer (July - September). Atmospheric deposition represents over 16 percent of the in-basin nitrogen loading and nearly 11 percent of the total nitrogen loading to Long Island Sound.<sup>5</sup>

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

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

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

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

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSEERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan. Based on the projected SO<sub>2</sub> emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed

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

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

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

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

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

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

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

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

<sup>6</sup>New York State Department of Environmental Conservation. 2003. Mercury Emissions Inventory for 2002. Division of Air Resources. Bureau of Air Quality Analysis and Research.

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

<sup>8</sup>New York State Department of Health. 'Chemicals in Sportfish and Game' 2004-2005.

for compliance; (10) allowing use of NO<sub>x</sub> allowances allocated under Part 204 for compliance with the requirements of Part 237 and; (11) applicability of smaller sources.

In carrying out its statutory obligation to assess all relevant technical and scientific factors in developing an appropriate control program that is most cost-effective, the Department determined that emissions cap-and-trade programs that are characterized by unencumbered trading of allowances are the most appropriate programs for the control SO<sub>2</sub> and NO<sub>x</sub> emissions from the subject sources.

#### **Regulatory Flexibility Analysis**

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

##### **1. Effects on Small Businesses and Local Governments.**

No small businesses will be directly affected by the adoption of new Parts 237 and 238 and the amendments to Part 200.

One local government is affected by the programs. The Jamestown Board of Public Utilities (JBPU), a municipally owned utility, owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of the ADRP, 40 CFR Part 75. Therefore, no additional monitoring costs will be incurred as a result of implementation of the ADRP. The costs associated with the ADRP will be dictated by how JBPU decides to comply with the provisions of the regulation.

##### **2. Compliance Requirements.** The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the ADRP, as described below.

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO<sub>2</sub> subject unit shall submit to the Department a complete SO<sub>2</sub> Budget permit application, by October, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO<sub>2</sub> allowances available for compliance deductions, as of the SO<sub>2</sub> allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO<sub>x</sub> trading program unit shall submit to the Department a complete NO<sub>x</sub> Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO<sub>x</sub> allowances available for compliance deductions, as of the NO<sub>x</sub> allowance transfer deadline (midnight of September 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO<sub>x</sub> emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

##### **3. Professional Services.** The one local government affected by the ADRP, the JBPU, may need to hire outside professional consultants to comply with new Parts 237 and 238 and the amendments to Part 200. This work would likely be associated with any analyses needed to determine the optimal manner in which to comply with the regulations. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

##### **4. Compliance Costs.** The JBPU will need to either limit emissions at the SACGS to no more than its allowance allocations under Parts 237 and 238 or purchase allowances equal to the number of tons emitted in excess of the number of allowances initially allocated to it. Given the highly variable nature of control equipment cost, the Department limited the analysis of control costs to the purchase of allowances to comply with the program and assumed that costs of allowances will be \$500 per ton for SO<sub>2</sub> and \$2000 per ton for NO<sub>x</sub>. The Department estimated allocations for SACGS and subtracted those allocations from 2000 facility emissions. The estimated cost for purchasing allowances was determined to be approximately \$1.5 million annually. However, these costs are based on the facility as it existed in 2000 and not on the facility as it exists today.

In 2001, a new natural gas-fired turbine was added to SACGS. This new unit emits significantly less SO<sub>2</sub> and NO<sub>x</sub> than the older coal units and its utilization offers JBPU a significant amount of flexibility to comply with this regulation. The operation of the new unit could allow the facility to meet its SO<sub>2</sub> and NO<sub>x</sub> obligations either without or with significantly fewer controls at any of the coal units. To operate within the estimated 2005 and 2008 allocations the new natural gas-fired turbine would need to operate at 40 and 50 percent capacity, respectively. By operating this unit at these levels, SACGS will be below its estimated NO<sub>x</sub> allocations. There are additional costs associated with the operation of the natural gas-fired turbine. The JBPU will experience additional fuel costs as a result of the price difference between natural gas and coal. It is expected that these costs will be somewhat lower than the costs of purchasing allowances and even permit the JBPU to sell excess allowances. The JBPU has a range of compliance options open to it and can use the operational flexibility it has at the SACGS and the flexibility inherent under a cap and trade program to comply with the regulations.

Increased operation of the natural gas-fired turbine would also provide a short term option to SACGS as a means for lowering SO<sub>2</sub> emissions at the facility. While this might provide a short term alternative to controlling SO<sub>2</sub> emissions from the coal units, any benefits gained would eventually diminish because the allocation methodology in Part 238 (i.e., oil and gas are allocated at 0.3 lbs/mmbtu compared to coal at 0.6 lbs/mmbtu in 2008). The shift in heat input from coal to gas will eventually lead to reduced allocations. Depending on the difference between allocations and actual emissions from the facility once this allocation change occurs, JBPU might have to purchase allowances or control emissions to comply.

JBPU also has the ability to change the physical characteristics of its older coal boilers pursuant to section 237-1.5, "Shutdown or change in physical characteristics of a NO<sub>x</sub> budget unit," and no longer be subject to the requirements of Part 237. This would eliminate the need for the new unit to offset NO<sub>x</sub> emissions from the coal units and allow JBPU to sell all its excess NO<sub>x</sub> allowances on the market. JBPU has worked with the Department's permitting staff and has completed changes to its coal units and the generators associated with them to reduce the nameplate capacity of the units below the 25 MW applicability threshold in Part 237.

##### **5. Minimizing Adverse Impact.** The promulgation of new Parts 237 and 238 and the amendments to Part 200 do not directly affect small businesses. One local government is affected by the ADRP - the JBPU. The ADRP constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the

ADRP in such a manner, the Department has attempted to minimize the adverse economic impacts of the program on the JBPU.

The Department considered establishing differing compliance or reporting requirements or timetables that take into account the resources available to small businesses and local governments. The Department determined that the provisions included in the regulations provide sufficient flexibility for compliance to the JBPU, as well as the other sources affected by the program. The Department chose not to use different allocation methodologies for the JBPU. The Department also considered the specifics in the situation of the JBPU in determining not to use separate allocation methodologies. The allocation formulae in Part 238 provide allowances to coal units at twice the rate applicable to non-coal units. This allocation procedure (albeit not designed to minimize impacts to JBPU specifically) mitigates the impacts the program will have on the SACGS.

The Department also considered exempting the SACGS from the rule, but did not because of the amount of emissions generated at the facility and the contribution of these emissions to acid deposition in New York State. In 2001, SACGS emitted 3,223 tons of SO<sub>2</sub>. This was the 12th highest total of SO<sub>2</sub> emissions out of the approximately 38 facilities in New York State that will be SO<sub>2</sub> budget sources under Part 238. SACGS emitted SO<sub>2</sub> at a rate of 2.65 pounds per million Btu. This is the 5th highest SO<sub>2</sub> emission rate and nearly 3.5 times the average of the approximately 38 affected New York State facilities (0.76 pounds/mmBtu). NO<sub>x</sub> emissions at SACGS were 507 tons in 2001. This was the 23rd highest total of NO<sub>x</sub> emissions out of approximately 69 facilities in New York State that will be NO<sub>x</sub> Budget sources under Part 237. SACGS emitted NO<sub>x</sub> at a rate of 0.42 pounds per million Btu. This is the 4th highest NO<sub>x</sub> emission rate and nearly twice the average of the approximately 69 affected New York State facilities (0.23 pounds/mmBtu).

In considering whether to exempt JBPU from these regulations, the Department evaluated the impact this exemption would have on the other sources included in the program. Reducing SO<sub>2</sub> emissions at SACGS to the level of allocation ("expected SO<sub>2</sub> reductions" = actual emissions - 0.9 pounds per million Btu × greatest heat input in the past 3 years) represents a reduction of about 2,200 tons or about 1.75 percent of the total SO<sub>2</sub> reductions expected from the program. The 2,200 tons of "expected SO<sub>2</sub> reductions" represent about 4 percent of the emissions and 13.5 percent of the "expected SO<sub>2</sub> reductions" from the largest SO<sub>2</sub> source in the State. Therefore, exempting SACGS from the ADRP would result in a significant burden to the other affected sources in the State by forcing them to make up this amount of SO<sub>2</sub> emission reductions.

The Department also considered the impact on the most sensitive areas in the State. While the combined contribution of all sources in New York State represents about 20 percent of the total sulfate deposition in New York State,<sup>1</sup> emission reductions from within New York State are crucial to meeting either the 40 to 50 percent reduction in sulfur and nitrogen deposition needed to return the condition in the Adirondack lakes to the levels observed in the mid-1980's<sup>2</sup> or the 80 percent reduction needed for significant improvements in chemical conditions to change watersheds similar to the Hubbard Brook Experimental Forest from acidic to non-acidic in 20 to 25 years in order to support biological recovery in 50 years.<sup>3</sup> In other words, the Department deems the emission reductions from the SACGS important to the ability to adequately address the acid deposition problem in New York State.

Under 6 NYCRR Part 204, NO<sub>x</sub> Budget Trading Program, the SACGS was given a specific allocation for each year as opposed to being included in the formulaic allocation procedures. This is different than how SACGS will be allocated under the ADRP. To determine the allocation procedures for Part 204, the Department convened a series of allocation workshops which resulted in an agreed upon allowance allocation procedure with all of the affected parties. This agreed upon procedure treated SACGS differently than the remainder of the sources through the allocation of a specific number of allowances prior to the remaining sources being allocated through the formulae. The Department felt it was proper to allocate SACGS differently because the allocation was based on a broad consensus among the affected parties. In this rule making, the Department did not convene such an allocation process because the intervening deregulation of the electricity generating industry put sources into a more competitive position and the prospect for an agreed upon allocation procedure was deemed to be remote. Instead, the Department devised an allocation procedure

that it deemed fair and equitable to all affected sources. This procedure did not include a separate allocation mechanism for any one particular source. In other words, all affected electric generators were treated the same.

Due to the widely different emission profiles between coal burning and non-coal burning units, the Department did not adopt a fuel neutral allowance allocation procedure under Part 238. Adoption of a fuel neutral methodology would have resulted in a pronounced bias against coal burning units. Coal burning units remain vital to the reliability of the State's electric grid and enhance fuel diversity. Having a fuel diverse electric generating system provides the State with a more competitive electricity generation market that is less susceptible to variations in the price of a particular fuel. Although SACGS has a natural gas fired unit that offers it flexibility in complying with the regulation, it also has several coal burning units that are allocated under the coal specific allowance allocation formulae in the SO<sub>2</sub> portion of the ADRP.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the ADRP with interested parties and provided input in the development of the allocation methodologies contained in new Parts 237 and 238 and the amendments to Part 200.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the ADRP: Control NO<sub>x</sub> and SO<sub>2</sub> emissions from the facility, increase operation of the low emitting new natural gas-fired turbine, or purchase allowances. There are NO<sub>x</sub> and SO<sub>2</sub> control technology options available to the SACGS. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

#### **Summary of Rural Area Flexibility Analysis**

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant CAA sections and the federal monitoring regulations applicable to the Program (40 CFR Part 75).

#### **TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED**

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

#### **REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS**

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, record keeping and compliance requirements detailed below.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO<sub>x</sub> trading program unit shall submit to the Department a complete NO<sub>x</sub> Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

<sup>1</sup>'The Sulfur Deposition Control Program,' New York State Department of Environmental Conservation, June 1985.

<sup>2</sup>'Acid Deposition Feasibility Study: Report to Congress', U.S. EPA, EPA 430-R-95-001a, October 1995.

<sup>3</sup>'Acid Rain Revisited: advances in scientific understanding since the passage of the 1970 and 1990 Clean Air Act Amendments'. Hubbard Brook Research Foundation. Science Links Publication. Vol. 1 No. 1. 2001.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO<sub>x</sub> allowances available for compliance deductions, as of the NO<sub>x</sub> allowance transfer deadline (midnight of September 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO<sub>x</sub> emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO<sub>2</sub> subject unit shall submit to the Department a complete SO<sub>2</sub> Budget permit application, by October 1, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO<sub>2</sub> allowances available for compliance deductions, as of the SO<sub>2</sub> allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

#### COSTS

In the past, with a regulated electric utility industry, the capital cost of the emission control equipment required by the new regulation would have been added to the utility's rate base and recovered through increased electricity rates. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures.

The Department sought input from NYSEERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSEERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately \$430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation. New York's rail system provides a valuable service to businesses throughout the state. The Department does not anticipate significant losses in coal transportation services in

New York as a result of this proposal. The modeled percentage reduction in coal generation is within the range of annual fluctuations caused by other factors and is not anticipated to have a major impact on the freight system. The use of unit trains further protects the system from these fluctuations because other products are not coupled with coal.

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSEERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO<sub>2</sub> emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed (32,000/184,000). With respect to NO<sub>x</sub> emissions, in the "No Additional Construction" scenario, annual NO<sub>x</sub> emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO<sub>x</sub> cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO<sub>x</sub> compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSEERDA was reasonable.

#### MINIMIZING ADVERSE IMPACT

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. In actuality, since one of the goals of the program is to reduce the impacts of acid rain on the Adirondacks, some of the most rural areas in the State will receive an environmental benefit from the further reduction in acid rain precursors associated with these regulations. The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the program to all sources on a statewide basis.

#### RURAL AREA PARTICIPATION

Since the announcement of the ADRP in October of 1999, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

#### Summary of Job Impact Statement

1. Nature of Impact: The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil

fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO<sub>2</sub>) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO<sub>x</sub>) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

The ADRP will have both adverse and beneficial impacts on job and employment opportunities. Electricity generators will incur costs related to the emissions controls needed to comply with the regulations and, based on the modeling used by the Department, this will translate into increased electricity prices. Based on the modeling used by the Department, the ADRP may have a corresponding negative impact on employment. There are also positive impacts related to the implementation of the ADRP, including jobs created through the construction of control devices and appurtenances needed to comply with the regulations and the additional electricity generation needed to meet increased demand. It is also expected that the travel and tourism industry will benefit from reductions in acid deposition and commensurate improvements in visibility.

#### 2. Categories and Numbers Affected:

The Department sought input from NYSEERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSEERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately \$430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation. New York's rail system provides a valuable service to businesses throughout the state. The Department does not anticipate significant losses in coal transportation services in New York as a result of this proposal. The modeled percentage reduction in coal generation is within the range of annual fluctuations caused by other factors and is not anticipated to have a major impact on the freight system. The use of unit trains further protects the system from these fluctuations because other products are not coupled with coal.

The MAPS model predicts an estimated increase of \$370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the \$370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO<sub>x</sub> and SO<sub>2</sub> emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSEERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO<sub>2</sub>

emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO<sub>2</sub> compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO<sub>2</sub> reduction needed (32,000/184,000). With respect to NO<sub>x</sub> emissions, in the "No Additional Construction" scenario, annual NO<sub>x</sub> emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO<sub>x</sub> cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO<sub>x</sub> compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSEERDA was reasonable.

Regulatory flexibility provisions built into the ADRP could not be analyzed as this is beyond the scope of the MAPS model. Specifically, these provisions are allowance banking, early reduction allowances and out-of-state source reductions. Each of these allows sources additional flexibility which lead to lower compliance costs. The allowance banking provisions permit sources to retain unused allowances for compliance obligations that will arise in the future. This flexibility permits sources to deal with the natural variations in generation between control periods and, in the case of a phased program (Part 238), allows full credit for reductions in the first phase to carry over to the second more stringent phase. Early reduction allowances are created when a source reduces emissions prior to the start of the programs. The Department has included provisions to allow for the creation of early reduction allowances at a 50 percent discount for those reductions that are greater than the target collective emission rate of the program but are below an historic baseline or rate. Full credit will be given for all reductions below the collective target emission rate of the program before the first year of implementation. This gives a generator with a source that is inexpensive to control the ability to create additional allowances which either may be expended for compliance purposes in the future or may be sold in the allowance market. The program also provides that demonstrated emissions reductions from sources located in 10 upwind States can be used as the basis for awarding up to 10 percent of the annual NO<sub>x</sub> and SO<sub>2</sub> budgets in the first year of the programs (declining to 8 percent in the second year, 6 percent in the third, 5 percent in the fourth and to 4 percent in the fifth year and beyond). The upwind reductions provisions act as a mechanism which allows any generator subject to the program to pursue less expensive emission reductions in upwind states to create additional allowances which will result in some decrease in allowance prices generally. The Department is not able to quantify the relative impact of the above flexibility provisions except to say that they are expected to reduce the overall cost of compliance with the regulation.

The ADRP will have some positive impact on employment. Generator companies will need to purchase control equipment and construct the facilities to house this equipment. The total capital expenditures as provided by the generators indicated capital investments of approximately \$430 million were necessary to comply with the regulations. While the above discussion clearly demonstrates that the Department believes that these costs are over-estimated, for discussion purposes these costs are cited to assess the relative impact on employment. Total capital expenditures include the costs for emissions control equipment, construction materials, labor and design. Each of these activities should have positive impacts on employment in New York. However, because of the lack of detailed information provided to the Department regarding these costs it is impossible to estimate the actual number of jobs that will be created by this capital expenditure. Still, based on United States Department of Commerce Bureau of Economic Analysis statistics for New York State in 1999, the Department calculated 11.7 jobs (14.3 construction jobs) are created for every \$1 million spent (Total non-farm jobs/Total non-farm gross state product). If half of the capital investments made to comply with the

regulations could be applied to the New York Gross State Product, then these expenditures would be expected to result in an estimated 2,515 jobs.

The MAPS modeling predicts increased generation from firing natural gas. This increase will likely necessitate increased operation of existing natural gas transmission capacity and the construction of new natural gas transmission capacity. While the quantification of the additional capacity is beyond the scope of the analysis performed for this effort, the additional natural gas transmission can be expected to increase employment opportunities in both the construction and operation facets.

The ADRP will also have a positive impact on the travel and tourism industry. Mitigation of the devastating effects of acid rain will aid in keeping New York State as a preferred vacation destination. In addition to reducing acid deposition, these regulations will also assist in the reduction of primary and secondary formation of fine particulate matter that plays a prominent role in regional haze. Because of regional haze, rural and urban vistas of New York are often obscured which reduces the desirability of travel in and around the State. While it is not possible to quantify the economic or the employment impact of these regulations, it is clear that their implementation will make New York State an even more attractive vacation destination.

3. Regions of Adverse Impact: The MAPS modeling predicts that the statewide average increase in wholesale electricity prices will be 5.4 percent. The greatest impacts will be in Buffalo, Rochester and Long Island with increases of 6, 9 and 16 percent, respectively. It can be expected that if any negative employment impacts result from this program, these areas will experience it. It is important to recognize the wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. The proportion of retail price comprised by the wholesale price is highly variable and cannot be precisely known, but might be expected to be in the range of one-third to one-half. As a result the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage of wholesale prices. The increase in wholesale electricity price and the commensurate increase in retail price assumes that the generators will react to the program as indicated in their responses to the DPS and install controls and otherwise over-control emissions as predicted by the MAPS model. Over-compliance to the extent predicted by the MAPS model is based on the generators' responses and is an unlikely scenario because of the economics of controlling beyond the levels called for in the ADRP.

4. Minimizing Adverse Impact: The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the ADRP through an allowance based cap and trade system, the Department has attempted to minimize the adverse economic impacts including the adverse employment impacts of the program.

5. Self-Employment Opportunities: Not applicable.

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## Department of Health

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### NOTICE OF ADOPTION

#### Watershed Rules and Regulations for the City of Syracuse

**I.D. No.** HLT-33-03-00008-A

**Filing No.** 912

**Filing date:** Aug. 13, 2004

**Effective date:** Sept. 1, 2004

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

**Action taken:** Repeal of section 131.1 and addition of new section 131.1 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 1100

**Subject:** Watershed rules and regulations for the City of Syracuse.

**Purpose:** To update the existing watershed rules.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-33-03-00008-P, Issue of August 20, 2003.

**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

One comment on the proposed revisions to the Watershed Rules and Regulations for the City of Syracuse (WRR) was received. The commenter states that "These revised rules appear to be written for the purpose of obtaining approval for the Filtration Abatement Waiver", and included many "Reasons Why The Filtration Abatement Waiver Must Not Be Granted".

The main purpose of the proposed revisions to the WRR for Skaneateles Lake and its watershed, is to "protect the health and general welfare of the public." Advances in the sciences related to watershed management have prompted this updating of the WRR which were last revised in 1974.

The New York State Department of Health regulations in Title 10 of the *Official Compilation of Codes, Rules and Regulations of the State of New York* (NYCRR) provide criteria for water systems with surface water sources to use if they seek avoidance of filtration requirements. Section 5-1.30 includes steps that must be taken by the water system to protect their water source(s). Subparagraph (c)(7)(iii) states that a water system must protect its source(s) of supply with promulgated watershed rules. As part of granting filtration avoidance to the City of Syracuse, the City was directed to update its existing WRR. In addition, the proposed revisions were needed because the current WRR are outdated. The approval of filtration avoidance is dependent on the existence of high quality source water and can be reviewed at any time. The revised Watershed Rules and Regulations will help to sustain the required high quality source water.

The commenter notes a number of potential sources of contamination in and near the Skaneateles Lake watershed. Many of the additional clauses in the proposed WRR address these types of potential contaminant sources. Proposed revisions to the WRR that address the commenter's concerns include: additional categories of potential contaminants that will require active management; clear details of responsibilities for inspection and permitting activities; and the delegation of authority to the City of Syracuse and its designees for inspection of the Protection Zones in the Watershed. The revisions also specify remedies for violations of these WRR. The Department of Health believes the proposed revisions will improve on the existing protection of the watershed, and addresses issues raised by the commenter.

### NOTICE OF ADOPTION

#### Treatment of Opiate Addiction

**I.D. No.** HLT-37-03-00001-A

**Filing No.** 910

**Filing date:** Aug. 13, 2004

**Effective date:** Sept. 1, 2004

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

**Action taken:** Amendment of section 80.86 and addition of section 80.84 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 3308(2), 3351 and 3352

**Subject:** Treatment of opiate addiction.

**Purpose:** To allow the treatment of opiate addiction in an office-based setting while curtailing controlled substance diversion.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-37-03-00001-P, Issue of September 17, 2003.

**Revised rule making(s) were previously published in the State Register** on May 19, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** 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 Department of Health (DOH) received two letters commenting on the revised rulemaking.

In one letter, the City of New York Department of Health and Mental Hygiene suggested eliminating the physician registration requirement. Both the Office of Alcohol and Substance Abuse Services (OASAS) and

the Bureau of Controlled Substances (BCS) strongly believe that such registration is necessary. This registration permits the Department to review the physician's licensure status and history of any controlled substances regulation violations, thereby helping to ensure New York patients that they will receive addiction treatment only from qualified physicians and protecting the public health. This registration is issued without fee and is valid for two years.

Additionally, the author stated that the physician must first wait for the Substance Abuse and Mental Health Services Administration (SAMHSA) application to be approved before registering with New York State, thus making the entire application process take about 14 weeks. This assessment is not correct. Physicians may register simultaneously with SAMHSA and DOH. DOH will process the application and issue the registration certificate upon receipt or acknowledgement of the approved SAMHSA application. It is expected that a properly completed application will be processed within 2-4 weeks.

In the other letter, the National Association of Chain Drug Stores suggested eliminating the requirement for the registration of pharmacies. BCS has used this registration process as a tool in educating pharmacists on the availability of office-based addiction treatment. In addition, BCS streamlined the registration process for chain pharmacies by contacting the corporate offices directly and allowing a single application for all entities. The pharmacy registration is also issued without fee and is valid for two years.

The requirement that both practitioners and pharmacies register to provide treatment to opiate addiction allows DOH to more effectively monitor the prescribing and dispensing of buprenorphine for such treatment. Through such monitoring, DOH is able to detect and prevent the diversion of this controlled substance.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Rules Governing Individual and Group Accident and Health Insurance Reserves

**I.D. No.** INS-35-04-00001-E

**Filing No.** 907

**Filing date:** Aug. 11, 2004

**Effective date:** Aug. 11, 2004

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

**Action taken:** Repeal of Part 94 and addition of new Part 94 (Regulation 56) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1304, 1308, 4217 and 4517

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

**Specific reasons underlying the finding of necessity:** Regulation No. 56 was originally effective August 18, 1971 in its present form and has not been substantively amended since that time. In the intervening 31 years, the National Association of Insurance Commissioners has adopted new reserving tables for individual and group disability income insurance policies, popularly referred to as the Commissioners' Disability Tables ("CDT"). The current CDT was adopted in 1986 and is used widely across the country as the standard for holding reserves for individual and group disability insurance policies. It reflects both modern morbidity and claims experience and the judgement of actuaries and regulators who are knowledgeable about the current state of the disability insurance market.

However, New York authorized insurers are required to use the 1964 CDT because it was required by Regulation No. 56 (see, e.g., 11 NYCRR Part 94.1(a)(4)(iii)(A)). Also, Regulation No. 56 did not apply to group insurance, providing little or no guidance to New York insurers that write this important form of protection. The effect of the application of this outdated regulation is that New York authorized insurers are required to hold reserves far in excess of the national standard for disability insurance active lives reserves, but below the prevailing standard for claims reserves.

Most New York authorized insurers hold reserves in excess of the amount needed to pay claims due to the required use of the outdated tables. For these insurers, the adoption of the more recent tables will significantly reduce the cost of doing business and allow them to compete more effectively with insurers that are not subject to New York standards and to pass the cost savings on to consumers. For some insurers, this regulation may require an increase in reserves especially for coverages such as group health insurance for which there had been no standards previously. The adoption of these standards will help to ensure that such insurers remain financially capable of paying claims as they come due.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on December 31, 2003. The filing date for the September 30, 2004 quarterly statement is November 15, 2004. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this new Regulation No. 56 is necessary for the general welfare.

**Subject:** Individual and group accident and health insurance reserves.

**Purpose:** To prescribe rules and regulations for valuation of minimum individual and group accident and health insurance reserves including standards for valuing certain benefits in life insurance policies and annuity contracts.

**Substance of emergency rule:**

The following is a summary of the substance of the rule:

Section 94.1 lists the main purposes of the regulation including implementation of sections 4217(d), 4517(d) and 4517(f) of the Insurance Law and prescribing rules for valuing certain accident and health benefits in the life insurance policies.

Section 94.2 is the applicability section. This section applies to both individual policies and group certificates. The regulation applies to all life insurers, fraternal benefit societies, and accredited reinsurers doing business in the State of New York. It applies to all statutory financial statements filed after its effective date.

Section 94.3 is the definitions section.

Section 94.4 sets forth the general requirements and minimum standards for claim reserves, including claim expense reserves and the testing of prior year reserves for adequacy and reasonableness using claim runoff schedules and residual unpaid liability.

Section 94.5 sets forth the general requirements and minimum standards for unearned premium reserves.

Section 94.6 sets forth the general requirements and minimum standards for contract reserves.

Section 94.7 concerns increases to, or credits against reserves carried, arising from reinsurance agreements.

Section 94.8 prescribes the methodology of adequately calculating the reserves for waiver of premium benefit on accident and health policies.

Section 94.9 provides that a company shall maintain adequate reserves for all individual and group accident and health insurance policies that reflect a sound value being placed on its liabilities under those policies.

Section 94.10 provides the specific standards for morbidity, interest and mortality.

Section 94.11 allows for a four-year period for grading into the higher reserves beginning with year-end 2003 for insurers for which higher reserves are required because of this Part.

Section 94.12 establishes the severability provision of the regulation.

**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 November 8, 2004.

**Text of emergency rule and any required statements and analyses may be obtained from:** Eric Mangan, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5257, e-mail: emangan@ins.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority:

The superintendent's authority for the adoption of Regulation No. 56 (11 NYCRR 94) is derived from sections 201, 301, 1304, 1308, 4217, and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Section 4217(d) provides that reserves for all individual and group accident and health policies shall reflect a sound value placed on the liabilities of such policies and permits the superintendent to issue, by regulation, guidelines for the application of reserve valuation provisions for these types of policies.

For fraternal benefit societies, section 4517(d) provides that reserves for all individual accident and health certificates shall reflect a sound value placed on the liabilities of such certificates and permits the superintendent to issue, by regulation, standards for minimum reserve requirements on these types of certificates. Additionally, section 4517(f) provides that reserves for unearned premiums and disabled lives be held in accordance with standards prescribed by the superintendent for certificates or other obligations which provide for benefits in case of death or disability resulting solely from accident, or temporary disability resulting from sickness, or hospital expense or surgical and medical expense benefits.

#### 2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

#### 3. Needs and benefits:

The regulation is necessary to help ensure the solvency of life insurers doing business in New York. The Insurance Law does not specify mortality, morbidity, and interest standards used to value individual and group accident and health insurance policies and relies on the superintendent to specify the method. Without this regulation, there would be no standard method for valuing such products and, in fact, the current regulation, absent the emergency regulation, provides no guidance related to certain coverages such as group accident and health policies. This could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

Additionally, the current regulation, absent the emergency regulation, requires higher reserves than necessary for certain individual accident and health insurance policies. This emergency regulation, by lowering such reserves for individual policies, will result in a lower cost of doing business in New York.

#### 4. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

#### 5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

#### 6. Paperwork:

The regulation imposes no new reporting requirements.

#### 7. Duplication:

The regulation does not duplicate any existing law or regulation.

#### 8. Alternatives:

The only significant alternative to be considered was to keep the current version of Regulation No. 56, without adopting this emergency regulation, which would result in different reserve requirements for those life insurers licensed in New York.

#### 9. Federal standards:

There are no federal standards in the subject area.

#### 10. Compliance schedule:

Beginning with year-end 2003, where the requirements of this regulation produce reserves higher than those calculated at year-end 2002, the insurer may linearly interpolate, over a four year period, between the higher reserves and those calculated based on the year-end 2002 standards. Insurers must be in full compliance with this Part by year-end 2006. This allows insurers subject to the regulation ample time to achieve full compliance, since this regulation has been adopted on an emergency basis since December 31, 2002.

#### **Regulatory Flexibility Analysis**

##### 1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business 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. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

##### 2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

#### **Rural Area Flexibility Analysis**

##### 1. Types and estimated number of rural areas:

Insurance companies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The regulation establishes reserve requirements for individual and group accident and health policies and establishes standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

##### 3. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

##### 4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

##### 5. Rural area participation:

The regulation was drafted after consultation with member companies of the Life Insurance Council of New York (LICONY). A copy of the draft was distributed to LICONY in November, 2002. Additional changes were made to the text of the regulation based on changes made to the NAIC's Health Insurance Reserves Model Regulation in December 2003 and a revised draft of the regulation was distributed to LICONY in January 2004.

In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the June 2004 issue of the *State Register*.

#### Job Impact Statement

Nature of impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting reserves for insurers. Most insurers will be able to reduce reserves and a few may need to increase reserves but this is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

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## Department of Labor

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### NOTICE OF ADOPTION

#### Work Study, Internship, Externships, or Working Placements for Non-Graduate Students Receiving Public Assistance

**I.D. No.** LAB-12-04-00001-A

**Filing No.** 908

**Filing date:** Aug. 12, 2004

**Effective date:** Sept. 1, 2004

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

**Action taken:** Amendment of section 1300.9 of Title 12 NYCRR.

**Statutory authority:** Social Services Law, sections 335-b, 336 and 336-c as amd. by L. 2000, ch. 534; L. 2002, ch. 100; L. 2004, ch. 83; Social Services Law, section 337 as amd. by L. 1997, ch. 436; Labor Law, section 21 as amd. by L. 1997, ch. 436

**Subject:** Participation in work-study, internships, externships or work placements that are part of a school curriculum for non-graduate students receiving public assistance.

**Purpose:** To incorporate the provision of the amendments to sections 335-b, 336, and 336-c of the Social Services Law contained in L. 2000, ch. 534 as amd. by L. 2002, ch. 100 and L. 2004, ch. 83 into Department of Labor regulations.

**Text of final rule:** Paragraphs (4) through (7) of subdivision (b) of section 1300.9 of 12 NYCRR are renumbered paragraphs (7) through (10) and new paragraphs (4), (5), and (6) are added to read as follows:

(4) *A non-graduate degree student who is participating in a work-study, internship, externship, or other work placement that is part of the curriculum of a student approved for participation by the City University of New York (CUNY), the State University of New York (SUNY), another degree granting institution, or any other education, training or vocational rehabilitation agency approved by the state or social services district, shall not be unreasonably denied the ability to participate in such program as a work activity assignment made in accordance with the provisions of this Part. A social services district may deny such participation based upon consideration of factors including, but not limited to:*

(a) *the determination that the student voluntarily quit a job or reduced earnings to qualify for initial or increased public assistance as determined in accordance with section 1300.13 of this Part;*

(b) *that a job or on-the-job training position that is comparable to the work-study, internship, externship or other work placement cannot reasonably be expected to exist in the private, public, or not-for-profit sector;*

(c) *that the student is not maintaining a cumulative C average (or its equivalent), which may be waived by the district for cases of undue hardship based on the death of a relative, the personal injury or illness of the student or other extenuating circumstances as determined appropriate by the district;*

(d) *failure of the institution or student to monitor and report to the social services district monthly, or as otherwise reasonably required by the district, information regarding the student's attendance and performance related to the work placement. Failure of the institution to monitor and report student attendance and performance shall be cause for the district to reasonably deny approval of the student's participation in such programs as a work activity;*

(e) *failure of the student to progress toward the completion of a course of study without good cause as determined by the social services district; and,*

(f) *that the student had previously enrolled in a work-study, internship, or other work placement and failed to complete the work placement without good cause as determined by the social services district.*

(5) *When a social services district assigns a non-graduate student participating in a social services district approved work-study, internship, externship or other work placement to work activities in accordance with the provisions of this Part, the district shall make reasonable efforts to assign the student to such activities during hours that do not conflict with his or her academic schedule.*

(6) *The hours of participation by an individual in a work-study, internship, externship or other work placement that is part of the student's curriculum and that has been approved by the social services district shall be included as a work activity within the definition of unsubsidized employment, subsidized private sector employment, subsidized public sector employment or on-the-job training pursuant to subdivision (a) of this section.*

Paragraph (5) of subdivision (d) of 1300.9 of 12 NYCRR is amended to read as follows:

(5) In assigning to work experience a recipient who is a *non-graduate* student attending CUNY, SUNY or other approved nonprofit education, training or vocational rehabilitation agency, the social services district [must] *shall:*

(i) after consultation with officials of CUNY, SUNY or other nonprofit education, training or vocational rehabilitation agency, assign the student to a work experience site on campus where the recipient is enrolled, if a work experience assignment approved by the social services official is available. Where such work experience assignment is not available, the social services district shall, to the extent possible, assign the student to a work experience site within reasonable proximity to the campus where the recipient is enrolled. Provided, however, in order to qualify for a work experience assignment on-campus, or in close proximity to campus, a student must have a cumulative C average, or its equivalent. The social services district may waive the requirement that the student have a cumulative C average or its equivalent for undue hardship based on:

[(i)](a) the death of a relative of the student;

[(ii)](b) the personal injury or illness of the student; or

[(iii)](c) any other extenuating circumstances;

(ii) *not unreasonably assign the student to participate in work experience during hours that conflict with the student's academic schedule.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 1300.9(b)(6).

**Text of rule and any required statements and analyses may be obtained from:** Stephanie Pardo, Department of Labor, Counsel's Office, Bldg. 12, Rm. 509, State Campus, Albany, NY 12240, (518) 457-4380, e-mail: stephanie.pardo@labor.state.ny.us

#### Revised Regulatory Impact Statement

1. Statutory authority

The New York State Department of Labor (the Department) supervises the welfare to work programs authorized by the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1997" Section 407 of P.L. 104-193 (PRWORA). Section 407 of PRWORA requires the state to meet federal participation rates by placing recipients of public assistance in work activities.

Section 21 of the Labor Law authorizes the Department to supervise social services districts in the administration of the work programs created under Title 9-B of the Social Services Law (SSL) including those authorized by the federal statute. Section 337 of the SSL vests responsibility for the operation and administration of the work, employment, and training programs in the Department. Section 146 of Part B of Chapter 436 of the Laws of 1997 (The Welfare Reform Act) transferred the work programs

under Title 9-B of the SSL to the Department. Section 335-b of the Social Services Law as amended by Section 148 of the Welfare Reform Act requires social services districts to meet participation rates for recipients of federal assistance and for recipients of the state assistance programs.

The proposed amendments to the regulations of the Department are authorized by Section 5 of Chapter 534 of the Laws of 2000 which amended Social Services Law § 335-b, § 336, and § 336-c to require social services districts to consider certain non-graduate work-study programs, internships, externships and other work placements as qualifying to meet the work requirements for public assistance recipients, and to assign certain non-graduate students to work experience during hours that do not conflict with the student's academic schedule. Social Service Districts must consider a student's academic schedule and strive to avoid work placement conflicts. The statutory amendments to Social Services Law § 335-b, § 336, and § 336-c were extended until June 30, 2004, by the provisions of Chapter 100 of the Laws of 2002. The statutory amendments to Social Services Law § 335-b, § 336, and § 336-c were extended until June 30, 2006, by the provisions of Chapter 83 of the Laws of 2004.

#### 2. Legislative objectives

It was the intent of the legislation to facilitate participation by welfare recipients in certain education activities while still allowing them to fulfill their public assistance work activity requirements. The revised regulations should enable many participants to continue in their educational programs while maintaining their eligibility for public assistance.

#### 3. Needs and benefits

The amendments to the Social Services Law require social services districts to allow a public assistance recipient to participate in non-graduate work-study, internship, externship or other work placement as an approved work activity that counts toward the recipient's work requirement. Additionally, the proposed regulations require a social services district to make reasonable efforts to assign certain non-graduate students to public assistance work activities that do not conflict with the student's academic schedule. The regulatory amendments are necessary to ensure that, where appropriate, social services districts permit public assistance recipients attending certain non-graduate work-study programs to count those programs as work activities, and to assure that, when feasible, students are not assigned to work activities that conflict with their academic schedule. This will enable participants to continue in their educational program rather than having to choose between obtaining their educational goals and participating in public assistance work programs. The proposed regulation clarifies for social services districts, fair hearings and other affected individuals when these provisions must be followed and will facilitate appropriate compliance with the statute. It will eliminate some of the uncertainty of public assistance recipients who are unsure of whether they will be able to continue in their educational programs.

#### 4. Costs

There are no significant additional costs that will be incurred as a result of this regulation. The legislation may have resulted in a small increase in administrative hearings by individuals who challenge the social services district's decision to deny approval of a work-study placement as a public assistance work activity. The regulations should ultimately minimize the number of fair hearings by making it clear that social services districts have the authority to deny such assignments based on the consideration of the factors enumerated in statute and included in the regulations, such as failure of the student or institution to report information regarding the student's attendance at the work placement.

#### 5. Local government mandates

These regulations impose an additional mandate on social services districts by establishing a requirement that the district not unreasonably deny a non-graduate student's participation in a work-study program as counting toward that student's public assistance work requirement. Additionally, districts are now required to make reasonable efforts to assign certain students to work activities during hours that do not conflict with the student's academic schedule. These requirements of the proposed regulations are not inconsistent with the previous policy of many social services districts and are currently mandated by state statute.

#### 6. Paperwork

The proposed amendment will not require any additional paperwork. Local social services districts and program participants are currently required to monitor attendance at work activities; therefore, the proposed rule does not impose additional requirements.

#### 7. Duplication

The proposed rule does not duplicate any regulatory provisions.

#### 8. Alternatives

The alternative considered was to implement the statutory changes through a policy guidance issued to the social services districts. The proposed regulations provide guidance to fair hearing officers on the scope of authority and discretion given to the social services districts. Regulations are also more compelling than policy guidance alone and would help to ensure compliance by the local social services districts.

#### 9. Federal standards

Federal regulations require each state to engage a minimum percentage of its total public assistance caseload in certain work activities. While the federal statute and regulations list allowable work activities, they afford states the flexibility to define those activities. This flexibility is intended to permit states to choose work activities that are most effective in moving the members of its caseload to self-sufficiency. The statute and proposed regulations, in keeping with this flexibility, provide that a definition of "work activities" includes certain non-graduate work-study, internship, externship and work placement programs.

#### 10. Compliance schedule

Social services districts will be able to comply with the regulations immediately. The governing statute was effective December 4, 2000, and on December 21, 2000, the Department sent the social services districts a policy guidance with instructions for implementing the provisions of the statute. The Department received no comments from the social services districts regarding the policy guidance. The rule will be effective upon adoption.

#### **Regulatory Flexibility Analysis**

No revised regulatory flexibility analysis for small business and local governments is necessary since there have been no substantive changes made to the proposed regulation.

#### **Rural Area Flexibility Analysis**

No revised rural area flexibility analysis is necessary since there have been no substantive changes made to the proposed regulation.

#### **Job Impact Statement**

No revised job impact statement is necessary since there have been no substantive changes made to the proposed regulation. The change to the proposed regulations will have no effect on jobs and employment opportunities. Therefore, a revised job impact statement is not included.

#### **Assessment of Public Comment**

The Department of Labor received, during the comment period, comments from one social services district and a legal aid society. The proposed amendments would require social services districts to consider certain non-graduate work-study programs, internships, externships and other work placements as qualifying to meet the work requirements for public assistance recipients, and to assign certain non-graduate students to work experience during hours that do not conflict with the student's academic schedule.

**Comment:** The proposed amendments appear to limit countable activities for participation rate purposes to those that are part of a curriculum approved by the social services district. This is not consistent with the statute that permits counting as work activities certain work-study, internship, externship or other work placements that are part of an undergraduate college curriculum or are part of the curriculum of a program approved by the state or local district.

**Response:** The intent of the regulation was to permit the counting of all of the activities delineated in the statute. The language in paragraph 6 of subdivision (b) has been modified slightly to make that intent clear.

**Comment:** The statute applies to students who are participating in work-study and to those who are approved to participate in such activities while the proposed amendment only includes the former.

**Response:** The general category of students participating in the work-study activities includes those who are approved to participate. Therefore, no change has been made to the amendment.

**Comment:** The statute provides that each hour of participation shall count toward satisfaction of a student's work activity requirements, however this is not specified in the regulations.

**Response:** The regulations provide that the hours in work study will be counted by requiring that such activities be classified as either unsubsidized employment, subsidized private sector employment, subsidized public sector employment or on-the-job training.

**Comment:** The list of factors that may be considered in denying participation in work-study includes "failure of the student to progress toward the completion of a course of study without good cause." This factor is vague and redundant given the requirement of a C average.

**Response:** The statute provides that social services districts may consider different factors when deciding to approve participation in work-study. The Department believes that consideration of an individual's his-

tory of participation in similar activities is a relevant factor for review as part of a client's assessment.

**Comment:** The addition of failure to complete a prior work-study, internship or other work placement without good cause as a factor to be considered when approving participation in work-study is overly broad. Denying participation in work-study or internships for failure to satisfy unrelated work requirements is not reasonable and is punitive and imposes an additional sanction not in law.

**Response:** The Department has determined that it is reasonable for social services districts to consider an individual's history of participation in work-study activities when determining whether to approve participation in a subsequent work-study activity. Consideration of such factors is not punitive but provides a realistic assessment of whether a participant will successfully complete a course of study. Because Temporary Assistance is time limited, districts must assign an individual to the activities it has determined, based on an assessment, are most likely to lead to self-sufficiency.

The Department will, in policy documents, provide additional guidance to the social services districts regarding the evaluation of past performance when considering approval of a work-study placement.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### Residential Treatment Facilities for Children and Youth

**I.D. No.** OMH-18-04-00010-E

**Filing No.** 909

**Filing date:** Aug. 13, 2004

**Effective date:** Aug. 13, 2004

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

**Action taken:** Amendment of section 584.5(e) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

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

**Specific reasons underlying the finding of necessity:** To address the immediate needs of children being served in residential treatment facilities for children and youth (RTF) it is necessary to continue to temporarily expand the capacity of certain RTF's.

**Subject:** Operation of residential treatment facilities for children and youth.

**Purpose:** To continue the temporary increase in the capacity of certain RTF's to serve the needs of emotionally disturbed children and youth.

**Text of emergency rule:** Subdivision 584.5(e) of Part 584 of 14 NYCRR is amended to read as follows:

(e) An operating certificate shall be issued for a residential treatment facility for a resident capacity of no less than 14 and no more than 56; provided, however, that for the period commencing April 1, 2000 through [September 30, 2003,] *September 30, 2004*, bed capacity for facilities primarily serving New York City residents may be temporarily increased up to an additional ten beds over the maximum certified capacity with the prior approval of the Commissioner. In order to receive such approval, the residential treatment facility must demonstrate that the additional capacity will be used to serve those children and youth deemed most in need of RTF services by the New York City Preadmission Certification Committee as set forth in Section 583.8.

**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 Oct. 11, 2004.

**Text of emergency rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

#### **Regulatory Impact Statement**

1. **Statutory Authority:** §§ 7.09(b), 31.04(a)(2) and 31.26(b) of the Mental Hygiene Law grant the Commissioner the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, to set standards of quality and adequacy of facilities, and to adopt regulations governing Residential Treatment Facilities for Children and Youth, respectively.

2. **Legislative Objectives:** NYCRR Part 584 sets forth standards for the operation of Residential Treatment Facilities for Children and Youth. This amendment to Part 584 allows for the temporary increase of capacity of certain facilities to allow additional children and youth to be served in the program.

3. **Needs and Benefits:** The Office of Mental Health has determined that it is necessary to continue the existing capacity of these Residential Treatment Facilities for Children and Youth (RTFs) which serve seriously emotionally disturbed children and youth who are residents of New York City. Under the existing regulation, (14 NYCRR Section 584.5(e)), RTF bed capacity serving primarily New York City residents may be temporarily increased until September 30, 2003 by up to 10 additional beds over the permitted maximum of 56 per facility.

There are a number of initiatives underway that focus on improving the use of the current RTF resources by decreasing the length of stay. These initiatives include focused development of supervised community residences, family based treatment programs, case management and family support to assist the youth discharged from an RTF to successfully reintegrate into the community.

To expand capacity, a total of 21 temporary beds were added to 5 existing RTF facilities serving New York City residents. These beds were added on a voluntary basis with the cooperation of the facilities and the support of the New York City Department of Mental Health. Three of the facilities that were not at the 56 bed maximum had their capacity increased administratively by a total of 13, without going over the maximum. One of the facilities, St. Christopher Otilie, was at 56 beds and another, Linden Hill, was at 55 beds. St. Christopher Otilie added 5 beds. Linden Hill added 3 beds. Therefore, 7 beds are permitted to be added under 14 NYCRR Section 584.5(e) as it currently exists. That permission expired on September 30, 2003. Although significant improvements in development of residential alternatives, such as the supervised community residences and the family based treatment beds, have been made in the last year, the expiration date must be changed to September 30, 2004, in order to permit the continued necessary increase in RTF capacity.

#### 4. Costs:

(a) **Costs to private regulated parties:** There will be no mandated costs to the regulated parties associated with allowing an increase in capacity to the RTF program.

(b) **Cost to state and local government:** The annual state cost for the 7 beds is estimated to be \$438,000. These additional funds will be covered by the State share of Medicaid appropriation. There is no local share for the RTF program.

(c) **The cost projection** was calculated by applying the per bed projected Medicaid rate to the 7 additional beds.

5. **Local Government Mandates:** There will be no additional mandates to local government.

6. **Paperwork:** There are no new paperwork requirements associated with this amendment.

7. **Duplication:** There are no duplicate, overlapping or conflicting mandates which may effect this rule.

8. **Alternatives:** The only alternative would be to allow the temporary additional capacity authority to expire, which is not acceptable given the critical need for these services.

9. **Federal Standards:** The rule does not exceed any Federal standards.

10. **Compliance Schedule:** Providers will be able to comply with this rule immediately.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

#### **Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules impact only Residential Treatment Facilities for Children and Youth serving children who are New York City residents.

#### **Job Impact Statement**

Because this amendment will impact only 2 providers of Residential Treatment Facilities for Children and Youth, and only permits these 2 providers

to continue the temporary operation of a total of 7 beds until September 30, 2004, it will not have any impact on jobs and employment activities.

**Assessment of Public Comment**

The agency received no public comment.

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

**Audits of Office of Mental Health Licensed or Operated Facilities, Programs or Units**

**I.D. No.** OMH-35-04-00010-P

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

**Proposed action:** Amendment of Part 552 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a), 31.07, 31.09, 31.11(a) and 43.02; and Social Services Law, sections 364(3) and 364-a(1)

**Subject:** Audits of Office of Mental Health licensed or operated facilities, programs or units.

**Purpose:** To clarify authority to require financial reports and audits.

**Text of proposed rule:** Pursuant to the authority granted to the Commissioner of the Office of Mental Health as set forth in §§ 7.09(b), 31.04(a), 31.07, 31.09(a), 31.11 and 43.02(a)-(c) of the Mental Hygiene Law, and §§ 364(3) and 364-a(1) of the Social Services Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows:

Part 552 is amended as follows:

New subdivisions (c), (d), (e) and (f) are added to § 552.2 to read as follows:

(c) *Subdivision (a) of Section 31.09 of the Mental Hygiene Law grants the Commissioner certain powers, including the power to inspect facilities and examine the records thereof.*

(d) *Section 31.11 establishes the duty of every holder of an operating certificate to assist the Commissioner of Mental Health by complying with the Mental Hygiene Law and other applicable laws and the regulations of the Commissioner, and by cooperating with the Commissioner in any investigation or inspection and permitting the Commissioner or an authorized representative to inspect its facility and all books and records.*

(e) *Subdivisions (a) and (b) of Section 43.02 of the Mental Hygiene Law grant the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law and to require that such facilities submit such financial, statistical and program information as the Commissioner may determine necessary. Subdivision (c) of Section 43.02 authorizes the Commissioner to adopt regulations establishing a uniform system of reports and audits relating to quality of care, utilization and cost of services.*

(f) *Sections 364(3) and 364-a(1) of the Social Services Law establish the Office of Mental Health's responsibility for establishing and maintaining standards for care and services provided to persons eligible for Medicaid reimbursement in facilities under its jurisdiction in accordance with cooperative arrangements with the Department of Health.*

Subdivision (e) of section 552.5 is amended as follows:

552.5(e): The provider of service must cooperate with Office of Mental Health staff or agents of the Office of Mental Health [carrying out the audit], by filing all financial reports required by the Office, including but not limited to those required pursuant to subdivision (b) and (c) of Section 43.02 of the Mental Hygiene Law and the requirements of this Part making available all documentation and information requested in a timely manner. Failure to timely file such required financial reports may result in an enumerated withhold of Medicaid payments until such time as such reports are appropriately filed, in addition to any other penalties or administrative actions.

**Text of proposed rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.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**

1. Statutory authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the

authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law provides that the Commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of Article 31, including setting standards of quality and adequacy for records.

Section 31.07 of the Mental Hygiene Law grants the Commissioner the power to conduct investigations into the operation of providers and to make inspections and examine records, including, but not limited to medical, service and financial records of facilities.

Subdivision (a) of Section 31.09 of the Mental Hygiene Law grants the Commissioner certain powers including the power to inspect facilities and examine records.

Section 31.11 of the Mental Hygiene Law establishes the duty of every holder of an operating certificate to assist the Commissioner of Mental Health by complying with the Mental Hygiene Law and other applicable laws and the regulations of the Commissioner in any investigation or inspection and permitting the Commissioner or an authorized representative to inspect its facility and all books and records.

Subdivisions (a) and (b) of Section 43.02 of the Mental Hygiene Law grant the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law and to require that such facilities submit such financial, statistical and program information as the Commissioner may determine necessary. Subdivision (c) of Section 43.02 authorizes the Commissioner to adopt regulations establishing a uniform system of reports and audits relating to quality of care, utilization and cost of services.

Sections 364(3) and 364-a(1) of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law established the Commissioner's authority regarding fees, rates, reports and audits.

Sections 364(3) and 364-a(1) of the Social Services Law reflect the objective that the Office of Mental Health shall be responsible for establishing and maintaining standards for Medicaid reimbursed mental health programs.

3. Needs and benefits: The Commissioner of Mental Health is granted authority over regulated and funded programs under the Mental Hygiene Law including the authority to require the maintenance of appropriate financial records and submission of financial reports.

This authority is clearly established in Mental Hygiene Law §§ 31.04, 31.07, 31.09, 31.11 and 43.02 and Social Services Law §§ 364(3) and 364-a(1), when programs receive Medicaid. Mental Hygiene Law § 31.11 establishes an affirmative duty upon providers to assist the Commissioner by complying with applicable laws and regulations.

This authority is necessary to ensure records and reports are available to document that the public funding, made available to providers, has been expended in compliance with all applicable federal and state statutes and regulations. When a provider fails to submit periodic financial reports in a timely manner, and/or fails to maintain and make available adequate financial records, the Office of Mental Health cannot be assured that this compliance has taken place. In cases where this failure to comply is serious and ongoing, the Office of Mental Health must take steps to prevent possible misuse of public funding, including suspending or terminating federal and state contract funding and/or participation in the Medicaid program. While the aforementioned statutes clearly provide this authority, the authority is not specifically emphasized in regulations, which is the legal authority most commonly referenced by regulated parties. This amendment addresses this concern and clarifies and comprehensively reflects the Commissioner's enforcement authority.

4. Costs: This proposal imposes no new costs.

5. Local government mandates: These regulatory amendments underscore the need to comply with existing requirements and will not result in any additional imposition of new duties or responsibilities upon county, city, town, village, school or fire districts. The proposed amendments merely clarify the authority of the Commissioner to impose penalties for non-compliance with existing reporting requirements.

6. Paperwork: This rule does not involve any new paperwork.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These regulatory amendments will be effective upon their adoption.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

These amendments do not add any new requirements, mandates or paperwork, but merely state clearly, in regulation, the legal authority granted the Office of Mental Health to ensure that records and reports are available to document that public funding, made available to providers, has been expended in compliance with all applicable federal and state statutes. This authority, provided for in statute, will be emphasized in the amended regulation, which is the legal authority most commonly referenced by regulated parties.

#### **Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas.

These amendments do not add any new requirements, mandates or paperwork, but merely state clearly, in regulation, the legal authority granted the Office of Mental Health to ensure that records and reports are available to document that public funding, made available to providers, has been expended in compliance with all applicable federal and state statutes. This authority, provided for in statute, will be emphasized in the amended regulation, which is the legal authority most commonly referenced by regulated parties.

#### **Job Impact Statement**

This amendment only clarifies the Commissioner's existing authority to require certain financial reports and records. It will not have any impact on jobs and employment activities.

These amendments do not add any new requirements, mandates or paperwork, but merely state clearly, in regulation, the legal authority granted the Office of Mental Health to ensure that records and reports are available to document that public funding, made available to providers, has been expended in compliance with all applicable federal and state statutes. This authority, provided for in statute, will be emphasized in the amended regulation, which is the legal authority most commonly referenced by regulated parties.

#### **Assessment of Public Comment**

Comment: The Department has received comments from several citizens and inspection station owners regarding the proposal to increase the combined safety/emissions fee in Upstate New York from \$16 to \$21. Four citizens expressed opposition to the fee increase because it imposes an unfair burden on New York State taxpayers. Eleven inspection station owners/station employees supported a higher fee increase to assist stations in recovering the cost of the On Board Diagnostic (OBD) testing equipment. The suggested fee increases ranged from \$31 to \$35. Two owners suggested charging a "flat rate" for inspections. One station owner suggested that we hold a public hearing on the fee increase. Senator John R. Kuhl asked the Department to balance the needs of the consumers with those of small business owners. AAA of New York, Inc. expressed a concern that by increasing the emissions fee across the board for owners of both OBD and non-OBD equipped vehicles, owners of non-OBD vehicles would be subsidizing owners of vehicles equipped with the OBD systems.

Response: The Department has carefully considered these comments and concluded that the proposed five dollar fee increase is fair and equitable. Initially, it should be emphasized that the federal Clean Air Act of 1990 mandates implementation of the OBD program. Failure to comply with this mandate would result in the loss of up to two billion dollars of federal funding for State highway and bridge projects.

The proposed fee is based on the cost of the new equipment to the stations, including the telephone calls that include seven years of maintenance costs on the equipment, labor for conducting the test and other miscellaneous costs. Generally, stations that do approximately 22 inspections a month will break even over the seven-year term of the program.

In order to insure the livelihood of as many smaller stations as possible and keep the fee charged to five million Upstate motorists as low as possible, the New York Vehicle Inspection Program (NYVIP) was designed to require the least expensive equipment possible while meeting the Federal Environmental Protection Agency requirements for this program. The Department successfully accomplished this, particularly in comparison to the cost of equipment in other states, *i.e.*, the NYVIP equipment costs several thousand dollars less than equipment in any other state. The cost of equipment is a fixed cost, and the profit on it increases with the number of inspections the facility performs. In addition, the Department included the maintenance fee in the telephone call, so the total maintenance expense varies with the number of inspections. This allows the smaller shop operators to pay a proportionate amount for maintenance based on the number of inspections they do.

It is also important to point out that it is not necessary to be an inspection station in order to be in the business of repairing vehicles. Many repair shops do not have inspection station licenses. Those repair shops that do choose to become inspection stations do so both as a service to their customers and to enhance their business opportunities. While the Department understands that inspection station operators need some reimbursement for inspections, we have never authorized a fee equal to what facility operators normally obtain for other repair work. The shop rate charged for repair work is set by each facility and includes overhead for the station and profit determined by the individual facility owner. Most of the overhead costs would exist even if the facility did repairs only and no inspections. Of course, the amount of profit each facility operator seeks, as part of the shop rate is also a matter of individual choice.

The Department does not believe that a public hearing is necessary. Since November of 2003, the Department has held over 60 meetings with representatives of the repair shop, inspection station and dealer industries. At those meetings, we have outlined the new OBD program and listened to the concerns of the industry. This proposed regulation reflects our best efforts to accommodate the needs of the industry, while also addressing the needs of the motoring public.

In response to AAA of New York's concern, the Department is aware that non-OBD vehicle owners will not be subject to the new OBD test. However, since such vehicles are part of both the registration based enforcement system and the general emissions testing and tracking system, as required by the Clean Air Act, their vehicle owners must contribute to the cost of maintaining the emissions testing program.

As we establish inspection fees, we must balance the needs of the station operator with the fact that the Federal government and our State requires motorists to have their vehicles inspected each year. We believe that the proposed five-dollar increase is equitable both for motorists and inspection stations.

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## Department of Motor Vehicles

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### NOTICE OF ADOPTION

#### **Motor Vehicle Inspections**

**I.D. No.** MTV-25-04-00023-A

**Filing No.** 913

**Filing date:** Aug. 16, 2004

**Effective date:** Sept. 1, 2004

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

**Action taken:** Amendment of Part 79 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 301(d)(1), 301(f), 302(a) and 302(e)

**Subject:** Motor vehicle inspections.

**Purpose:** To test emissions.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MTV-25-04-00023-P, Issue of June 23, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Michele Welch, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

## Public Service Commission

### NOTICE OF ADOPTION

#### Pension Settlement Loss by Niagara Mohawk Power Corporation

**I.D. No.** PSC-12-04-00005-A

**Filing date:** Aug. 11, 2004

**Effective date:** Aug. 11, 2004

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

**Action taken:** The commission, on July 8, 2004, adopted an order in Case 03-M-0651 approving the terms of the Memorandum of Agreement between Niagara Mohawk Power Corporation (Niagara Mohawk) and the Department of Public Service staff regarding Niagara Mohawk's pension settlement loss.

**Statutory authority:** Public Service Law, section 66

**Subject:** Outstanding pension settlement loss issues.

**Purpose:** To resolve the ratemaking of Niagara Mohawk's pension settlement loss for the fiscal year ending March 31, 2003.

**Substance of final rule:** The Commission adopted the terms of the Memorandum of Agreement between Niagara Mohawk Power Corporation (Niagara Mohawk) and the Department of Public Service Staff authorizing Niagara Mohawk to defer and subsequently recover from ratepayers \$14,485,259 of pension settlement losses and absorb and fund from stockholder earnings the remaining \$14,915,695 of pension settlement losses, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-M-0651SA2)

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

#### Demand Response Programs by Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-35-04-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 9 to become effective Nov. 15, 2004.

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

**Subject:** Demand response programs.

**Purpose:** To allow customers to use on-site generation to export power and energy to the company's primary distribution feeders.

**Substance of proposed rule:** Consolidated Edison Company of New York, Inc. (company) made a tariff filing to allow customers to use on-site generation to export power and energy to the company's primary distribution feeders when operated at the direction of the New York Independent System Operator (NYISO) under NYISO demand response programs for special case resources and for emergency demand response, to conform to program changes adopted by the NYISO on March 17, 2004. The company also proposes changes to its own demand response programs to permit generator export under Rider O—Curtable Electric Service and Rider U—Distribution Load Relief Program. The company further proposes tariff changes that set out the requirements of customers who contract to deliver power and energy to the company's primary distribution feeders. In addition, the filing continues Rider U through October 31, 2007, and

eliminates the October 31, 2004 expiration date for Rider W—Day Ahead Demand Response Program.

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

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

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

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

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

(04-E-1005SA1)

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

#### Contract Consultant and Associated Expenditures by ICF Associates, LLC

**I.D. No.** PSC-35-04-00015-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 the total expenditures for a consultant, ICF Associates, LLC, in order to conduct a study of the oil industry infrastructure and its interaction with natural gas supply and delivery systems.

**Statutory authority:** Public Service Law, sections 4(1) and 66(1), (2), (5) and (11)

**Subject:** Contract with a consultant, and associated expenditures.

**Purpose:** To approve a contract with a consultant, and associated expenditures, and conduct a study of the oil industry infrastructure, including the scope of study.

**Substance of proposed rule:** The Commission is considering whether to approve the total expenditures for a consultant, ICF Associates, LLC, in order to conduct a study of the oil industry infrastructure and its interaction with natural gas supply and delivery systems. Such amount would be assessed to certain natural gas local distribution companies by the New York State Energy Research and Development Authority using allocation percentages previously determined by the Commission. The Commission is also considering whether to approve the final scope of study (statement of work) agreed to by ICF Associates, LLC.

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

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

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

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

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

(00-G-0996SA8)

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

#### Schedule for Gas Service by Rochester Gas and Electric Corporation

**I.D. No.** PSC-35-04-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges,

rules and regulations contained in its schedule for gas service—P.S.C. No. 16.

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

**Subject:** General retail access—multi-retailer model, small transportation service and firm gas transportation service for distributed generation facilities <50MW.

**Purpose:** To revise its balancing, cashout and capacity requirements provisions.

**Substance of proposed rule:** Rochester Gas and Electric Corporation (the company) proposes to implement a daily imbalance automatic adjustment prior to the application of the daily cash-out charges under S.C. No. 3's (Large Transportation Service) Daily Balancing Service. The company also proposes to require that Energy Services Companies (ESCO) serving S.C. No. 3 customers without alternate fuel capability demonstrate that the ESCO either holds firm, non-recallable, primary delivery point capacity or has notified its customers and the company, in writing, that the customers may be subject to interruption. In addition, the company proposes that ESCOs serving S.C. No. 5—Small Transportation Service and S.C. No. 7—Firm Gas Transportation Service for Distributed Generation Facilities <50 MW customers who do not meet the existing tariff requirement of transferring storage gas on the first calendar day of the appropriate month be assessed a charge of \$2.50 per therm per day.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(03-G-0766SA4)

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

**Application Form for Distributed Generation by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-35-04-00017-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 Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 4.

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

**Subject:** Application form for distributed generation.

**Purpose:** To establish a new supplementary application form for customers.

**Substance of proposed rule:** Orange and Rockland Utilities, Inc. proposes to establish a new supplementary application form for customers applying for Rider B under S.C. No. 1—Residential and Space Heating, S.C. No. 2—General Service and S.C. No. 6—Firm Transportation. Rider B is applicable to customers using gas to fuel on-site distributed generation facilities. The new application form will be required to obtain from customers information about their gas usage and peak day requirements to determine eligibility for Rider B.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(04-G-0982SA1)

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

**Schedule for Gas Service by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-35-04-00018-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 4.

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

**Subject:** Interruptible sales service and interruptible transportation service.

**Purpose:** To establish additional eligibility requirements.

**Substance of proposed rule:** Orange and Rockland Utilities, Inc. (the company) proposes to establish additional eligibility requirements for new customers taking interruptible transportation service under S.C. No. 8—Interruptible Transportation Service. The new eligibility requirements will require customers commencing interruptible transportation service on or after November 1, 2004 to meet certain minimum peak and annual usage requirements. Customers taking service under S.C. No. 8 before November 1, 2004 will not be subject to the new eligibility rules. The company also proposes to remove the Emergency Service provision from S.C. No. 3—Interruptible Sales Service and S.C. No. 8. The provision gives the company the option to allow customers that experience equipment failure or are unable to secure adequate alternate fuel to continue to burn gas during a company announced interruption without penalty charges to the extent the company deems it possible to continue to supply gas to interruptible customers without jeopardizing service to its firm sales and transportation customers.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(04-G-0999SA1)

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

**Authorization to Defer Actuarial Experience Pension Settlement for Fiscal Year 2004 by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-35-04-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition of Niagara Mohawk Power Corporation for authorization to defer actuarial experience pension settlement for the fiscal year 2004.

**Statutory authority:** Public Service Law, section 66

**Subject:** Pension settlement.

**Purpose:** To resolve the ratemaking of the pension settlement loss.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, the verified petition of Niagara Mohawk Power Corporation (Niagara Mohawk) for Authorization to Defer Actuarial Experience Pension Settlement for Fiscal Year 2004. The petition proposes to record a regulatory asset equal to the amount of the Financial Accounting Standard 88 settlement loss and to amortize the

regulatory asset on a straight line basis over ten years commencing with approval of the petition. The amortized amounts would be included in its pension expense rate reconciliation. The pension settlement loss was triggered by Niagara Mohawk's lump sum payments to employees retiring during the fiscal year ending March 31, 2004 and other employees who chose to terminate their employment with the Company and rollover their accumulated earned pension benefits.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(04-M-0938SA1)

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

**Calculation of Franchise Fees in the Village of Millbrook by Cablevision Systems of Dutchess Corp.**

**I.D. No.** PSC-35-04-00020-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision Systems of Dutchess Corp. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Calculation of franchise fees.

**Purpose:** To exclude the amount of the franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision Systems Dutchess Corp. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Village of Millbrook (Dutchess County).

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(01-V-1807SA1)

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

**Calculation of Franchise Fees in the Village of Harriman by Cablevision of Wappingers Falls, Inc.**

**I.D. No.** PSC-35-04-00021-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Calculation of franchise fees.

**Purpose:** To exclude the amount of the franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Village of Harriman (Orange County).

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(04-V-0989SA1)

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

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

**I.D. No.** PSC-35-04-00022-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by the Aquarion Water Company of Sea Cliff to implement Reconciliation Statement No. 1 contained in its tariff schedule, P.S.C. No. 3—Water, to become effective Oct. 1, 2004.

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

**Subject:** Water rates and charges.

**Purpose:** To reconcile both property taxes and interest rates of Aquarion Water Company of Sea Cliff for the period of Oct. 1, 2003 through Sept. 30, 2004.

**Substance of proposed rule:** On June 30, 2004, the Aquarion Water Company of Sea Cliff (Aquarion) filed Reconciliation Statement No. 1 pursuant to Commission Order in Case 02-W-1564 issued October 22, 2003, to become effective October 1, 2004. The proposed filing reconciles both property taxes and interest rates for the rate year October 1, 2003 through September 30, 2004. Aquarion currently provides water service to 4,370 customers and is located in the Town of Oyster Bay, Nassau County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(02-W-1564SA3)

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

**Transfer of Water Plant Assets by Camfield-Purcell Water Works, Inc., Brickyard Road Water System, et al.**

**I.D. No.** PSC-35-04-00023-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a joint petition filed by the Camfield-Purcell Water Works, Inc., Brickyard Road Water System and the Town of Stillwater to transfer the water plant assets of the Camfield-Purcell Water, Inc. and Brickyard Road Water System to the Town of Stillwater.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Transfer of water plant assets.

**Purpose:** To consider the transfer of water plant assets.

**Substance of proposed rule:** On July 27, 2004, the Town of Stillwater filed a letter and contract for purchase and sale of the Camfield-Purcell Waterworks, Inc. and the Brickyard Road Water System (collectively "petition"), for approval of the transfer of the water plant assets of the Camfield-Purcell Water, Inc. and Brickyard Road Water System to the Town of Stillwater. Camfield-Purcell Water Works, Inc. currently provides water service to approximately 55 customers and the Brickyard Road Water System provides water service to approximately 50 customers in the Town of Stillwater, Saratoga County. The Commission may approve or reject, in whole or in part, or modify the petition.

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

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

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

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

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

(04-W-0959SA1)

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

**Purpose:** To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Oct. 1, 2004, and ending Dec. 31, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

**Text of proposed rule:** Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xxxvi) to read as follows:

Sales Tax Component	Motor Fuel Composite Rate	Aggregate Rate	Sales Tax Component	Diesel Motor Fuel Composite Rate	Aggregate Rate
(xxxv) July-September 2004					
11.4	19.4	34.0	11.1	19.1	31.95
(xxxvi) October - December 2004					
12.3	20.3	34.9	11.9	19.9	32.75

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

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-3746

**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 rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

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## State University of New York

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### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the State University of New York publishes a new notice of proposed rule making in the NYS Register.

**Traffic and Parking Regulations and Signage of the State University of New York at Stony Brook**

I.D. No.	Proposed	Expiration Date
SUN-07-04-00001-P	February 18, 2004	August 16, 2004

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## Department of Taxation and Finance

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

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel**

**I.D. No.** TAF-35-04-00002-P

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

**Proposed action:** Amendment of section 492.1(b)(1) of Title 20 NYCRR.

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