

# 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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## Banking Department

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### EMERGENCY RULE MAKING

#### Credit Unions

**I.D. No.** BNK-05-05-00001-E  
**Filing No.** 40  
**Filing date:** Jan. 13, 2005  
**Effective date:** Jan. 17, 2005

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

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

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

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

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

**Subject:** Changes in the regulations governing credit unions.

**Purpose:** To provide New York chartered credit unions with powers comparable to, and competitive with, federally chartered credit unions and provide for prior notice of the proposed exercise of new credit union investment powers.

#### **Text of emergency rule:**

PART 95  
BORROWINGS BY CREDIT UNIONS  
(Statutory Authority: Banking Law Section 454(9))  
Section 95.2 is REPEALED.

PART 96  
LENDING LIMITS FOR CREDIT UNIONS  
(Statutory authority: Banking Law Section 454(6))  
Section 96.1 is REPEALED.

A new Section 96.1 is added to read:

*96.1 Definitions For purposes of this Part:*

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

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

Section 96.3 is amended to read:

96.3 Fully secured loans.

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

PART 97  
INVESTMENTS IN CREDIT UNION ORGANIZATIONS  
(Statutory authority: Banking Law Section 454(19))

Section 97.5 is amended to read:

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

PART 113  
INVESTMENTS BY CREDIT UNIONS IN THE SHARES OF CENTRAL UNIONS LOCATED IN THIS STATE  
(Statutory authority: Banking Law Section 454(8))  
Part 113 is REPEALED.

A new Part 326 is added to read:

PART 326  
MAINTENANCE OF RESERVES BY CREDIT UNIONS  
(Statutory Authority: Banking Law Section 458-a)

326.1 Applicability.

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

326.2 Reserve Accounts.

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

326.3 Definition.

(a) *The term net worth shall mean the retained earnings balance of the credit union at the end of a quarterly period as determined under generally accepted accounting principles. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by the management of a credit union or regulatory authorities. Only undivided earnings and appropriations of undivided earnings shall be included*

in net worth. Net Worth shall not include the allowance for loan and lease losses account. In the case of a credit union that qualifies to be designated as a low income credit union, net worth shall also include secondary capital accounts that are uninsured and subordinate to all other claims of creditors, shareholders and the National Credit Union Share Insurance Fund.

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 12, 2005.

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

**Regulatory Impact Statement**

1. Statutory authority:

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

2. Legislative objectives:

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

3. Needs and benefits:

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

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

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

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

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

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

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

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

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

4. Costs:

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

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

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

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

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

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

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

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

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

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

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

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

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

#### 7. Duplication:

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

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

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

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

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

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

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

#### 8. Alternative approaches:

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

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

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

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

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

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

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

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

#### 9. Federal standards:

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

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

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

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

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

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

New Superintendent's Regulation Part 327 exceeds minimum standards of the federal government for the same subject area insofar as it imposes a prior notice requirement for certain investments by credit unions whereas no notice or approval requirement for such investments is im-

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

#### 10. Compliance schedule:

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

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

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

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

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

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

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

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

#### **Job Impact Statement**

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

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## Education Department

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

#### **Homeless Children**

**I.D. No.** EDU-05-05-00013-EP

**Filing No.** 75

**Filing date:** Jan. 18, 2005

**Effective date:** Jan. 18, 2005

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

**Action taken:** Amendment of Parts 275 and 276 and section 100.2(x) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided); 207 (not subdivided); 215 (not subdivided); 305(1) and (2); 310 (not subdivided); 311 (not subdivided); 3202(1), (8); 3209(7) and 3713(1) and (2)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed amendment modifies the procedures for appeals to the Commissioner of Education pursuant to Education Law section 310, that concern a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x).

The rule is being proposed for adoption as an emergency measure because such action is necessary for the preservation of the general welfare in order to immediately conform the Commissioner's Regulations regarding the procedures for appeals involving homeless children that are brought pursuant to Education Law section 310 to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110], and thereby ensure the rights of homeless individuals consistent with Federal statutes and ensure compliance with requirements for receipt of Federal funds.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their May 16-17, 2005 meeting, which is the first scheduled meeting after expiration of the public comment period mandated by the State Administrative Procedure Act.

**Subject:** Education Law section 310 appeals involving homeless children.

**Purpose:** To modify the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310 and conform the commissioner's regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.counsel.nysed.gov](http://www.counsel.nysed.gov)):** The State Education Department proposes to amend Parts 275 and 276 and section 100.2(x) of the Regulations of the Commissioner of Education, effective January 18, 2005, regarding procedures for appeals to the Commissioner of Education pursuant to Education Law section 310, that concern a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x). The following is a summary of the substantive provisions of the proposed rule.

Section 275.3 is amended to provide that if the petitioner is a parent or guardian of a homeless child or youth or unaccompanied youth as defined in 8 NYCRR section 100.2(x) and if such petitioner submits a form petition prescribed by the commissioner, the pleadings shall be legible but shall not be required to be submitted in typewritten form.

Section 275.4 is amended to provide that if the petitioner is the parent or guardian of a homeless child or youth or unaccompanied youth, the petitioner may, in lieu of endorsing the pleadings with petitioner's name, post office address and telephone number, endorse all pleadings and appeal papers with the name, post office address and telephone number of the local educational liaison for homeless children and youth.

Section 275.5 is amended to provide that the parent or guardian of a homeless child or youth or unaccompanied youth, in lieu of verifying the pleadings, may include a signed statement in the pleading indicating that based on information and belief the information contained in the pleading is true to the best of his/her knowledge and an acknowledgment that to knowingly offer a false instrument for filing is a violation of Offering a False Instrument for Filing in the 2nd Degree, a Class A Misdemeanor, pursuant to Penal Law section 175.30.

Section 275.7 is amended to provide that, in lieu of an affidavit, a parent or guardian of a homeless child or youth may provide a signed statement that the information contained in the pleading is true to the best of his/her knowledge and an acknowledgment that to knowingly offer a false instrument for filing is a violation of Penal Law section 175.10.

Section 275.8 is amended to establish criteria for the alternative service of pleadings in appeals regarding the education of a homeless child or youth, including provisions for service upon the local educational agency liaison for homeless children and youth on behalf of a school district, officer and/or employee named as a party.

Section 275.9 is amended to establish filing criteria for appeals regarding the education of homeless children or youth, and to specify that no fee shall be required in appeals regarding a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x).

Section 275.13 is amended to establish alternative criteria for the service of the answer and supporting papers in an appeal regarding the education of a homeless child or youth.

Section 275.14 is amended to establish criteria for the service of a reply in an appeal regarding a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x), including a provision that the reply shall be served in the manner set forth in section 275.8(b) or (e).

Section 276.3 is amended to provide that the petitioner in an appeal regarding the education of a homeless child or youth may elect to provide notice of an application for an extension of time to reply to an answer by delivering a written application, postmarked not later than five days prior to the date on which the time to reply will expire, to the local educational agency liaison for homeless children and youth, who shall mail the application to all parties and the State Education Department's Office of Counsel.

Section 276.4 is amended to establish alternative criteria for the service of petitioner's memorandum of law.

Section 276.5 is amended to establish alternative criteria for the service of additional affidavits, exhibits and other supporting papers.

Section 276.7 is amended to provide that a copy of the Commissioner's decision shall also be forwarded to the local educational liaison for homeless children or youth in an appeal regarding a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x).

Section 276.8 is amended to establish criteria for the service of an application to reopen a prior Commissioner's decision in an appeal regarding a homeless child's or youth's access to a free, appropriate public education pursuant to 8 NYCRR section 100.2(x).

Section 100.2(x)(7)(iv) is relettered (ii) and a new clause (c) is added to require school districts, as part of the dispute resolution process for homeless children and youth, to delay for thirty days the implementation of a final determination to decline to either enroll in and/or transport a homeless child or youth or unaccompanied youth to the school of origin or a school requested by the parent or guardian or unaccompanied youth; provided that if the parent or guardian commences an appeal to the Commissioner pursuant to Education Law section 310 with a stay application within thirty days of the final determination, the child or youth shall be permitted to continue attending the school he or she is enrolled in at the time of the appeal until the Commissioner renders a decision on the stay application.

Section 100.2(x)(7)(v) is relettered (iii) and clause (c) is added to prescribe the duties of the local educational agency liaison to assist the parent or guardian of a homeless child or youth in commencing an appeal of a final determination regarding enrollment, school selection and/or transportation, including: providing a form petition; assisting in the completion of the form petition; arranging for copying of the form petition, without cost; accepting service of the form petition; providing a signed and dated acknowledgment verifying receipt of the form petition; and transmitting the form petition and other pleadings to the State Education Department's Office of Counsel; accepting service of subsequent pleadings or papers, including any appeal correspondence, if the parent or guardian so elects. The school district shall ensure that the local educational agency liaison maintains a record of all appeals of enrollment, school selection and transportation determinations.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 17, 2005.

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

**Data, views or arguments may be submitted to:** Kathy A. Ahearn, Chief of Staff and Counsel and Deputy Commissioner for Legal Affairs, Education Department, Education Bldg., Rm. 148, Albany, NY 12234, (518) 474-6400, e-mail: [legal@mail.nysed.gov](mailto:legal@mail.nysed.gov)

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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations implementing State law regarding education.

Education Law section 215 provides the Commissioner with authority to require schools to submit reports containing such information as the Commissioner may prescribe.

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies. Section 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law.

Education Law section 310 provides that an aggrieved party may appeal by petition to the Commissioner of Education in consequence of certain specified actions by school districts and school officials.

Education Law section 311 authorizes the Commissioner to regulate the practice of appeals to the Commissioner brought pursuant to Education Law section 310.

Education Law section 3202(1) specifies the school district of residence as the school district in which children residing in New York State are entitled to attend school without the payment of tuition. That section is

intended to assure that each child residing within the State is able to attend school on a tuition-free basis in accordance with Article XI, section 1 of the New York State Constitution. Moreover, it is the policy of the Legislature, as expressed in Education Law section 3205(1) to require instruction for each child of compulsory school age within the State.

Education law section 3202(8) establishes the right of homeless children whose families are placed in temporary housing by a local social services district or runaway and homeless youth housed in a residential program for runaway and homeless youth to designate either the school district of last attendance or the school district of current location as the school district such children or youth will attend. Paragraph (a) of subdivision (8) specifically authorizes and requires the Commissioner to adopt regulations defining the terms "homeless child," "runaway youth," and "school district of last attendance" for the purposes of the statute, and otherwise implementing the provisions of the statute.

Education Law section 3209 sets forth requirements for the education of homeless children. Subdivision (7) of section 3209 authorizes the Commissioner to promulgate regulations to carry out the provisions of the statute.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept Federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with Federal agencies to implement such law.

## 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes to regulate the practice and procedures to be followed in Education Law section appeals, and is necessary to ensure State compliance with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. Law 107-110]. The proposed amendment modifies the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310.

## 3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed amendment modifies the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310 to ensure the rights of homeless individuals consistent with Federal statutes.

## 4. COSTS:

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the McKinney-Vento Act, as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State and local governments are required to comply with the Federal statutes as a condition to its receipt of Federal funding. The proposed amendment will not impose any costs on the State or local governments beyond those imposed by State and Federal statutes. The proposed amendment applies to school districts and does not impose any costs or compliance requirements on private parties.

## 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and Federal statutes. The proposed amendment modifies existing procedures in certain appeals brought pursuant to Education Law section 310 that involve the education of homeless children, to ensure the rights of homeless individuals consistent with Federal statutes. The State and school districts are required to comply with these Federal statutes as a condition to their receipt of Federal funding.

School districts must delay for thirty (30) days the implementation of a final determination to decline to either enroll in and/or transport the homeless child or youth or unaccompanied youth to the school or origin or a school requested by the parent or guardian or unaccompanied youth; provided that if the parent or guardian of a homeless child or youth or

unaccompanied youth commences an appeal to the Commissioner pursuant to Education Law section 310 with a stay application within thirty (30) days of such final determination, the homeless child or youth or unaccompanied youth shall be permitted to continue attending the school he or she is enrolled in at the time of the appeal until the Commissioner renders a decision on the stay application.

School districts shall inform school personnel, service providers and advocates working with homeless families of the duties of the local educational agency liaison.

The proposed amendment also requires the local educational agency liaison to assist the homeless child's or youth's parent or guardian or the unaccompanied youth in commencing an appeal to the of a final determination regarding enrollment, school selection and/or transportation.

## 6. PAPERWORK:

The proposed amendment imposes no additional reporting, forms or other paperwork requirements. The proposed amendment modifies existing procedures in certain appeals brought pursuant to Education Law section 310, that involve the education of homeless children, to ensure the rights of homeless individuals consistent with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

The proposed amendment also requires the local educational agency liaison to assist the homeless child's or youth's parent or guardian or the unaccompanied youth in commencing an appeal to the Commissioner of a final determination regarding enrollment, school selection and/or transportation including providing and assisting in the completion of a form petition; arranging for the copying of the form petition and supporting documents; accepting service of the form petition and supporting papers on behalf any school district employee or officer named as a party or the school district if it is named as a party or arranging for service by mail; providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgment verifying that the local educational agency liaison has received the form petition and supporting documents; transmitting the form petition or any pleading or paper to the State Education Department; providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgement verifying that the local educational agency liaison has received the form petition and supporting documents and will transmit these documents to the Office of Counsel; and accepting service of any subsequent pleadings or papers, including any correspondence related to the appeal, if the parent or guardian or unaccompanied youth so elects, and making such correspondence available to the parent or guardian or unaccompanied youth.

School districts shall also ensure that the local educational agency liaison maintains a record of all appeals of enrollment, school selection and transportation determinations.

## 7. DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and Federal rules or requirements, and is necessary to conform the Commissioner's Regulations to ensure the State's compliance with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

## 8. ALTERNATIVES:

There were no significant alternatives. The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

## 9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the Federal government for the same or similar subject areas. The proposed amendment conforms the Commissioner's Regulations to ensure the State's compliance with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110].

## 10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the provisions of the proposed amendment by its effective date. The proposed amendment conforms the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The proposed amendment does not impose any compliance requirements beyond those required by State and Federal statutes.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed amendment relates to procedures for appeals involving homeless children that are brought pursuant to Education Law section 310, and does not apply to small businesses since they are not parties to such proceedings. The proposed amendment will not impose any additional reporting, recordkeeping or other compliance requirements on small businesses, nor will it have any adverse economic impact on small businesses. Because it is evident from the nature of the rule that it does not apply to small businesses, no further steps were needed to ascertain that fact and none were taken. Therefore, a regulatory flexibility analysis is not required, and one has not been prepared.

**Local Governments:**

**EFFECT OF PROPOSED RULE :**

The proposed amendment is applicable to all public school districts in the State.

**COMPLIANCE REQUIREMENTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed amendment modifies existing procedures in certain appeals brought pursuant to Education Law section 310, that involve the education of homeless children, to ensure the rights of homeless individuals consistent with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements on local governments beyond those imposed by Federal and State statutes.

School districts must delay for thirty (30) days the implementation of a final determination to decline to either enroll in and/or transport the homeless child or youth or unaccompanied youth to the school or origin or a school requested by the parent or guardian or unaccompanied youth; provided that if the parent or guardian of a homeless child or youth or unaccompanied youth commences an appeal to the Commissioner pursuant to Education Law section 310 with a stay application within thirty (30) days of such final determination, the homeless child or youth or unaccompanied youth shall be permitted to continue attending the school he or she is enrolled in at the time of the appeal until the Commissioner renders a decision on the stay application.

School districts shall inform school personnel, service providers and advocates working with homeless families of the duties of the local educational agency liaison.

School districts shall require the local educational agency liaison for homeless children and youth to assist the homeless child's or youth's parent or guardian or the unaccompanied youth in commencing an appeal of a final determination regarding enrollment, school selection and/or transportation by:

- (1) providing the parent or guardian or unaccompanied youth with a form petition prescribed by the Commissioner;
- (2) assisting the parent or guardian or unaccompanied youth in completing the form petition;
- (3) arranging for the copying of the form petition and supporting documents for the parent or guardian or unaccompanied youth, without cost to the parent or guardian or unaccompanied youth;
- (4) accepting service of the form petition and supporting papers on behalf any school district employee or officer named as a party or the school district if it is named as a party or arranging for service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf the school district;
- (5) providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgment verifying that the local educational agency liaison has received the form petition and supporting documents and will either accept service of these documents on behalf of the school district employee or officer or school district or effect service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf the school district;

(7) transmitting on behalf of the parent or guardian or unaccompanied youth, within five days of after the service of the form petition or any pleading or paper to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234;

(8) providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgement verifying that the local educational agency liaison has received the form petition and supporting documents and will transmit these documents on behalf of the parent, guardian or unaccompanied youth to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234; and

(9) accepting service of any subsequent pleadings or papers, including any correspondence related to the appeal, if the parent or guardian or unaccompanied youth so elects related to the appeal on behalf of the parent or guardian or unaccompanied youth and making such correspondence available to the parent or guardian or unaccompanied youth;

School districts shall also ensure that the local educational agency liaison maintains a record of all appeals of enrollment, school selection and transportation determinations.

**PROFESSIONAL SERVICES:**

The proposed amendment will not increase the level of professional services needed by local governments to comply with its requirements.

**COMPLIANCE COSTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the McKinney-Vento Act, as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the Federal statutes as a condition to its receipt of Federal funding. The proposed amendment will not impose any costs on school districts beyond those imposed by State and Federal statutes.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any additional technological requirements on local governments. Economic feasibility is addressed under the compliance costs section above.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed amendment modifies the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310. The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements on local governments beyond those imposed by Federal and State statutes.

**LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

**Rural Area Flexibility Analysis**

**TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At present 2 school districts and 11 BOCES serve rural areas.

**REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed amendment modifies existing procedures in certain appeals brought pursuant to Education Law section 310, that involve the education of homeless children, to ensure the rights of homeless individuals consistent with the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements on rural areas beyond those imposed by Federal and State statutes. The proposed amendment will not increase the level of professional services needed to comply with its requirements.

School districts must delay for thirty (30) days the implementation of a final determination to decline to either enroll in and/or transport the homeless child or youth or unaccompanied youth to the school or origin or a school requested by the parent or guardian or unaccompanied youth; provided that if the parent or guardian of a homeless child or youth or unaccompanied youth commences an appeal to the Commissioner pursuant to Education Law section 310 with a stay application within thirty (30) days of such final determination, the homeless child or youth or unaccompanied youth shall be permitted to continue attending the school he or she is enrolled in at the time of the appeal until the Commissioner renders a decision on the stay application.

School districts shall inform school personnel, service providers and advocates working with homeless families of the duties of the local educational agency liaison.

School districts shall require the local educational agency liaison for homeless children and youth to assist the homeless child's or youth's parent or guardian or the unaccompanied youth in commencing an appeal of a final determination regarding enrollment, school selection and/or transportation by:

(1) providing the parent or guardian or unaccompanied youth with a form petition prescribed by the Commissioner;

(2) assisting the parent or guardian or unaccompanied youth in completing the form petition;

(3) arranging for the copying of the form petition and supporting documents for the parent or guardian or unaccompanied youth, without cost to the parent or guardian or unaccompanied youth;

(4) accepting service of the form petition and supporting papers on behalf any school district employee or officer named as a party or the school district if it is named as a party or arranging for service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf the school district;

(5) providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgement verifying that the local educational agency liaison has received the form petition and supporting documents and will either accept service of these documents on behalf of the school district employee or officer or school district or effect service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf the school district;

(7) transmitting on behalf of the parent or guardian or unaccompanied youth, within five days of after the service of the form petition or any pleading or paper to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234;

(8) providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgement verifying that the local educational agency liaison has received the form petition and supporting documents and will transmit these documents on behalf of the parent, guardian or unaccompanied youth to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234; and

(9) accepting service of any subsequent pleadings or papers, including any correspondence related to the appeal, if the parent or guardian or unaccompanied youth so elects related to the appeal on behalf of the parent or guardian or unaccompanied youth and making such correspondence available to the parent or guardian or unaccompanied youth;

School districts shall also ensure that the local educational agency liaison maintains a record of all appeals of enrollment, school selection and transportation determinations.

#### COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the McKinney-Vento Act, as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the Federal statutes as a condition to its receipt of Federal funding. The proposed amendment will not impose any costs on school districts beyond those imposed by State and Federal statutes.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 U.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-110]. The State is required to comply with the requirements of the McKinney-Vento Act and the NCLB as a condition to its receipt of Federal funds. The proposed

amendment modifies the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310. The proposed amendment does not impose any additional reporting, record-keeping or other compliance requirements on rural areas beyond those imposed by Federal and State statutes. Because these Federal and State requirements are applicable State-wide, it was not possible to prescribe lesser requirements for rural areas.

#### RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### Job Impact Statement

The proposed amendment relates to Education Law section 310 appeal procedures involving homeless children and will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## NOTICE OF ADOPTION

### Professional Licensure in Mental Health Counseling

**I.D. No.** EDU-34-04-00011-A

**Filing No.** 70

**Filing date:** Jan. 18, 2005

**Effective date:** Feb. 3, 2005

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

**Action taken:** Addition of section 52.32 and Subpart 79-9 to Title 8 NYCRR.

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

**Subject:** Professional licensure in mental health counseling.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-34-04-00011-P, Issue of August 25, 2004.

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

**Revised rule making(s) were previously published in the State Register** on December 1, 2004.

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

#### Assessment of Public Comment

The proposed rule was published as a revised rule making on December 1, 2004. Below is a summary of written comments received by the State Education Department concerning the proposed rule, which were not addressed in the previously published Assessment, and the Department's response.

**COMMENT:** The requirement that an applicant complete a 60-semester hour degree by January 1, 2010 for licensure will be a hardship on students. A registered program leading to licensure in mental health counseling should require the completion of 48-semester hours of instruction as preparation for employment and allow the completion of 12 semester hours while employed. I would favor the issuance of a limited permit that would allow the applicant to practice mental health counseling when he or she completes 48 semester hours and a license to practice when the education, examination and experience requirements are fully met.

**RESPONSE:** Section 8402(3)(b) of the Education Law requires that an applicant complete a registered graduate program in counseling or its equivalent. The proposed regulation prescribes the requirements for the registered program, including the minimum number of semester hours in the program. That number is 48 semester hours until January 1, 2010 and 60 semester hours after that date. The number was increased to 60 semester hours as a result of public comment. This number is consistent with national accrediting standards for programs in mental health counseling. The comment proposes an alternative that would permit an applicant to complete the education requirement while practicing mental health coun-

selling under a limited permit. The Department does not have the authority to establish this alternative through regulation because it would violate the authorizing statute. Section 8409(1) of the Education Law provides that a limited permit to practice mental health counseling may only be issued by the Department upon the applicant's completion of all requirements for licensure, except the examination and/or experience requirements. The education requirements must be fully met before the Department may issue a limited permit.

COMMENT: The phase-in to 60 semester hours for the registered program leading to licensure is too long. The registered program should require completion of 48 semester hours by 2008, but the applicant should be required to complete an additional 12 semester hours of graduate coursework for licensure. By 2012, the registered programs should require 60 semester hours.

RESPONSE: Registered programs that lead to licensure in mental health counseling should include all education requirements for licensure. The Department does not believe it reasonable to require an applicant to complete 12 semester hours in additional coursework after he or she has completed a registered licensure-qualifying program.

COMMENT: I received my degrees in counseling in the 1970's and human development was not a required course at that time. You may receive numerous requests from individuals to waive this requirement since it was only recently added. In particular, individuals seeking licensure through the alternative routes may not have completed this requirement.

RESPONSE: Section 8402(3)(b) of the Education Law specifies the minimum graduate coursework that must be completed to meet the education requirement for licensure in mental health counseling. This statute requires an applicant to complete coursework in human growth and development. The alternative requirements also require applicants to complete this coursework. The Department believes that an applicant needs to have completed this coursework as part of his or her educational preparation for licensure.

COMMENT: The curriculum prescribed in the regulation for registered programs leading to licensure does not adequately provide subject matter knowledge in areas needed for practice.

RESPONSE: The subject area requirements for registered programs leading to licensure are specified in statute. Therefore, the regulation must include these subjects as mandatory requirements for registered programs leading to licensure. These requirements provide adequate subject matter preparation for licensure.

COMMENT: The regulations require applicants for licensure to complete a 48-semester hour graduate program in order to be licensed. This is less than what is required of applicants for licensure in other professions that require 60 semester hours. The regulations should be revised to require practicing counselors to complete 48 semester hours and applicants new to the profession, 60 hours.

RESPONSE: In response to public comment, the regulations were revised to increase the semester hour requirement for registered programs leading to licensure from 48 to 60 semester hours. Current programs in mental health counseling require between 48 to 60 semester hours for completion. The Department believes that the 48-semester hour program provides applicants with adequate preparation for licensure, and the increase to 60 semester hours will strengthen the applicant's preparation. The increase would become effective on January 1, 2010 to minimize the impact on students and educational institutions. The phase-in period will provide mental health counseling programs adequate time to modify their programs. Finally, the regulation provides practicing mental health counselors ample options for licensure through alternative routes to licensure.

COMMENT: The regulations should permit faculty experience in teaching or supervising graduate students in counseling programs to count toward meeting the 3,000-hour experience requirement.

RESPONSE: Section 8402(3)(c) of the Education Law requires an applicant to complete 3,000 hours of supervised, post-degree experience relevant to the practice of mental health counseling. The definition of mental health counseling in the Education Law does not include supervision of students or teaching in college programs. Permitting faculty teaching and supervision to be used to meet the experience requirement would be contrary to the statutory requirement.

COMMENT: I would suggest that teaching in counseling or a related field and professional research and presentations, or administrative leadership, such as management of an agency, should count toward the experience necessary for licensure under the special provisions.

RESPONSE: As stated above, section 8402(3)(c) of the Education Law requires an applicant to complete an experience relevant to the practice of

mental health counseling. The definition of the practice of mental health counseling does not include teaching, the making of professional presentations, research, or management of an agency. Permitting such experience to count toward the experience requirement for licensure would be contrary to the requirements in the Education Law.

COMMENT: Some of the requirements for supervision are unrealistic. Other than file reviews, a supervisor does not discuss every single client contact with the counselor. The regulations should be less specific and allow supervising practitioners additional discretion to supervise the applicant's experience.

RESPONSE: The State Education Department staff, in consultation with the State Board, developed the regulations that define acceptable supervision for Mental Health Practitioners. Because the individual under supervision is not licensed or authorized to practice independently, the supervisor is responsible for the assessment and treatment of each client. The regulations ensure competent supervision while providing flexibility to the supervisor and applicant to meet the stated requirements.

COMMENT: The regulations should specify that supervisors of the experience requirement who are licensed in other fields and are exempt from licensure under Article 163 should be governed by the practice requirements of their particular profession.

RESPONSE: The supervisor who is licensed in another profession is bound by the statutory and regulatory requirements of that profession. It is unnecessary to repeat this requirement in these regulations.

COMMENT: The National Board for Certified Counselors issues the National Certified Counselor Credential. The National Board permits an applicant for this credential to complete an accredited graduate program in lieu of completing 3,000 hours of supervised experience requirement required for the credential. The regulation should similarly permit the completion of an accredited counseling program to substitute for some or all of the 3,000 hours of supervised experience required for licensure in New York State.

RESPONSE: Section 8402(2) of the Education Law requires an applicant for licensure in mental health counseling to complete a master's or higher degree in counseling from a program registered by the Department or the equivalent, and 3,000 hours of post-master's supervised experience relevant to the practice of mental health counseling. The proposed substitution of an accredited counseling program for some or all of the post-master's experience required for licensure is inconsistent with the Education Law. Consequently, the State Education does not have the statutory authority to make this change.

COMMENT: An applicant who has completed post-master's education should have the number of hours of required experience reduced.

RESPONSE: The number of hours of required experience (3,000 hours) is established in Education Law section 8402(3)(c). The Department does not have the authority to reduce this number by regulation.

COMMENT: The limited permits should be for a longer period, such as four to five years, to prevent a new practitioner from losing his or her job because of something that is not the practitioner's fault.

RESPONSE: Section 8409(2) of the Education Law establishes the duration of the limited permit. It is two years with a one-year renewal period. The Department does not have the authority to extend the duration of the limited permit through regulations, as suggested by the comment.

COMMENT: The alternate routes do not permit licensure of a person who does not possess a baccalaureate degree in counseling or a related field but has 20 or more years of experience in the field. Such an individual should be allowed to continue practice as a psychotherapist based upon the attestation of licensed practitioners familiar with his or her work.

RESPONSE: Two of the alternative routes for licensure permit licensure with a baccalaureate-level education in counseling or a related mental health field, provided that other prescribed requirements are met. Requiring an applicant for licensure to have at minimum a baccalaureate-level education in counseling or a related field is a reasonable requirement.

COMMENT: If an applicant for licensure is already licensed in another state as a licensed professional counselor, that individual should qualify for licensure as a licensed mental health counselor in New York State without having to meet additional requirements.

RESPONSE: Requirements for licensure in professional counseling vary among the states. As a result, an individual who is licensed in another state as a professional counselor may not meet New York State's licensure requirements or their equivalent. Therefore, implementation of the suggestion would not ensure that licensees are adequately prepared to practice mental health counseling in New York State.

COMMENT: We are concerned that applicants under several of the special provisions for licensure must submit certifications endorsing their competence.

RESPONSE: Along with meeting prescribed education and experience requirements, several alternatives in the special provisions for licensure will require certifications from qualified individuals that endorse the applicant's professional ethics and clinical competence to practice mental health counseling. This is a reasonable requirement for licensure under these special provisions.

COMMENT: The requirements in the special provisions that permit licensure with baccalaureate education should require the applicant to pass a licensure examination.

RESPONSE: The special provisions are only available until January 1, 2006, and are designed to assist individuals who have practiced in this field for many years to become licensed. Alternatives two and three of the special provisions require applicants to be baccalaureate-educated, complete prescribed coursework, have extensive experience in the field, and obtain certifications from qualified individuals that endorse the applicant's professional ethics and clinical competence. These requirements establish satisfactory standards for licensure. An additional examination requirement is unnecessary.

## NOTICE OF ADOPTION

### Professional Licensure in Marriage and Family Therapy

**I.D. No.** EDU-34-04-00012-A

**Filing No.** 71

**Filing date:** Jan. 18, 2005

**Effective date:** Feb. 3, 2005

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

**Action taken:** Addition of section 52.33 and Subpart 79-10 to Title 8 NYCRR.

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

**Subject:** Professional licensure in marriage and family therapy.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-34-04-00012-P, Issue of August 25, 2004.

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

**Revised rule making(s) were previously published in the State Register on** December 1, 2004.

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

#### Assessment of Public Comment

The proposed rule was published as a revised rule making on December 1, 2004. Below is a summary of written comments received by the State Education Department concerning the proposed rule, which were not addressed in the previously published Assessment, and the Department's response.

COMMENT: The proposed regulations should require the supervisor of the experience requirement to be qualified as supervisors by the American Association for Marriage & Family Therapy (AAMFT). Unlike other professions, the supervision of marriage and family therapy requires subspecialty training.

RESPONSE: In response to public comment, the regulations have been strengthened to increase requirements for supervisors of the applicant's experience. Such individuals are required to have master's level education and three year's experience in the practice of marriage and family therapy. In addition, they must be licensed in New York State in specified fields, which permit them to practice marriage and family therapy in New York State, or meet equivalent qualifications. The regulation would permit the acceptance of a supervisor's credential issued by an acceptable national certifying or registering body as a substitute for licensure and evidence of supervisory competence until January 1, 2008. This will accommodate the fact that marriage and family therapy is a new licensed profession in New

York State. The regulations have adequate standards to ensure the qualifications of supervisors of the experience requirement for licensure.

COMMENT: The proposed regulation would not allow an applicant to meet the experience requirement in a private practice. AAMFT approved supervisors are taught to ask for audiotapes and videotapes of patient treatment to monitor therapy in the post-degree phase. Limiting the practice setting accomplishes little.

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

COMMENT: The State Education Department does not have the authority to prohibit in regulation the experience requirement to be met in a private practice owned or operated by the applicant.

RESPONSE: The Department has the authority to regulate the setting of the experience requirement for licensure in marriage and family therapy. Education Law section 8403(3)(c) requires the applicant to meet an experience requirement "in accordance with the commissioner's regulations." The regulation at issue will help to ensure the quality of the experience.

COMMENT: Experience obtained prior to licensure should not count towards the three-years of experience necessary to become a qualified supervisor of the experience requirement.

RESPONSE: This is a new licensed profession and the Department needs the flexibility to consider pre-licensure experience in the determination of qualified supervisors.

COMMENT: The requirements for supervisors of the experience required for licensure in marriage and family therapy are insufficient. Such supervisors should be required to meet additional experience and coursework requirements relating to supervision of marriage and family therapists.

RESPONSE: The regulation has been revised to increase requirements for supervisors of the required experience for licensure. Such supervisors must have completed a master's or higher degree in marriage and family therapy or a related field, have engaged in the practice of marriage and family therapy for three years, and be licensed to practice marriage and family therapy or be licensed in a profession that is exempt from licensure, or be an individual with equivalent qualifications, or until December 31, 2007 be appropriately certified as a clinical supervisor. The Department does not believe it necessary to add additional education and experience requirements for supervisors.

COMMENT: The regulations should specify that supervisors of the experience requirement who are licensed in other fields and are exempt from licensure under Article 163 should be governed by the practice requirements of their particular profession.

RESPONSE: The supervisor who is licensed in another profession is bound by the statutory and regulatory requirements of that profession. It is unnecessary to repeat this requirement in these regulations.

COMMENT: The curriculum prescribed in the regulation for registered programs leading to licensure does not adequately provide subject matter knowledge in areas needed for practice.

RESPONSE: The subject area requirements for registered programs leading to licensure are specified in the statute. Therefore, the regulation must include these subjects as mandatory requirements for registered programs leading to licensure. These requirements provide adequate subject matter preparation for licensure.

COMMENT: The regulations for registered programs leading to licensure in marriage and family therapy should specify detailed requirements for internships, including paid and unpaid internships, flexibility for working students, supervision requirements, and diversity of placements.

RESPONSE: The regulations require registered programs leading to licensure in marriage and family therapy to include a supervised practicum of at least 300 client clock hours. Prior to registration, the Department will review the adequacy of the practicum, including the adequacy of supervision and placements. The Department does not believe it necessary to specify in regulation additional requirements for the practicum.

COMMENT: We strongly support the regulation's flexibility in permitting an applicant to meet the education requirement for licensure through completion of a graduate degree program in an allied mental health field and additional graduate level coursework, if needed.

RESPONSE: No response is necessary.

COMMENT: The regulations do not allow for a number of well established, nationally certified marriage and family therapists to qualify for a license through alternative requirements.

RESPONSE: The regulations provide four alternative routes to licensure in marriage and family therapy, for applicants who apply and meet the

requirements by January 1, 2006. The regulations provide ample opportunities for applicants who are currently practicing in this field to become licensed through these alternative requirements.

**COMMENT:** The requirements in the special provisions that permit licensure with baccalaureate education should require the applicant to pass a licensure examination.

**RESPONSE:** The special provisions are only available until January 1, 2006, and are designed to assist individuals who have practiced in this field for many years to become licensed. Alternatives two and three of the special provisions require applicants to be baccalaureate-educated, complete prescribed coursework, have extensive experience in the field, and obtain certifications from qualified individuals that endorse the applicant's professional ethics and clinical competence. These requirements establish satisfactory standards for licensure. An additional examination requirement is unnecessary.

**COMMENT:** We are opposed to baccalaureate degree under any circumstances as the basis for licensure in marriage and family therapy because the statutory authorizing language for obtaining a license through the alternative method requires the criteria for licensure to be substantially equivalent to the regular requirements for licensure.

**RESPONSE:** Education Law section 8411(2)(a) provides the statutory basis for establishing the alternative requirements for licensure in marriage and family therapy. Section 8411(2)(a) acknowledges that the applicant "does not meet the requirements for licensure within this article." It authorizes the establishment of "alternative criteria determined by the department to be substantially equivalent of such criteria." The regulation includes alternative requirements for licensure in this new profession for applicants who have practiced marriage and family therapy for many years prior to the imposition of this new licensure requirement. The special provisions are only available for a limited time, until January 1, 2006. Alternatives two and three of the special provisions permit licensure of baccalaureate-educated individuals. Such applicants must complete prescribed coursework and have significant experience in marriage and family therapy. In addition, they must obtain certifications from qualified individuals that endorse their professional ethics and clinical competence.

The Memorandum in Support of the enabling legislation makes it clear that the sponsors of the Legislation did not intend to unfairly disenfranchise individuals who were practicing the profession prior to the imposition of the licensure requirement. The Memorandum states: "The Bill is not intended to disenfranchise any individuals presently practicing mental health counseling, marriage and family therapy, creative arts therapy or psychoanalysis that meet standards set forth in the bill or their substantial equivalent as determined by SED." In developing these alternative requirements, the Department consulted with the State Legislature to ensure that the requirements were consistent with legislative intent that authorized the Department to establish alternative criteria for licensure.

The prescribed requirements, taken together, establish standards that are substantially equivalent to the regular requirements for licensure. The alternative requirements for licensure will ensure that adequacy of preparation for licensure in the field of marriage and family therapy, while easing the transition to licensure for individuals who have practiced this profession for many years. The State Education Department has statutory authority to establish such alternative requirements in regulation.

**NOTICE OF ADOPTION**

**Professional Licensure in Creative Arts Therapy**

**I.D. No.** EDU-34-04-00013-A  
**Filing No.** 72  
**Filing date:** Jan. 18, 2005  
**Effective date:** Feb. 3, 2005

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

**Action taken:** Addition of section 52.34 and Subpart 79-11 to Title 8 NYCRR.

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

**Subject:** Professional licensure in creative arts therapy.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-34-04-00013-P, Issue of August 25, 2004.

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

**Revised rule making(s) were previously published in the State Register** on December 1, 2004.

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

**Assessment of Public Comment**

The proposed rule was published as a revised rule making on December 1, 2004. Below is a summary of written comments received by the State Education Department concerning the proposed rule, which were not addressed in the previously published Assessment, and the Department's response.

**COMMENT:** While we agree that the increase of the credit hours for creative arts therapists from 30 to 48 semester hours will strengthen the training and competence of licensees, it is still not enough semester hours to cover the nine subject areas specified in the regulation. Also, the curriculum does not provide sufficient education in psychopathology.

**RESPONSE:** In response to public comment, the regulation was revised to increase from 30 to 48 the number of semester hours that must be included in registered programs leading to licensure in creative arts therapy. This number of semester hours is sufficient to cover the coursework requirements prescribed in the regulation and is consistent with accreditation standards. The regulation requires the curriculum to include coursework in psychopathology, and does not need to prescribe additional requirements. The Department will review the programs prior to registering them to ensure that they have adequate coverage in the prescribed subject areas, including psychopathology.

**COMMENT:** The curriculum prescribed in the regulation for registered programs leading to licensure does not adequately provide subject matter knowledge in areas needed for practice.

**RESPONSE:** The subject area requirements for registered programs leading to licensure are specified in statute. Therefore, the regulation must include these subjects as mandatory requirements for registered programs leading to licensure. These requirements provide adequate subject matter preparation for licensure.

**COMMENT:** The regulations should specify that supervisors of the experience requirement who are licensed in other fields and are exempt from licensure under Article 163 should be governed by the practice requirements of their particular profession.

**RESPONSE:** The supervisor who is licensed in another profession is bound by the statutory and regulatory requirements of that profession. It is unnecessary to repeat this requirement in these regulations.

**COMMENT:** The requirements in the special provisions that permit licensure with baccalaureate education should require the applicant to pass a licensure examination.

**RESPONSE:**

The special provisions are only available until January 1, 2006, and are designed to assist individuals who have practiced in this field for many years to become licensed. Alternative two of the special provisions require applicants to be baccalaureate-educated, complete prescribed coursework, have extensive experience in the field, and obtain certifications from qualified individuals that endorse the applicant's professional ethics and clinical competence. These requirements establish satisfactory standards for licensure. An additional examination requirement is unnecessary.

**NOTICE OF ADOPTION**

**Professional Licensure in Psychoanalysis**

**I.D. No.** EDU-34-04-00014-A  
**Filing No.** 73  
**Filing date:** Jan. 18, 2005  
**Effective date:** Feb. 3, 2005

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

**Action taken:** Addition of section 52.35 and Subpart 79-12 to Title 8 NYCRR.

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

**Subject:** Professional licensure in psychoanalysis.

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

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

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

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

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

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

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

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

- (i) personality development;
- (ii) psychoanalytic theory of psychopathology;
- (iii) psychoanalytic theory of psychodiagnosis;
- (iv) sociocultural influence on growth and psychopathology;
- (v) practice technique (including dreams and symbolic processes);
- (vi) analysis of resistance, transference, and countertransference;
- (vii) case seminars on clinical practice;
- (viii) practice in psychopathology and psychodiagnosis; and
- (ix) professional ethics and psychoanalytic research methodology.

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

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

- (i) 50 clock hours of individual supervision with one supervisor working on one case; and
- (ii) at least 100 clock hours of individual supervision with another supervisor working on one or more additional cases.

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

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

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

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

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

- (i) completing a program in psychoanalysis that is registered as leading to licensure in this field pursuant to section 52.35 of this Title, or a program in psychoanalysis that is accredited by an acceptable accrediting agency, or

a program in psychoanalysis that is substantially equivalent to such a registered or accredited program, as determined by the department; or

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

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

Section 79-12.3 establishes the experience requirement for licensure. Subdivision (a) and (b) establish the general requirements, as follows:

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

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

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

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

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

- (1) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;
- (2) meet all requirements for licensure as a psychoanalyst, except the examination and/or experience requirements; and
- (3) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-12.3 of this Subpart.

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

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

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

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

- (i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8404(3)(g) of the Education Law;
- (ii) be of good moral character as determined by the department;
- (iii) be at least 21 years of age;

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

and supervised analysis of the applicant's cases. In addition, the applicant is required to have engaged in the practice of psychoanalysis for at least 1,500 clock hours.

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

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

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

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

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

(3) either:

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

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

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 79-12.6(a)(1)(v)(g) and (vii).

**Revised rule making(s) were previously published in the State Register** on December 1, 2004.

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

#### **Regulatory Impact Statement**

Since publication of the Notice of Revised Rule Making in the *State Register* on December 1, 2004, the proposed rule has been non-substantially revised as follows:

Section 79-12.6(a)(1)(v)(g) is non-substantially revised to remove the words "and psychoanalytic research methodology" from this clause in order to clarify the regulation. This subject is already listed in clause (f) as a subject that must be included in the course of study required for alternative route one, and is repeated unnecessarily in clause (g).

Section 79-12.6(a)(1)(vii) is non-substantially revised to correct the spelling of the word "completed".

The above non-substantial revisions to the proposed rule do not require changes to the Regulatory Impact Statement.

#### **Regulatory Flexibility Analysis**

Since publication of the Notice of Revised Rule Making in the *State Register* on December 1, 2004, non-substantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

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

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

Since publication of the Notice of Revised Rule Making in the *State Register* on December 1, 2004, non-substantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The non-substantial revisions do not necessitate any changes in the Rural Area Flexibility Analysis.

#### **Job Impact Statement**

Since publication of the Notice of Revised Rule Making in the *State Register* on December 1, 2004, non-substantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

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

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

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

The proposed rule was published as a revised rule making on December 1, 2004. Below is a summary of written comments received by the State Education Department concerning the proposed rule, which were not addressed in the previously published Assessment, and the Department's response.

**COMMENT:** Proposed section 52.35(b) would require the completion of a master's or higher degree before entry into a registered program leading to licensure psychoanalysis. The regulations should not penalize psychoanalytic candidates by requiring the receipt of a graduate degree prior to clinical entry, when such a requirement is not imposed upon social workers or psychologists.

**RESPONSE:** Section 8405(3)(b) of the Education Law establishes the education requirement for licensure in psychoanalysis. It requires the applicant to have received a master's or higher degree and to have completed a registered program leading to licensure or its equivalent. Section 6507(3)(a) of the Education Law authorizes the State Education Department to establish pre-professional education requirements. The requirement that the candidate have completed a master's or higher degree program prior to admission to the registered licensure-qualifying program is reasonable and consistent with the statutory requirements.

**COMMENT:** We believe the statute mandates that persons in psychoanalytic training who are not either exempt from licensure under Education Law section 8410(1), or already licensed in another field under Article 163, or in possession of a master's degree in a health or mental health field of study, should be required to complete additional coursework equivalent to coursework required for licensure in mental health counseling.

**RESPONSE:** Education Law section 8405(3)(b) requires the applicant for licensure in psychoanalysis to meet the following education requirement: "Have received a master's or higher degree from a degree-granting

program registered by the department and have completed a program of study registered by the department in a psychoanalytic institute chartered by the board of regents or the substantial equivalent as determined by the department. The program of study in a psychoanalytic institute shall include coursework substantially equivalent to coursework required for a master's degree in a health or mental health field of study." The education requirements prescribed in the proposed regulation are consistent with these statutory requirements. The applicant must hold a master's degree, and complete a registered program leading to licensure in psychoanalysis or its equivalent. There is no basis in the authorizing statute to require applicants to complete an additional 48 to 60 semester hours of graduate coursework in mental health counseling beyond this requirement, as suggested by the comment.

COMMENT: The curriculum prescribed in the regulation for registered programs leading to licensure does not adequately provide subject matter knowledge in areas needed for practice.

RESPONSE: The subject area requirements for registered programs leading to licensure are specified in statute. Therefore, the regulation must include these subjects as mandatory requirements for registered programs leading to licensure. These requirements provide adequate subject matter preparation for licensure.

COMMENT: We urge the Department to survey training institute catalogs to establish required coursework in licensure-qualifying programs that is consistent with prevailing areas of instruction.

RESPONSE: Education Law section 8405(3)(b) establishes the minimum subject areas that must be covered by registered programs leading to licensure in psychoanalysis. The regulation prescribes these mandatory subjects areas, which must be included in registered programs at minimum.

COMMENT: The education requirement for licensure should more closely align with the standards for psychoanalytic training developed by the Accreditation Council for Psychoanalytic Education (ACPE), and should all be stated in the education requirement for licensure rather than the requirements for registered programs leading to licensure.

RESPONSE: The Department consulted with a variety of stakeholders in the field of psychoanalysis, including accrediting bodies, training institutes, professional associations, and individual practitioners, during the development of the education requirements for licensure. The Department believes that the requirements are reasonable and ensure adequate educational preparation for licensure. The regulation requires individuals to complete registered programs leading to licensure in psychoanalysis or equivalent programs. The regulation appropriately prescribes requirements for the registered programs.

COMMENT: The coursework in registered programs leading to licensure should include an additional broad-based course on psychopathology.

RESPONSE: The regulation requires registered programs to include adequate coverage in psychopathology, including coursework in psychoanalytic theory of psychopathology, sociocultural influence on growth and psychopathology, and practice in psychopathology and psychodiagnosis.

COMMENT: It is unclear why section 79-12.3 requires a supervisor of an applicant's experience requirement to hold a baccalaureate or higher degree, when a student entering a registered program must have a master's degree.

RESPONSE: The regulations require the supervisor to have completed at minimum a baccalaureate program in psychoanalysis or a related field, in addition to other prescribed requirements. The practice of psychoanalysis has not been regulated, and many practitioners hold only a baccalaureate degree. These individuals may qualify for licensure under the special provisions, effective until January 1, 2006, that allow licensure of an individual with a baccalaureate degree, and prescribed psychoanalytic training and experience in psychoanalysis. The proposed regulations would allow these experienced practitioners to function as supervisors of applicants for licensure in psychoanalysis, while the applicants are meeting the experience requirement for licensure.

COMMENT: The regulation's requirements for personal analysis and supervised analysis and clinical experience should specify a minimum frequency of three sessions of psychoanalysis per week.

RESPONSE: The regulation includes a requirement that the registered program leading to licensure include 300 clock hours of personal psychoanalysis and 150 clock hours of supervised analysis. The regulation prescribes a supervised experience requirement of 1,500 clock hours in the practice of psychoanalysis. These requirements are sufficiently prescriptive. The Department does not believe it necessary to specify frequency of session per week requirements.

COMMENT: I support the regulation as written and oppose mandating in regulation a particular number of sessions per week that the applicant must meet with the client during the required experience for licensure.

RESPONSE: No response is necessary.

COMMENT: The regulation should permit physicians, psychologists, licensed clinical social workers and other exempt professionals who are permitted by section 8410 of the Education Law to provide psychoanalysis without a separate license to use their own private practices to obtain qualifying experience for licensure in psychoanalysis.

RESPONSE: The regulation requires all applicants for licensure in psychoanalysis to meet a supervised experience requirement. The regulation provides that the setting for the experience shall not be a private practice that is owned or operated by the applicant. This is a reasonable requirement that helps to ensure the quality of the supervised experience. Applicants who are already licensed in another profession will have to meet this requirement and will not be permitted to use their own private practices to satisfy the supervised experience requirement for licensure in psychoanalysis.

COMMENT: The regulations should specify that supervisors of the experience requirement who are licensed in other fields and are exempt from licensure under Article 163 should be governed by the practice requirements of their particular profession.

RESPONSE: The supervisor who is licensed in another profession is bound by the statutory and regulatory requirements of that profession. It is unnecessary to repeat this requirement in these regulations.

COMMENT: The regulation should specify the proportion of individual versus group supervision required of the supervisor of the experience requirement for licensure.

RESPONSE: The regulation requires the supervisor of the experience requirement to provide an average of one hour per week or two hours every other week of in-person individual or group supervision. The Department believes this standard is adequately prescriptive.

COMMENT: The regulation does not respect the ongoing tradition of psychoanalytic training that permits individuals in training to obtain experience in their own private practice, as part of this training.

RESPONSE: Education Law section 8405(3)(c) establishes the requirement that applicants for licensure in psychoanalysis must complete a minimum of 1,500 hours of supervised clinical practice. The regulation requires the setting for the supervised experience to be outside of the student's own practice to help ensure the quality of the supervised clinical experience.

COMMENT: The licensure examination should not be a multiple-choice examination but instead should be narrative case studies.

RESPONSE: At present, applicants will meet the licensure examination requirement through submission of case narratives. The Department will review other examinations as they become available, and will not rule out reliable examinations using the multiple-choice format.

COMMENT: If an applicant fails the case narrative twice, he or she should be permitted to submit additional case narratives.

RESPONSE: The regulation does not prohibit additional attempts to pass the examination but it does restrict the number of times the same failing case narrative may be revised and submitted. This is a reasonable requirement that ensures the integrity of the examination process.

COMMENT: The alternative requirements for licensure provide that the applicant must complete 150 clock hours of personal psychoanalysis. This number should be increased to 300 clock hours.

RESPONSE: The alternative requirements are available until January 1, 2006. They permit applicants who have practiced psychoanalysis for many years prior to the imposition of the licensure requirement to become licensed through meeting alternative requirements, including alternative education and experience requirements. The Department believes that 150 clock hours of personal psychoanalysis is a reasonable minimum for such experienced practitioners.

COMMENT: The requirements in the special provisions that permit licensure with baccalaureate education should require the applicant to pass a licensure examination.

RESPONSE: The special provisions are only available until January 1, 2006, and are designed to assist individuals who have practiced in this field for many years to become licensed. Alternative two of the special provisions requires applicants to be baccalaureate-educated, complete prescribed coursework, have extensive experience in the field, and obtain certifications from qualified individuals that endorse the applicant's professional ethics and clinical competence. These requirements establish satisfactory standards for licensure. An additional examination requirement is unnecessary.

## NOTICE OF ADOPTION

**The Period of Validity of the Initial Teaching Certificate and Flexibility in the Staffing of Teacher Preparation Programs****I.D. No.** EDU-43-04-00005-A**Filing No.** 74**Filing date:** Jan. 18, 2005**Effective date:** Feb. 3, 2005

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

**Action taken:** Amendment of sections 80-3.3(a)(1) and 52.21(b)(2)(i)(h) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 210 (not subdivided); 215 (not subdivided); 305(1), (2), (7); 3001(2); 3004(1); 3006(1)(b)

**Subject:** The period of validity of the initial teaching certificate and flexibility in the staffing of the teacher preparation programs.

**Purpose:** To increase the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provide teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-43-04-00005-P, Issue of October 27, 2004.

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

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

**Assessment of Public Comment**

The proposed rule was published in the *State Register* on October 27, 2004.

Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's response.

**COMMENT:** We support extending the duration of the initial certificate to five years. Our reflective experience over the past several years continues to affirm the necessity of having a longer time frame in which to meet the requirements for the professional certificate. This will positively impact the recruitment, retention, and quality of new teachers as well as benefit those who are currently enrolled in teacher preparation programs.

**RESPONSE:** Increasing the duration of the initial certificate to five years has strong support in the field. In a survey of the presidents of all colleges and universities with teacher preparation programs, conducted by the Department's Office of Higher Education, 83 percent of the responding presidents indicated the need to extend the duration of the initial certificate to five years. Many teaching candidates, teacher preparation programs and school districts from around the State have reported that the duration of the initial certificate (three years) is currently too short to provide new teachers with sufficient time to complete the master's degree program required for a professional certificate.

After carefully considering extensive commentary from teacher preparation programs, teacher candidates and school districts from around the State, the Department concurs that it is necessary and appropriate to extend the duration of the initial teaching certificate from three to five years to facilitate the ability of new teachers to complete the study necessary to earn a master's degree for the professional certificate.

**COMMENT:** If the duration period of the initial certificate is extended from three to five years, the benefit of this extension should be provided to all initial certificate recipients since the implementation of the new initial certificate on February 2, 2004.

**RESPONSE:**

The Department agrees and plans to administratively extend the duration of all initial certificates issued since February 2, 2004.

**COMMENT:** We ask the Regents to approve the regulations that replace fixed regulatory input standards for faculty workloads in teacher education programs and require that a majority of teacher education courses be taught by full-time faculty, with outcome measures establishing program quality. In the independent sector where the quality of programs is not only an academic hallmark, but also a key economic indicator, given that quality determines reputation in the marketplace, these quantitative requirements represent an intrusion on many of our campuses. As long as institutions maintain a high level of quality as measured by teacher education program accreditation and the pass rate, responsibility for allocation of

resources within the institutions should reside within their own internal governance structures.

**RESPONSE:** The proposed regulation moves toward a performance-based system - a system that continues to require high standards of quality while giving the leadership of colleges and universities with demonstrated records of performance more discretion and flexibility to develop staffing plans that are consistent with their program designs. The proposed amendment eliminates the percentage requirement for full-time faculty and the fixed workload requirements for those teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations. This approach ensures the quality of teacher education offerings, while permitting colleges and universities greater flexibility to manage their staffing needs consistent with program design.

**COMMENT:** The proposed change of the current requirement that a majority of courses in registered teacher preparation programs must be taught by full-time faculty will undermine recent progress made by institutions of higher education to improve the quality and capacity of their teacher preparation programs.

**RESPONSE:** The Department does not believe the current proposal will undermine the recent quality/capacity gains of teacher preparation programs. The current proposal continues to explicitly recognize the criticality of maintaining sufficient full-time faculty to ensure the integrity of registered teacher preparation programs. The regulation would only permit flexibility in the percentage requirement for full-time faculty when institutions of higher education meet two critical accountability measures. First, the teacher preparation program must be accredited and maintain such accreditation. Second, at least 80 percent of the teacher candidates from the institution's teacher preparation program must pass the NYS teacher certification examinations. Together, these measures will provide reasonable assurances of the teacher preparation program's continuing quality.

**COMMENT:** The change in the requirement that a majority of the courses in registered teacher preparation programs must be taught by full-time faculty is premature to the extent that the first cohort of teachers trained under the more rigorous teacher preparation standards associated with the new classroom teaching certificates graduated in May 2004. A change at this time is not warranted since data is not yet available verifying the relationship between full-time faculty and quantitative output measures.

**RESPONSE:** The Department does not believe that the proposed change is premature. The amendment gives hiring flexibility to institutions of higher education whose teacher preparation programs meet defined standards of accountability. The Department will carefully evaluate the impact of providing this hiring flexibility on the performance of teacher certification candidates and the quality of teacher preparation programs and will reconsider this policy if objective evidence demonstrates a negative impact on them.

**COMMENT:** Full-time faculty perform many functions that part-time adjuncts, by the limited nature of their appointments, cannot perform. Full-time faculty are, for example, more available to work with students on the academic training necessary to become a teacher, to coordinate a teaching candidate's field work, to work with necessary faculty partners across the institution to improve the preparation of teacher candidates and to provide continuity in the quality of teacher preparation programs.

**RESPONSE:** The Department continues to recognize and value the vital role of full-time faculty, and the regulations will continue to require all institutions that offer teacher preparation programs to provide sufficient numbers of qualified, full-time faculty to foster and maintain continuity and stability in these programs and ensure the proper discharge of instructional and all other faculty responsibilities. The regulations will also continue to require all teacher preparation programs to meet the requirements for faculty that are applicable to all registered college programs, which include additional standards to ensure the quality of the faculty. The proposal would only extend staffing flexibility to those teacher preparation programs that meet the articulated accountability standards that demonstrate the quality of the programs.

**COMMENT:** The change is unnecessary because the current regulation permits institutions of higher education to request a waiver from the Department of the percentage requirement for full-time faculty.

**RESPONSE:** The amendment is needed to move towards a performance-based system. The amendment eliminates the percentage requirement for full-time faculty and the fixed workload requirements for those teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting

association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations. The regulation would also continue the opportunity for a waiver request from the staffing standards for good cause, such as inability to hire sufficient numbers of full-time faculty in a new program.

COMMENT: Teacher preparation is far too important to argue that since no other programs that prepare professionals have a percentage requirement for full-time faculty, teacher preparation programs should not either. This reasoning undercuts the importance of quality standards.

RESPONSE: It is instructive to note that no other academic programs leading to professional licensure in professions registered by the Department are required to maintain a specified percentage of full-time faculty by either the Department or their accrediting body. Colleges and universities offering licensure-qualifying programs in medicine, nursing, architecture, engineering, public accountancy, dentistry, and other professions maintain high standards of quality while exercising discretion to establish staffing plans in those program areas. Likewise, no teacher education-accrediting agency identifies a fixed percentage of required full-time faculty. Rather, all accrediting bodies assess the overall financial and human resources supporting a program to determine whether the program is able to operate effectively and meet its academic mission. The Department does not believe it necessary to retain the percentage requirement for teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations.

COMMENT: Since the average statewide pass rates on the certification exams is close to 90 percent, allowing variance from the requirement that a majority of courses be taught by full-time faculty if 80 percent of a teacher preparation program's completers pass the certification exams could be viewed as lowering of the State's quality standards.

RESPONSE: The Department does not believe providing additional hiring flexibility to accredited teacher education institutions whose program completers consistently pass the certification exams at rates of 80 percent or above diminishes the State's quality standard.

COMMENT: The proposals in the regulation to extend the duration period of the initial certificate, in order to provide additional time for new teachers to earn a master's degree, and to provide additional hiring flexibility to institutions of higher education with teacher preparation programs that achieve articulated quality standards should be separated because they are unrelated.

RESPONSE: The Department consistently amends at the same time several provisions of the Regulations of the Commissioner of Education relating to common subject areas. In this instance, both provisions relate to teacher certification and the Department's ongoing efforts to provide additional flexibility in regulatory requirements to facilitate production of additional certified teachers.

COMMENT: The Department appears to be advancing the proposal to remove the percentage requirement for full-time faculty in teacher preparation programs in an effort to accommodate the economic/management desires of some institutions of higher education rather than data demonstrating the need for a policy change.

RESPONSE: The Regents Teaching Policy includes a commitment to ongoing monitoring of the implementation and impact of the Policy and a plan to consider adjustments and modifications as necessary to advance the Policy in today's educational environment. In numerous communications and activities, including the above-referenced survey of college presidents, the leaders at colleges and universities with teacher preparation programs, while agreeing that maintaining a significant proportion of full-time faculty and faculty workload limitations are important standards for ensuring program quality, have requested more flexibility to develop staffing plans that are consistent with the changing needs of their programs (e.g., enrollment fluctuations and the need to offer specific courses to meet the demands for teachers in certain subject areas, etc.). Presidents of institutions with teacher preparation programs, as well as some deans, program chairs, faculty, and representatives of higher education organizations have described a number of unintended consequences from the requirement for a fixed percentage of full-time faculty. For example, some institutions reported having to reduce, rather than expand, the number of programs and courses they offer. Others have reported having to increase class size and faculty/student ratios. A number of institutions have reported a diminishing pool of high quality, full-time teacher education faculty candidates in subject shortage areas.

The Department believes that elimination of the percentage requirement for full-time faculty for those teacher preparation programs that

demonstrate program quality by being accredited and meeting or exceeding the established pass rate of 80 percent on teacher certification examinations is reasonable. It will provide institutions that have demonstrated quality additional flexibility to meet their staffing needs. The Department will carefully monitor the effects of the new policy to ensure that it does not result in a reduction in the quality of teacher preparation programs.

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## Department of Environmental Conservation

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### 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.** 48

**Filing date:** Jan. 14, 2005

**Effective date:** Jan. 14, 2005

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

**Action taken:** 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

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

In order to forestall the loss of the public health and environmental benefits that were to be realized during the first year of implementation of the ADRP as originally scheduled, the Department is promulgating these emergency regulations. The control periods (the yearly regulatory compliance periods) are scheduled to commence on October 1, 2004 and January 1, 2005, under the Acid Deposition Reduction NO<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 rule making pursuant

to SAPA section 202.1 in order to reinstate the ADRP, the public health and environmental benefits that would have occurred for the first control periods under the regulations would certainly be lost because the rule making process would not conclude until well after the control periods were scheduled to commence. Because of concerns about the need for the ADRP regulations to be consistent and compatible with, among other things, the operation of the ozone season NO<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 rule making process of SAPA section 202.1 and lose one or more control periods.

Health risks associated with the inhalation of PM are influenced by both the penetration and deposition of PM in the various regions of the respiratory tract and the biological responses to these deposited materials. Smaller PM is known to deposit furthest in the respiratory tract. The most significant monetized benefits of reducing ambient concentrations of PM are attributable to reductions in health risks associated with air pollution.<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 water ways lifeless. This problem is amplified when brief periods of low pH from snowmelt and/or heavy downpours (episodic acidification) are factored into the equation. These events, sometimes short in duration, have been known to cause large scale fish kills because of the high levels of acidity and the rapid rate at which the water way reaches peak acidity. Approximately 26% of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification.

Acid deposition also impairs tree growth in several ways. Acidic cloud water in higher elevations may increase the susceptibility of the red spruce to winter injury, while acid deposition has been stripping forest soils of vital nutrients necessary for forest productivity. Inputs to soils of sulfates from SO<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 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.

**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 September 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 October 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 the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. ENV-35-04-00024-P, Issue of September 1, 2004. The emergency rule will expire March 14, 2005.

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

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

#### **Summary of Regulatory Impact Statement**

On October 14, 1999, Governor Pataki announced that fossil fuel-fired electric generators in New York would be required to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid rain. Specifically, electric generators would have to reduce sulfur dioxide (SO<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>2</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 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 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.

<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.

<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.

### 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.

<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.

### 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.

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 NYSEDA 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 NYSEDA 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.

#### MINIMIZING ADVERSE IMPACT

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

#### RURAL AREA PARTICIPATION

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

#### Job Impact Statement

1. Nature of Impact: The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO<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 NYSEDA 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.

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

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, 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 Department proposed Parts 237 and 238 on August 18, 2004. Hearings were held in Albany, on October 12, 2004, in New York City on October 13, 2005, in Ray Brook on October 14, 2004, and in Avon on October 15, 2004. The comment period closed at 5:00 p.m. on October 22, 2004. The Department received written comments and oral statements on the ADRP from 611 interested parties. This resulted in nearly two thousand pages of text (hearing statements and written comments) that have been reviewed, summarized, and responded to by the Department.

Comments were received on a number of sections in the regulations, some in support and some in opposition. While a few commenters offered support for the proposal, the majority of commenters offered recommended additions, changes and deletions to the regulations.

The most frequently requested revision to the regulations was to provide for deeper reductions in SO<sub>2</sub> and the addition of emission caps for carbon dioxide (CO<sub>2</sub>) and mercury. The Department concluded that, although there is a scientific consensus that deeper cuts in SO<sub>2</sub> are necessary for complete recovery of the State's sensitive receptor areas, the proposed ADRP provides for SO<sub>2</sub> reductions that are technologically and economically feasible at this time. The Department further concluded that deeper SO<sub>2</sub> emissions reductions are required at the federal level. Mandating even deeper reductions solely from sources based in New York will not be as effective as obtaining from upwind out-of-state sources new reductions that are similar to those required by the ADRP. In regard to CO<sub>2</sub> and mercury, the Department explained that while this regulatory effort was solely for the control of acid deposition precursor emissions, reductions of CO<sub>2</sub> and mercury emissions would almost certainly result from the implementation of the ADRP, principally due to projected changes in fuel use by some of the electricity generators. The Department further explained that it is actively participating in the Regional Greenhouse Gas Initiative to develop a model cap-and-trade rule for CO<sub>2</sub> emissions from electric generating sources. The Department then explained how it originally deferred action in anticipation of the promulgation of an appropriate federal Maximum Achievable Control Technology (MACT) standard. The Department further expressed that the MACT standard was still the preferred approach to addressing mercury emissions, but that the Department was not satisfied with the efforts the United States Environmental Protection Agency in developing such a MACT for mercury. The Department noted that it will continue to advocate for a federal program that addresses mercury emissions in a manner protective of the public health and natural resources of New York State. No revisions to the proposed ADRP were made as a result of these comments.

A number of concerns were raised regarding the modeling performed in support of the regulations, the Market Assessment and Portfolio Strategies (MAPS) model, run by the New York State Energy Research and Development Authority (NYSERDA). In particular, commenters were concerned that the modeling conclusions did not reflect current market conditions, did not account for the loss of new generation included in the modeling, and understated the costs and impacts on the State's economy, including impacts on the freight rail system.

The Department explained why it believes that the compliance costs and related consumer price increases were overstated in the MAPS modeling results. The individual compliance plans submitted by budget sources in response to a Department of Public Service (DPS) questionnaire did not account for various flexibility mechanisms that are contained in the structure of the proposed ADRP. The Department further stated that the projected over-compliance that was shown from these individual compliance responses would not occur under real market conditions (*i.e.*, sources that are more costly to control will purchase allowances from sources that can control emissions more cost effectively).

The Department needed to address commenters concerns that the MAPS modeling assumptions of a more robust economic environment and the construction of significantly more new electricity generators renders unreliable the NYSEERDA's conclusions regarding the effects of the ADRP on the economy and the electricity generating industry. The Department recognizes that the 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 the NYSEERDA, also analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Specifically, the 2002 SEP "No Additional Construction" scenario, that was developed to assess the potential impacts of a major reduction in the number of new generating units, analyzed the impact of only 1,995 MW of new capacity, a reduction from the 7,139 MW of new capacity that was assumed under the "compliance case" scenario in the MAPS modeling done to assess the effects of the ADRP. 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, the Department further stated in the Regulatory Impact Statement (RIS) that it is evident from the most recent review of permitting, construction and operational figures for new generation, that the prediction of new generation by DPS and NYSEERDA was reasonable.

It was determined that although the delay of new capacity additions may increase compliance costs, it would also be likely to result in addi-

tional running time for existing units. This could increase their operating margins and may at least partially offset the additional compliance costs.

Some commenters were also concerned that a State only trading program is too limited and would not provide a sufficient number of allowances to make the market liquid enough to be workable. The commenters particularly fear the exercise of market power by a few market participants and extremely high allowance prices which would cause certain electricity generators to curtail or cease operation. The lack of a liquid market was therefore claimed to create an adverse impact on the electricity grid and system reliability. There were also comments regarding the Department's choice of allocation methodology (input versus output based). Commenters were split on the use of a fuel-neutral versus the fuel-specific allocation methodology contained in Part 238.

The Department initially explained that the flexibility provisions under the regulations provided liquidity to the market. The regulation allows for the creation and use of early reduction allowances and supplemental allowances as well as the use of future control period allowances to cover emissions that occur during an electric grid reliability emergency. As stated in the RIS, the Department felt these provisions provided enough flexibility so that a New York State only trading program is viable. The Department explained that the cap on the creation of supplemental allowances was included to guarantee in-State reductions of both SO<sub>2</sub> and NO<sub>x</sub>.

The Department chose its allocation methodologies (fuel-specific for SO<sub>2</sub> and fuel-neutral for NO<sub>x</sub>), to distribute allowances in a manner that closely reflects how particular sources are expected to operate. Having a fuel diverse electric generation system provides the State with a more competitive electric generation market that is less susceptible to variations in the price of a particular fuel. The allocation of allowances, whether by a fuel-neutral or another method will not realize any further emission reductions. Only the total number of allowances has any real effect on the overall environmental benefit. The Department has decided to allocate allowances using historical heat input because of data availability concerns and the complex issue of accounting for combined heat and power. Data on electricity output is not currently reported to EPA. Combined heat and power sources would not receive credit for their thermal output if only electrical output is counted.

Some commenters provided specific comments regarding the need to reduce three tons of emissions for each supplemental allowance (1 allowance = the limited authorization to emit 1 ton of emissions in New York State) applied for. They contended the modeling performed in support of the 3-to-1 discount was flawed and that a different, less stringent ratio should be applied. The Department expressed that the modeling of the impacts of out-of-state sources was undertaken to determine a reasonable discount rate that could be applied to emission reductions at sources in upwind states that were to serve as the basis for the award of supplemental allowances that could be used to emit pollution in New York State. Seeking an award of supplemental allowances is totally voluntary.

The Department conceded that in the modeling done as part of the development of the report entitled "An Assessment of Sulfur Dioxide Emissions Reductions and the Relative Impacts of Sulfates over New York State" it did not model every conceivable scenario to show the contribution that may be attributable to out-of-state sources to in-state receptor areas. The Department used its best judgment in determining how to use its resources in modeling the impact of upwind emissions on New York State receptor areas to arrive at a uniform discount figure that could be applied in an administratively efficient way to all upwind emissions that are being used as the basis for the award of supplemental allowances.

One commenter expressed concern that the Department, the NYSEERDA and the DPS failed to disclose, pursuant to State Administrative Procedure Act § 104 and the Freedom of Information Law (Public Officers Law §§ 84-90), requested records pertaining to the MAPS modeling. The Department observed that the commenter did not previously make any request for the disclosure of any information during the course of the present rulemaking and that the comment refers to a request made during the original 2003 ADRP rulemaking. The issue of the Department's obligations to disclose the requested information during the 2003 rulemaking is a subject of current litigation and the Department referred the commenter to the Department's legal briefs in that litigation. To the extent that the commenter's comment could be construed as a new request for disclosure of certain information that was used as inputs to the MAPS modeling, the Department has disclosed some of that information in responding to this comment.

One commenter was concerned that the Department failed to analyze historical emission rates, and that the Department's only characterization

of that emission rate failed to capture the significant emission reductions required by budget sources under the NO<sub>x</sub> program in Part 237. The Department noted that it had utilized historic emission rates only as a point of reference in its original response to comments document.

One commenter submitted comments regarding the Department's authority with regard to the State Acid Deposition Control Act (SADCA). The issue of the applicability of SADCA to the ADRP is a subject of current litigation and the Department referred the commenter to the Department's legal briefs in that litigation.

The Department also received from two commenters copies of the comments they submitted during the rulemaking for the original 2003 version of the ADRP. The Department provided the Department's original responses to the comments from the earlier rulemaking and included them as appendices to the Response to Comments document.

## NOTICE OF ADOPTION

### Beaver Trapping Regulations

**I.D. No.** ENV-37-04-00008-A

**Filing No.** 47

**Filing date:** Jan. 14, 2005

**Effective date:** Feb. 2, 2005

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

**Action taken:** Amendment of sections 6.2 and 6.3 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-1101 and 11-1103

**Subject:** Trapping regulations for beaver trapping in areas closed to river otter trapping within the Southern Zone.

**Purpose:** To reduce the accidental taking of river otter in body-gripping traps set for beaver in areas closed to river otter trapping.

#### Text of final rule:

Paragraph 6.2(a)(1) is amended to read as follows:

(1) Mink and muskrat.

Open season	Wildlife management units
December 15th to February 25th	1A, 1C and 2A
November 25th to March 15th [(or the close of the beaver trapping season, including any extension, whichever is later)]	3A, 3C, 3F, 3G, 3H, 3J, 3K, 3M, 3N, 3P, 3R, 3S, 4A, 4B, 4C, 4F, 4G, 4H, 4J, 4K, 4L, 4M, 4N, 4O, 4P, 4R, 4S, 4T, 4U, 4W, 4X, 4Y, 4Z, 5K, 5N, 5P, 5R, 6R, and 6S
November 25th to February 15th [(or the close of the beaver trapping season, including any extension, whichever is later)]	6P, 7F, 7H, 7J, 7M, 7R, 7S, 8A, 8C, 8F, 8G, 8H, 8J, 8K, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9A, 9C, 9F, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X and 9Y
October 25th to April 10th	5C, 5F, 5H, 6F and 6J
October 25th to April 15th	5A, 5G, 5J, 6A, 6C, 6G, 6H, 6K, 6N and 7A

Paragraph 6.2(a)(2) through the end of Section 6.2 remains unchanged. 6 NYCRR Section 6.3, "General regulations for trapping beaver, otter, mink, muskrat, raccoon, opossum, weasel, red fox, gray fox, skunk, coyote, fisher, bobcat and pine marten" is amended as follows:

A new paragraph 6.3(a)(12) is adopted to read as follows:

(12) *Trigger specifications for body gripping traps in the Southern Zone.*

*In the Southern Zone, no person shall use or set a body gripping trap with a dimension of more than nine inches in any wildlife management unit where the river otter trapping season is closed, unless the trap has only one triggering device and such device is a "tension adjustable/parallel trigger" possessing all of the following design features:*

(a) *the trigger is equipped with a tensioning device that allows for manual adjustment of the tension required to move the trigger and fire the trap; and*

(b) *the sides of the trigger notch are perpendicular to the side of the frame to which the trigger is attached; and*

(c) *the trigger only moves along an axis at right angles to the side of the frame to which the trigger is attached; and*

(d) *the trigger wires are joined together to form a fixed set of closely parallel or twisted wires operating as a single vertical trigger assembly; and*

(e) *The trigger assembly is no longer than 6½ inches, measured from the inside edge of the frame of the trap where the trigger is attached to the end of the trigger wires; and*

(f) *The distance between the inside edge of one side of the trap and the nearest trigger wire shall be no less than 8 inches; and*

(g) *a fixed stop is attached to the frame, preventing the trigger from sliding along the frame.*

Subdivision 6.3(b) through end of Section 6.3 remains unchanged.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 6.3(a)(12).

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

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

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

The final text of the proposed rule includes a change. The Department has removed language which would have required beaver trappers to possess only traps with modified triggers when afield. This change that does not alter the analysis contained in the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, and Job Impact Statement. Therefore, no revisions to these documents are necessary.

#### Assessment of Public Comment

The Department received comments on the proposed regulation. Generally, the comments addressed three main themes: (1) The regulation is not needed and will be an obstacle to effective and efficient trapping, and beaver management; (2) The proposed regulation is flawed and needs to be corrected; and (3) The regulation is needed, but it should be strongly enforced and carefully evaluated.

The proposed regulation will allow the Department to manage beaver and otter separately in the Southern Zone so that the unique management needs of each species are met. This regulation will help to reduce the unintended taking of otter in beaver sets, and increase otter populations in areas of the Southern Zone currently closed to otter trapping. Currently, when river otter trapping seasons are held, the season dates for otter are the same as beaver because they live in the same or similar habitats. Traps without the modified triggers are capable of catching either species. The proposed regulation will provide the Department with the flexibility to establish shorter otter trapping seasons "within" a longer beaver trapping season in areas where limited otter harvest may be allowable.

Concerns were expressed that the proposed regulation will increase the length of time required to kill a beaver in a body-gripping trap. Body-gripping traps, sometimes referred to as "Conibear" traps, catch and hold beaver under water. Beaver are primarily killed via the build-up of carbon dioxide in the blood stream. This manner of death occurs regardless of whether the trigger is positioned to the side of the trap, or if it is centered. Moreover, the Department's research, summarized at <http://www.dec.state.ny.us/website/dfwmr/wildlife/wildgame/330testing.pdf>, shows that the "strike" locations of modified and unmodified body-gripping traps is not significantly different. Therefore, the Department believes that the use of body-gripping traps with modified triggers will not alter the animal welfare considerations associated with beaver trapping.

Concerns were also expressed that the proposed regulation was unduly burdensome on trappers because of the proposed requirement that traps "possessed afield" would also need to be modified. Some trappers stated that this was especially relevant in areas where closed and open otter trapping areas are in close proximity. The Department has reviewed this concern and has concluded that this provision of the regulation is not essential to achieving the regulation's intended purpose or to effective enforcement of the regulation. Therefore, this language has been removed from the final text of the rule. However, the Department will carefully

evaluate the regulation and its effectiveness on an annual basis, and trapper compliance will be monitored. If necessary to ensure compliance and to facilitate enforcement, the Department will reconsider this issue and may propose a change in the future to require that modified traps be possessed afield as well.

Some trappers also expressed concern that the regulation required expensive alterations to existing traps, the purchase of new equipment, or both. The regulation has been written to specifically allow trappers to modify existing triggers with commonly available or inexpensively purchased materials. The Department estimates that each trapper will spend less than \$20 modifying their traps (\$2-3 per trap). The Department believes that the benefits of the proposed regulation (i.e., reduction of otter mortality) outweigh these costs.

Concern was expressed that trappers would not be able to effectively set traps under ice to catch beaver because the regulation would restrict the use of baits to attract beaver. This is not the case. The regulation does not effect the use of baits for traps set under water or under ice. Although traps used under ice will still need to be equipped with the modified triggers, the regulation does not restrict the placement of baits. Trappers will be allowed to place baits on their modified traps in any manner they choose.

Trappers expressed concerns that the proposed regulation would end the extension of mink and muskrat trapping during a beaver season extension. The Department remains concerned that mink and muskrat trappers may accidentally capture river otter during a closed otter season (e.g., during a beaver season extension), and that this change, as summarized in the proposed rulemaking, is warranted. However, there are several types of traps that are very selective for muskrat and mink, based on the dimensions of the openings. The Department will evaluate whether a new regulation should be proposed to allow mink and muskrat trapping during an open beaver trapping season by requiring the use of those more selective traps.

Concerns were expressed that the requirement to use modified traps would diminish the ability of trappers to catch beaver causing nuisance flooding or other damage. The Department's nuisance beaver permits are issued under a separate legal authority, and this regulatory proposal does not affect the process by which that authority is used for the issuance of special permits. The proposed regulation applies to licensed trappers trapping beaver during the regular beaver trapping seasons. The Departments' regional offices retain the authority to stipulate specific conditions on permits issued to control nuisance beaver, and this regulation does not affect that process.

Some comments stated that the Department's proposed regulation is needed, but that it should be aggressively enforced and carefully evaluated. The Department agrees and will continue to strongly enforce the trapping laws and regulations, including the proposed new regulation. The Department will annually evaluate this regulation to determine trapper compliance, trapper understanding, and the effectiveness of the regulation in reducing the catch of river otter in beaver traps. The first year of implementation (2005-2006) and subsequent years will be followed by a thorough evaluation of these factors, followed by potential adjustments in the regulation to address any technical or enforcement problems. The Department will inform trappers about the adoption of the new regulation through a direct mailing, along with prominent information about the requirements in future issues of the annual Hunting and Trapping Regulations Guide.

The Department is adopting the proposed regulation as originally published in the September 15, 2004 issue of the NYS Register, with the exception noted above: the removal of the words "possess afield" in the text of the proposed rule.

## Department of Health

### EMERGENCY RULE MAKING

#### Nursing Home Pharmacy Regulations

**I.D. No.** HLT-05-05-00003-E

**Filing No.** 42

**Filing date:** Jan. 14, 2005

**Effective date:** Jan. 14, 2005

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

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

**Statutory authority:** Public Health Law, section 2803

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

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

**Subject:** Nursing home pharmacy regulations.

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

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

Section 415.18 Pharmacy Services.

\* \* \*

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

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

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

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

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

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

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

(i) sublingual nitroglycerine; and

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

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

\* \* \*

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be

given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 13, 2005.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

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

##### Legislative Objectives:

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

##### Needs and Benefits:

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

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

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

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the unique clinical needs of special populations. When promulgated, these

regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

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

##### Costs:

##### Costs to Regulated Parties:

There will be no additional costs to regulated parties.

##### Costs to State and Local Government:

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

##### Costs to the Department of Health:

There will be no additional costs to the Department.

##### Local Government Mandates:

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

##### Paperwork:

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

##### Duplication:

The regulation does not duplicate any federal or state regulation.

##### Alternative Approaches:

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

##### Federal Standards:

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

##### Compliance Schedule:

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

#### **Regulatory Flexibility Analysis**

##### Effect on Small Business and Local Government:

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

##### Compliance Requirements:

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

##### Professional Services:

The regulation would impose no additional professional services.

##### Compliance Costs:

The regulation would impose no additional costs.

##### Economic and Technological Feasibility Assessment:

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

##### Minimizing Adverse Impact:

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

##### Small Business and Local Government Input:

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed revisions have been sent to the Codes and Regulations Committee of the Council and have appeared on the agenda of the Codes and Regulations

Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

**Rural Area Flexibility Analysis**

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

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

**Professional Services:**

The regulation would not require additional professional services.

**Compliance Costs:**

The regulation would not impose additional costs.

**Minimizing Adverse Impact:**

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

**Opportunity for Rural Area Participation:**

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

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

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

**Job Impact Statement**

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

**EMERGENCY  
RULE MAKING**

**Controlled Substances in Emergency Kits**

**I.D. No.** HLT-05-05-00004-E

**Filing No.** 43

**Filing date:** Jan. 14, 2005

**Effective date:** Jan. 14, 2005

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

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

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

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

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

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

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

**Subject:** Controlled substances in emergency kits.

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

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

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

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

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

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

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

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

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

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

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a

registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part, except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.*

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 13, 2005.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

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

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

##### Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and

control the possession, prescribing, manufacturing, dispensing, administering, and distribution of licit controlled substances within New York. Section 3300-a expressly states that one of the statute's purposes is to allow the legitimate use of controlled substances in health care.

##### Needs and Benefits:

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

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

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

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

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

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

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

##### Costs:

##### Costs to Regulated Parties

Healthcare facilities licensed as Class 3a institutional dispensers limited already possess required secure cabinets for safeguarding controlled substances. Such secure cabinets can also safeguard emergency kits containing controlled substances. Those facilities choosing to maintain such

emergency kits will incur minimal costs to do so. These costs will be reflected in the purchase of the limited supplies of controlled substances and the sealable emergency kits required to secure and store them.

**Costs to State and Local Government**

There will be no costs to state or local government.

**Costs to the Department of Health**

There will be no additional costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

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

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

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

**Duplication:**

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

**Alternatives:**

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

**Federal Standards:**

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

**Compliance Schedule:**

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

**Regulatory Flexibility Analysis**

**Effect of Rule on Small Business and Local Government:**

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

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

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

supply such facilities with controlled substances for emergency medication kits.

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

**Compliance Requirements:**

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

**Professional Services:**

No additional professional services are necessary.

**Compliance Costs:**

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

**Economic and Technological Feasibility:**

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

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

**Minimize Adverse Impact:**

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

**Small Business and Local Government Participation:**

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

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

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**

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

**Compliance Requirements:**

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional recordkeeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

**Professional Services:**

Pharmacies already employ the professional services of licensed and registered pharmacists. Class 3a healthcare facilities employ the services of practitioners, nurses, and consultant pharmacists. The proposed regula-

tion would require no additional professional services, either public or private, in rural areas.

#### Compliance Costs:

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

#### Economic and Technological Feasibility:

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

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

#### Minimizing Adverse Impact:

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

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

#### Rural Area Participation:

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

#### Job Impact Statement

##### Nature of Impact:

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

## EMERGENCY RULE MAKING

### Health Provider Network Access and Reporting Requirements

I.D. No. HLT-05-05-00005-E

Filing No. 44

Filing date: Jan. 14, 2005

Effective date: Jan. 14, 2005

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

**Action taken:** Amendment of sections 487.12, 488.12 and 490.12 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 460; and L. 1997, ch. 436

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

**Specific reasons underlying the finding of necessity:** The agency finds the immediate adoption of this rule is necessary to preserve the public health, safety and general welfare of the citizens of the State of New York. Compliance with State Administrative Procedure Act section 202(1) would be contrary to the public interest. This regulation would amend sections 487.12, 488.12, and 490.12 of 18 NYCRR to require all adult care facilities (ACFs) to establish and maintain a Health Provider Network (HPN) account with the Department of Health.

The HPN is a secure web-based application that can be utilized by these facilities to receive current and up-to-date information as well as to submit data to specialized programs for reporting or surveillance purposes. In times of emergencies or urgent matters, it is imperative that these facilities receive from the department and submit to the department information in a rapid, efficient manner. The HPN, a free service, is the best means to ensure a rapid, efficient exchange of information. Current methods of accessing and distributing information utilizing telephone, fax and e-mail have yielded sporadic results.

This problem was recently evident with the current and ongoing influenza crisis as the department was determining the availability and the need for influenza vaccine throughout the State. There will be a need for frequent updates to the State to quickly determine where the need is and where the vaccine is available. The vaccine shortage is only one reason that this regulation is needed. Any emergency affecting these facilities whether locally, regionally, or Statewide will need to be evaluated as soon as possible to permit the department to allocate resources and direct them to where they are most needed. New York has experienced various emergencies affecting these facilities in the recent past. The September 11, 2001 terrorist attacks, the August 2003 blackout and any weather related situations such as snow and ice storms, hurricanes and heat waves have all had an impact on the State's adult care facilities. The HPN will be the best means for the Department to communicate with these facilities to determine the best approach for handling such emergencies in the future.

**Subject:** Health provider network access and reporting requirements.

**Purpose:** To require adult homes, enriched housing programs and residences for adults to establish and maintain Health provider Network (HPN) accounts with the Department of Health for the purpose of exchanging information with the department in a rapid, efficient manner in times of emergencies or urgent matters.

**Text of emergency rule:** A new subdivision (k) is added to Section 487.12 to read as follows:

(k) *The operator of an adult home shall obtain from the Department's Health Provider Network (HPN), HPN accounts for each adult home he or she operates and ensure that sufficient, knowledgeable staff will be available to and shall maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the adult home's hours of operation, for emergency communication and alerts, must be designated by each home in the HPN Communications Directory. A policy defining the adult home's twenty-four hour, seven-day a week coverage, or coverage consistent with the home's hours of operation, shall be created and reviewed by the adult home no less than annually. Maintenance of each adult home's HPN accounts shall consist of, but not be limited to, the following:*

(1) *sufficient designation of the home's HPN coordinator(s) to allow for HPN individual user application;*

(2) *designation by the adult home operator of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;*

(3) *adherence to the requirements of the HPN user contract; and*

(4) *current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.*

A new subdivision (m) is added to Section 488.12 to read as follows:

(m) *The operator of an enriched housing program shall obtain from the Department's Health Provider Network (HPN), HPN accounts for each program he or she operates and ensure that sufficient, knowledgeable staff will be available to and shall maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the enriched housing program's hours of operation, for emergency communication and alerts, must be designated by each program in the HPN Communications Directory. A policy defining the enriched housing program's twenty-four hour, seven-day a week coverage, or coverage consistent with the enriched housing program's hours of operation, shall be created and reviewed by the enriched housing program no less than annually. Maintenance of each enriched housing program's HPN accounts shall consist of, but not be limited to, the following:*

(1) *sufficient designation of the enriched housing program's HPN coordinator(s) to allow for HPN individual user application;*

(2) *designation by the enriched housing program operator of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;*

(3) *adherence to the requirements of the HPN user contract; and*

(4) current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.

A new subdivision (k) is added to Section 490.12 to read as follows:

(k) *The operator of a residence for adults shall obtain from the Department's Health Provider Network (HPN), HPN accounts for each residence he or she operates and ensure that sufficient, knowledgeable staff will be available to and shall maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the residence for adults' hours of operation, for emergency communication and alerts, must be designated by each residence for adults' in the HPN Communications Directory. A policy defining the residence for adults' twenty-four hour, seven-day a week coverage, or coverage consistent with the residence for adults' hours of operation, shall be created and reviewed by the residence for adults no less than annually. Maintenance of each residence for adults' HPN accounts shall consist of, but not be limited to, the following:*

(1) *sufficient designation of the residence's HPN coordinator(s) to allow for HPN individual user application;*

(2) *designation by the residence for adults operator of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;*

(3) *adherence to the requirements of the HPN user contract; and*

(4) *current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.*

**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 April 13, 2005.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

The authority for the promulgation of these regulations is contained in Sections 460 and 461 of the Social Services Law (SSL) and Chapter 436 of the Laws of 1997. SSL Section 460 delegates the comprehensive responsibility for the development and administration of programs, standards and methods of operation of residential care programs to the Department of Social Services (DSS) directly or through social services districts, and with the cooperation of other state agencies to protect and assure the life, health, safety and comfort of individuals who must be cared for away from their own homes. SSL Section 461 requires DSS to promulgate regulations for adult care facilities subject to its inspection and supervision only after consultation with the board of social welfare, departments of health and mental hygiene and office for the aging. Chapter 436 of the Laws of 1997 transferred the functions, powers, duties and obligations concerning adult homes, enriched housing programs and residences for adults from the former Department of Social Services to the Department of Health.

##### Legislative Objectives:

The legislative objective of SSL Residential Care Program provisions is to provide services of the highest quality, efficiently and properly utilized at a reasonable cost. It also intends to effectively protect and assure the life, health, safety and comfort of residents who must be cared for away from their own homes. Consistent with this legislative intent, these provisions seek to require adult home, enriched housing and residence for adults providers to be enrolled and connected electronically to the Department's Health Provider Network (HPN).

The HPN is a secure web-based application that can be utilized by these entities to receive current and up-to-date information as well as submit data to specialized programs for reporting or surveillance purposes. In times of emergencies or urgent matters, such as disease outbreaks, it is imperative that these entities receive from and submit to the Department information in a rapid efficient manner. The HPN, a free service, is the best means to ensure a rapid, efficient exchange of information.

##### Needs and Benefits:

In 1996 the New York State Department of Health (NYSDOH) established the Health Information Network (HIN) for local health departments and the Health Provider Network (HPN) for all other health care partners. The Health Alert Network (HAN) is designed to post rapid alerts, updates

and information regarding current threats, developments, advisories or references for all HIN/HPN users.

These systems are housed within the NYSDOH Commerce System, a secure web-based application that allows healthcare providers and local health departments to receive current and up-to-date information as well as submit data to specialized programs for reporting or surveillance purposes. In order to access this secure application, users must obtain and maintain HPN accounts. It enables electronic connectivity in real time to partners who have HPN accounts. Hospitals and long term care facilities currently submit information for purposes of reporting. For example, hospitals submit information to the New York Patient Occurrence Reporting and Tracking System (NYPORTS), financial reports and Health Emergency Response Data System Reports (HERDS) and information by their HPN accounts. Due to the specificity of those programs, and lack of any HPN activity by some providers, the Department has encountered difficulty in reaching out in a rapid and efficient manner to multiple key contacts at health care facilities, agencies and residences in times of emergencies or urgent matters.

In order to enhance overall emergency preparedness in New York State, it is imperative that all health care facilities, agencies and residences be enrolled and connected electronically to this system with enough depth and scope to connect and respond on a 24 hour, 7 day a week basis. For facilities that are not open 24 hours a day, 7 days a week, such facilities must be able to connect and respond during the hours that are consistent with their hours of operation.

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

There is no cost to enroll in the HPN program. Facility staff will need to be designated as HPN Coordinators and HPN users. A computer and internet connectivity will be required. The cost of a computer and internet access can vary depending on the sophistication of the equipment and connection. A basic computer, which would be adequate for connecting to the HPN, could cost approximately \$500.00 with up to a free year of technical support. Additional technical support and warranties can be purchased for approximately \$44.00/month. Internet service costs as little as \$10.00/month up to \$45.00/month depending on the type of connection (dial-up vs. dedicated connection). Ultimately, the cost of compliance would be decided by each affected entity based on its needs.

Cost to State and Local Government:

None.

Cost to the Department of Health:

None.

Local Government Mandates:

None.

Paperwork:

There will be minimal paperwork required for enrolling in the HPN for each facility and each user.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternative Approaches:

Emergency communications with many health care providers have been difficult as many times only phone, fax, and in some cases, e-mail is available. No other alternatives were identified that would enable rapid communication bidirectionally. Experience over the past 24 month period has shown poor voluntary response from most facilities to requests that they obtain HPN accounts.

Federal Requirements:

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

Compliance Schedule:

The emergency regulations will go into effect immediately upon filing with the Department of State. A grace period will be established for full compliance within ninety days from the effective date. Initial accounts and partial Communication Directory completion shall be submitted within 30 days from the effective date.

#### **Regulatory Flexibility Analysis**

Effect of Rule:

There are 514 existing adult care facilities (ACFs) in New York State. Of those, 384 have been identified as being certified for 100 or fewer beds and considered a small business.

Local governments are not affected by this rule.

Compliance Requirements:

In order to comply with these requirements, an ACF must enroll in the NYSDOH HPN and be able to maintain the account as prescribed with

sufficient depth and scope of staff. A computer and internet connectivity will be required.

**Professional Services:**

All facilities required to enroll in the HPN program must have trained staff to participate. No other professional staff is required.

**Compliance Costs:**

There are no costs to facilities to establish an HPN account. A computer and internet connectivity will be required to participate in the HPN program. The cost of a computer and internet access can vary depending on the sophistication of the equipment and connection. A basic computer, which would be adequate for connecting to the HPN, could cost approximately \$500.00 with up to a free year of technical support. Additional technical support and warranties can be purchased for approximately \$44.00/month. Internet service costs as little as \$10.00/month up to \$45.00/month depending on the type of connection (dial-up vs. dedicated connection). Ultimately, the cost of compliance would be decided by each affected entity based on its needs.

**Economic and Technological Feasibility:**

It should be economically and technologically feasible for small businesses to comply with the regulations. Regulated parties will not incur any costs to establish an HPN account. Existing staff will need training to participate. Such training and technical support will be provided free of charge by the Department. A computer and internet connectivity will be required.

**Minimizing Adverse Impact:**

The Department will establish a grace period for full compliance for ninety days from the effective date. Initial accounts and partial Communication Directory completion shall be submitted within 30 days from the effective date.

**Small Business and Local Government Participation:**

Outreach to the affected parties, some of whom are small businesses, is being conducted.

**Rural Area Flexibility Analysis**

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural adult care facilities, nor will it impose any additional recordkeeping, reporting and other compliance requirements.

**Job Impact Statement**

A Job Impact Statement is not included because it is apparent from the nature and purpose of these amendments that they will not have a substantial adverse impact on jobs and employment activities.

## EMERGENCY RULE MAKING

### Health Provider Network Access and Reporting Requirements

**I.D. No.** HLT-05-05-00006-E

**Filing No.** 46

**Filing date:** Jan. 14, 2005

**Effective date:** Jan. 14, 2005

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

**Action taken:** Amendment of sections 400.10, 763.11, 766.9 and 793.1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2800, 2803, 3612 and 4010

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

**Specific reasons underlying the finding of necessity:** The agency finds the immediate adoption of this rule is necessary to preserve the public health, safety and general welfare of the citizens of the State of New York. Compliance with State Administrative Procedure Act section 202(1) would be contrary to the public interest. This regulation would add a new Section 400.10 of 10 NYCRR and amend sections 763.11, 766.9, and 793.1 of 10 NYCRR to require all facilities defined as a hospital within Public Health Law (PHL) article 28, home care facilities within article 36 of the Public Health Law and hospices within article 40 of the Public Health Law to establish and maintain a Health Provider Network (HPN) account with the Department of Health.

The HPN is a secure web-based application that can be utilized by these facilities to receive current and up-to-date information as well as to submit data to specialized programs for reporting or surveillance purposes. In

times of emergencies or urgent matters, it is imperative that these facilities receive from the department and submit to the department information in a rapid, efficient manner. The HPN, a free service, is the best means to ensure a rapid, efficient exchange of information. Current methods of accessing and distributing information utilizing telephone, fax and e-mail have yielded sporadic results.

This problem was recently highlighted by the current and ongoing influenza crisis as the department was determining the availability and the need for influenza vaccine throughout the State. There will be a need for frequent updates to the State to quickly determine where the need is and where the vaccine is available. The vaccine shortage is only one reason that this regulation is needed. Any emergency affecting these facilities whether locally, regionally, or Statewide will need to be evaluated as soon as possible to permit the department to allocate resources and direct them to where they are most needed. New York has experienced various emergencies affecting these facilities in the recent past. The September 11, 2001 terrorist attacks, the August 2003 blackout and any weather related situations such as snow and ice storms, hurricanes and heat waves have all had an impact on the State's health care facilities. The HPN will be the best means for the Department to communicate with these facilities to determine the best approach for handling such emergencies in the future.

**Subject:** Health provider network access and reporting requirements for arts. 28, 36 and 40 facilities.

**Purpose:** To require arts. 28, 36 and 40 facilities to establish and maintain health provider (HPN) accounts with the Department of Health, for the purpose of exchanging information with the DOH in a rapid efficient manner in times of emergencies or urgent matters.

**Text of emergency rule:**

PART 400
ALL FACILITIES—GENERAL REQUIREMENTS
(Statutory authority: Public Health Law, Sections 2800, 2803)
Sec.
400.1 Title and applicability
* * *
400.10 [RESERVED] <i>Health Provider Network Access and Reporting Requirements</i>
* * *

A new section 400.10 is added to read as follows:

*Section 400.10 Health Provider Network Access and Reporting Requirements*

*All facilities shall obtain from the Department's Health Provider Network (HPN) HPN accounts and ensure that sufficient, knowledgeable staff will be available to maintain and keep current such accounts. Twenty-four hour, seven day a week contacts, or contacts available consistent with the facility's hours of operation, for emergency communication and alerts must be designated by each facility in the HPN Communication Directory. A policy defining the facility's twenty-four hour, seven day a week coverage, or coverage consistent with the facility's hours of operation shall be created and reviewed no less than annually. Maintenance of each facility's HPN accounts shall consist of, but not be limited to, the following:*

*(a) sufficient designation of the facility's HPN coordinator(s) to allow for HPN individual user application;*

*(b) designation by the facility of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;*

*(c) adherence to the requirements of the HPN user contract; and;*

*(d) current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.*

A new subdivision (f) is added to Section 763.11 to read as follows:

*(f) Health Provider Network Access and Reporting Requirements. All agencies shall obtain from the Department's Health Provider Network (HPN), HPN accounts and ensure that sufficient, knowledgeable staff will be available to maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the agency's hours of operation, for emergency communication and alerts, must be designated by each agency in the HPN Communication Directory. A policy defining the agency's twenty-four hour, seven-day a week coverage, or coverage consistent with the agency's hours of operation, shall be created and reviewed no less than annually. Maintenance of each agency's HPN accounts shall consist of, but not be limited to, the following:*

*(1) sufficient designation of the facility's HPN coordinator(s) to allow for HPN individual user application;*

(2) designation by the agency of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;

(3) adherence to the requirements of the HPN user contract; and

(4) current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.

A new subdivision (o) is added to Section 766.9 to read as follows:

(o) *Health Provider Network Access and Reporting Requirements.* All agencies shall obtain from the Department's Health Provider Network (HPN), HPN accounts and ensure that sufficient, knowledgeable staff will be available to maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the agency's hours of operation, for emergency communication and alerts, must be designated by each agency in the HPN Communication Directory. A policy defining the agency's twenty-four hour, seven-day a week coverage, or coverage consistent with the agency's hours of operation, shall be created and reviewed no less than annually. Maintenance of each agency's HPN accounts shall consist of, but not be limited to, the following:

(1) sufficient designation of the agency's HPN coordinator(s) to allow for HPN individual user application;

(2) designation by the agency of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;

(3) adherence to the requirements of the HPN user contract; and

(4) current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.

A new subdivision (n) is added to Section 793.1 to read as follows:

(n) *Health Provider Network Access Reporting Requirements.* All hospices shall obtain from the Department's Health Provider Network (HPN), HPN accounts and ensure that sufficient, knowledgeable staff will be available to maintain and keep current such accounts. Twenty-four hour, seven-day a week contacts, or contacts available consistent with the hospice's hours of operation, for emergency communication and alerts, must be designated by each agency in the HPN Communication Directory. A policy defining the hospice's twenty-four hour, seven-day a week coverage, or coverage consistent with the hospice's hours of operation, shall be created and reviewed no less than annually. Maintenance of each hospice's HPN accounts shall consist of, but not be limited to, the following:

(1) sufficient designation of the hospice's HPN coordinator(s) to allow for HPN individual user application;

(2) designation by the hospice of sufficient staff users of the HPN accounts to ensure rapid response to requests for information by the State and/or local Department of Health;

(3) adherence to the requirements of the HPN user contract; and

(4) current and complete updates of the Communications Directory reflecting changes that include, but are not limited to, general information and personnel role changes as soon as they occur, and at a minimum, on a monthly basis.

**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 April 13, 2005.

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

#### **Regulatory Impact Statement**

Statutory Authority:

The authority for the promulgation of these regulations is contained in Sections 2800, 2803(2), 3612 and 4010 (4) of the Public Health Law (PHL). PHL Article 28 (Hospitals), Section 2800 specifies that "Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facili-

ties for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article."

PHL Section 2803(2) authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities. PHL Article 36 (Home Care Services), Section 3612 authorizes the SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to certified home health agencies, providers of long term home health care programs and providers of AIDS home care programs. PHL Article 40 (Hospice), Section 4010 (4) authorizes the SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to hospices.

#### **Legislative Objectives:**

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services of the highest quality at a reasonable cost. PHL Article 36 intends that there be a public commitment to the appropriate provision and expansion of services rendered to the residents of the State by certified home health agencies, to the maintenance of a consistently high level of services by all home care services agencies, to the central collection and public accessibility of information concerning all organized home care services, and to the adequate regulation and coordination of existing home care services. PHL Article 40 declares that hospice is a socially and financially beneficial alternative to conventional curative care for those afflicted by terminal illness. In recognition of the value of hospice and consistent with State policy to encourage the expansion of health care service options available to New York State residents, it is the intention of the Legislature that hospice be available to all who seek such care and that it become a permanent component of the State's health care system. Consistent with this legislative intent, these provisions seek to require Article 28, Article 36 and Article 40 healthcare providers to be enrolled and connected electronically to the Department's Health Provider Network (HPN).

The HPN is a secure web-based application that can be utilized by these facilities to receive current and up-to-date information as well as submit data to specialized programs for reporting or surveillance purposes. In times of emergencies or urgent matters, such as disease outbreaks, it is imperative that these facilities receive from and submit to the Department information in a rapid efficient manner. The HPN, a free service, is the best means to ensure a rapid, efficient exchange of information.

#### **Needs and Benefits:**

In 1996 the New York State Department of Health (NYSDOH) established the Health Information Network (HIN) for local health departments and the Health Provider Network (HPN) for all other health care partners. The Health Alert Network (HAN) is designed to post rapid alerts, updates and information regarding current threats, developments, advisories or references for all HIN/HPN users.

These systems are housed within the NYSDOH Commerce System, a secure web-based application that allows healthcare providers and local health departments to receive current and up-to-date information as well as submit data to specialized programs for reporting or surveillance purposes. In order to access this secure application, users must obtain and maintain HPN accounts. It enables electronic connectivity in real time to partners who have HPN accounts. Hospitals and long term care facilities currently submit information for purposes of reporting. For example, hospitals submit information to the New York Patient Occurrence Reporting and Tracking System (NYPORIS), financial reports and Health Emergency Response Data System Reports (HERDS) and information by their HPN accounts. Due to the specificity of those programs, and lack of any HPN activity by some facilities such as Diagnostic and Treatment Centers, the Department has encountered difficulty in reaching out in a rapid and efficient manner to multiple key contacts at health care facilities and agencies in times of emergencies or urgent matters.

In order to enhance overall emergency preparedness in New York State, it is imperative that all health care facilities and agencies be enrolled and connected electronically to this system with enough depth and scope to connect and respond on a 24 hour, 7 day a week basis. For facilities that are not open 24 hours a day, 7 days a week, such facilities must be able to connect and respond during the hours that are consistent with their hours of operation.

#### **COSTS:**

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

There is no cost to enroll in the HPN program. Facility staff will need to be designated as HPN Coordinators and HPN users. A computer and internet connectivity will be required. The cost of a computer and internet access can vary depending on the sophistication of the equipment and the connection. A basic computer, which would be adequate for connecting to the HPN, could cost approximately \$500.00 with up to a free year of technical support. Additional technical support and warranties can be purchased for approximately \$44.00/month. Internet service costs as little as \$10.00/month up to \$45.00/month depending on the type of connection (dial-up vs. dedicated connection). Ultimately, the cost of compliance would be decided by each affected entity based on its needs.

Cost to State and Local Government:

None.

Cost to the Department of Health:

None.

Local Government Mandates:

None.

Paperwork:

There will be minimal paperwork required for enrolling in the HPN for each facility and each user.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternative Approaches:

Emergency communications with many health care providers have been difficult as many times only phone, fax, and in some cases, e-mail is available. No other alternatives were identified that would enable rapid communication bidirectionally. Experience over the past 24 month period has shown poor voluntary response from most facilities to requests that they obtain HPN accounts.

Federal Requirements:

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

Compliance Schedule:

The emergency regulations will go into effect immediately upon filing with the Department of State. A grace period will be established for full compliance within ninety days from the effective date. Initial accounts and partial Communication Directory completion shall be submitted within 30 days from the effective date.

#### **Regulatory Flexibility Analysis**

Effect of Rule:

Any facility defined as a hospital pursuant to PHL Article 28, home care agency within PHL Article 36, or Hospice within PHL Article 40 will be required to comply. Small businesses (defined as 100 employees or less), independently owned and operated, affected by this rule will include: 3 hospitals, 237 diagnostic and treatment centers, approximately 100 nursing homes, and approximately 200 home care services agencies. There are 52 certified hospices in New York State. Most of them would fit into the category of a small business, but definitive data concerning their small business status was not available.

Local governments are not affected by this rule.

Compliance Requirements:

In order to comply with these requirements, a facility must enroll in the NYSDOH HPN and be able to maintain the account as prescribed with sufficient depth and scope of staff. A computer and internet connectivity will be required.

Professional Services:

All facilities required to enroll in the HPN program must have trained staff to participate. No other professional staff are required.

Compliance Costs:

There are no costs to facilities to establish an HPN account. A computer and internet connectivity will be required to participate in the HPN program. The cost of a computer and internet access can vary depending on the sophistication of the equipment and the connection. A basic computer, which would be adequate for connecting to the HPN, could cost approximately \$500.00 with up to a free year of technical support. Additional technical support and warranties can be purchased for approximately \$44.00/month. Internet service costs as little as \$10.00/month up to \$45.00/month depending on the type of connection (dial-up vs. dedicated connection). Ultimately, the cost of compliance would be decided by each affected entity based on its needs.

Economic and Technological Feasibility:

It should be economically and technologically feasible for small businesses to comply with the regulations. Regulated parties will not incur any costs to establish an HPN account. Existing staff will need training to participate. Such training and technical support will be provided free of charge by the Department. A computer and internet connectivity will be required.

Minimizing Adverse Impact:

The Department will establish a grace period for full compliance for ninety days from the effective date. Initial accounts and partial Communication Directory completion shall be submitted within 30 days from the effective date.

Small Business and Local Government Participation:

Outreach to the affected parties, some of whom are small businesses, is being conducted. Organizations who represent the affected parties have been given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

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

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural facilities defined as within Articles 28, 36, or 40 of the Public Health Law, nor will it impose any additional recordkeeping, reporting and other compliance requirements.

#### **Job Impact Statement**

A Job Impact Statement is not included because it is apparent from the nature and purpose of these amendments that they will not have a substantial adverse impact on jobs and employment activities.

## NOTICE OF ADOPTION

### **Rate of Payment for Limited Home Care Services Agencies**

**I.D. No.** HLT-36-04-00001-A

**Filing No.** 45

**Filing date:** Jan. 14, 2005

**Effective date:** Feb. 2, 2005

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

**Action taken:** Addition of Subpart 86-8 to Title 10 NYCRR.

**Statutory authority:** L. 1995, ch. 81, sec. 105-d as amd. by L. 1997, ch. 433, sec. 69

**Subject:** Establishment of a rate of payment for limited home care services agencies.

**Purpose:** To reduce Medicaid expenditures for certain personal care services furnished to eligible residents of an adult home or enriched housing program by providing reimbursement directly to the limited home care services agency rather than an outside personal care provider or certified home health agency.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-36-04-00001-P, Issue of September 8, 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 following comments are being made to points raised by the New York State Association of Health Care Providers, Inc., (HCP) and the Empire State Association of Adult Homes and Assisted Living Facilities regarding proposed changes to Part 86-8 of 10 NYCRR.

Comment

HCP opposes the proposed regulation based on concerns about the timing of adoption. With the Limited Licensed Home Care Services Agencies (LLHCSA) legislation set to expire on March 31, 2005, and the recent adoption of the Assisted Living Program legislation, HCP believes that the proposed regulations will complicate the process of extending the existing LLHCSA statute and implementing the new Assisted Living law.

Response

This proposal is designed to codify a reimbursement method, as required by existing statute (Section 367-p of the Social Services Law), which will provide another option for the delivery of personal care services

and certain nursing services currently being provided to the residents of adult homes or enriched housing programs. Although statutory changes to the LLHCSA and Assisted Living laws may be adopted in the future, this regulation is required under existing law and is necessary to allow the adult homes and enriched housing programs the flexibility to provide these needed services directly to their residents as LLHCSAs.

**Comment**

HCP is concerned that the proposed regulations to allow adult homes or enriched housing programs to operate LLHCSAs may limit freedom of choice for residents and may create an exclusive Medicaid market for the adult home and enriched housing program providers.

**Response**

This proposal actually expands access to needed services for adult home and enriched housing program residents by creating an opportunity for services to be provided directly by the LLHCSA, rather than through contract arrangement only with personal care providers or certified home health agencies. In addition to expanding access to services for residents of adult homes or enriched housing programs, Department analysis has determined that expanding the market of potential providers to include LLHCSAs creates an opportunity for a cost savings to the Medicaid program.

**Comment**

The Empire State Association of Adult Homes and Assisted Living Facilities (ESA) is opposed to the calculation of regional rates based on 1997 weighted average fee for service rates without a cost of living adjustment. ESA is also opposed to the quarter hour billing rate for personal care services based on the excessive recordkeeping requirements that will be created.

**Response**

The regional rates were calculated and maintained at the original level to insure, in accordance with Section 367-p of the Social Services Law, that "... a limited home care services agency licensed by the department of health shall be reimbursed at a rate that is significantly less than the current costs of providing such services through a personal care provider or certified home health agency in the same service area." Quarter hour personal care rates are a standard billing unit for Medicaid personal care services designed to provide needed flexibility for local district social services to more effectively authorize appropriate levels of service.

**Comment**

ESA states that, contrary to the Regulatory Impact Statement, there is a cost to the regulated parties (adult homes and enriched housing programs) that will result from adoption of this regulation.

**Response**

The Regulatory Impact Statement analysis properly reflects the cost to regulated parties for this specific regulatory amendment codifying the reimbursement methodology as required by existing statute. The Regulatory Impact Statement properly does not address any analysis of the cost for an adult home or enriched housing program to become a LLHCSA, since the proposed regulation does not require that any adult home or enriched Housing program become a LLHCSA.

**Comment**

ESA is opposed to the adoption of the regulations without the Department addressing several programmatic concerns that effect the operation of the LLHCSA:

- The need for expansion of medication assistance tasks for registered nurses that would allow the LLHCSA to bill for needed services beyond the subcutaneous and/or intramuscular injections identified in the proposed regulations.
- Allowing administration of medications by a licensed practical nurse under the supervision of a registered nurse as an appropriate and cost effective measure that is utilized in all other health care settings.
- The need for a more reasonable definition of "total assistance" to insure a less restrictive interpretation of resident clinical eligibility for personal care services in the LLHCSA program.

**Response**

This proposal is designed to codify a reimbursement method, as required by existing statute (Section 367-p of the Social Services Law), which will provide another option for the delivery of personal care services and certain nursing services currently being provided to the residents of adult homes or enriched housing programs under the existing LLHCSA program structure. The program changes proposed by ESA can form the basis for continued efforts, in cooperation with the Department, to improve the delivery of care to adult home and enriched housing residents through the LLHCSA program. At this time; however, the proposed reimbursement regulation is required under existing law and is necessary under the existing LLHCSA program structure, to allow the adult homes and enriched

housing programs the flexibility to provide these needed services directly to their residents.

## NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

### New York City Watershed Rules and Regulations

**I.D. No.** HLT-32-04-00003-C

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

**The notice of proposed rule making**, I.D. No. HLT-32-04-00003-P was published in the *State Register* on August 11, 2004.

**Subject:** New York City watershed rules and regulations.

**Purpose:** To make the State-adopted New York City watershed rules and regulations consistent with the revised New York City regulations.

**Substance of rule:** The purpose of the NYC watershed regulations is to provide tools to protect New York City's water supply, which serves more than half the population of New York State – eight million residents of New York City (the City) and an additional one million consumers north of the City. The regulations were developed by the New York City Department of Environmental Protection (NYCDEP) in conjunction with the New York State Department of Health (the Department) to preserve and, wherever possible, improve the excellent quality of the water supply by reducing, eliminating and controlling current and potential sources of pollution and contamination.

The City recently revised its watershed regulations banning new galley systems in the NYC watershed. The City took that action based on a study it commissioned required by the Watershed Agreement. The Galley Project Final Report: A General Study of Galley Systems, May 2000, by James M. Hassett, Ph.D., Donald I. Siegel, Ph.D., Mark Sherlock, Ph.D. and Albert Zumbuhl, M.S., concluded that galley systems were not as effective in treating wastewater as conventional subsurface sewage treatment systems (SSTSs). The City also conducted an analysis of new SSTSs constructed on the watershed from May 1997 through August 2001. The analysis was presented in a November 5, 2001, DEP Findings Memorandum, re: Proposed Modification to NYC's Watershed Regulations to Prohibit New Galley Systems in NYC's Upstate Watershed, CEQR #01DEP088. The analysis revealed that less than 1% (26 of 2972) of the SSTSs were galley systems. The City concluded that banning galley systems would benefit water quality in the watershed while having minimal impact on development.

**Changes to rule:** No substantive changes.

**Expiration date:** August 11, 2005.

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

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

## NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

### Part-Time Clinics

**I.D. No.** HLT-32-04-00007-C

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

**The notice of proposed rule making**, I.D. No. HLT-32-07-00007-P was published in the *State Register* on August 11, 2004.

**Subject:** Part-time clinics.

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

**Substance of rule:** The proposed amendments would update standards under which part-time clinics are permitted to operate and establish new procedures for the process by which clinics are approved to provide services. These changes will promote improved quality and appropriateness of care at a reasonable cost to payers.

**Changes to rule:** No substantive changes.

**Expiration date:** August 11, 2005.

**Text of proposed rule and changes, if any, may be obtained from:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza,

Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

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

### NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

#### Payment for Psychiatric Social Work Services

**I.D. No.** HLT-32-04-00008-C

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

**The notice of proposed rule making**, I.D. No. HLT-32-04-00008-P was published in the *State Register* on August 11, 2004.

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

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

**Substance of rule:** This amendment will allow psychotherapy by certified social workers (CSWs) as a billable visit under the following circumstances:

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

**Changes to rule:** No substantive changes.

**Expiration date:** August 11, 2005.

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

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

### NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

#### Standard Autopsy Protocols for Unanticipated Infant Deaths

**I.D. No.** HLT-32-04-00009-C

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

**The notice of proposed rule making**, I.D. No. HLT-32-04-00009-P was published in the *State Register* on August 11, 2004.

**Subject:** Standard autopsy protocols for unanticipated infant deaths.

**Purpose:** To establish standard autopsy protocols for any person under the age of one year whose death is unanticipated by medical history or when the cause of death is unknown.

**Substance of rule:** The proposed regulations require infant autopsies consistent with the International Standardized Autopsy Protocol for Sudden Unexpected Infant Death (ISAP). The ISAP was developed and implemented to serve the following purposes:

- Assist medical examiners, hospital pathologists and coroners in establishing the cause and manner of death of infants dying suddenly and unexpectedly.
- Standardize postmortem examinations in participating countries.
- Assist in comparison of SIDS cases in participating countries.
- Support research.

**Changes to rule:** No substantive changes.

**Expiration date:** August 11, 2005.

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

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

### NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

#### Water Well Construction

**I.D. No.** HLT-33-04-00004-C

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

**The notice of proposed rule making**, I.D. No. HLT-33-04-00004-P was published in the *State Register* on August 18, 2004.

**Subject:** Water well construction.

**Purpose:** To establish standards for water well construction.

**Substance of rule:** DOH proposes to replace the existing Appendix 5-B (known as "Rural Water Supply") of its rules and regulations, 10 NYCRR, with a new Appendix 5-B, "Standards for Water Wells." The proposed new Appendix 5-B provides the minimum requirements for all water wells used for drinking, culinary and/or food processing purposes. Concurrent amendments will be made to other DOH regulations that reference Appendix 5-B and/or Rural Water Supply to update these references.

**Changes to rule:** No substantive changes.

**Expiration date:** August 18, 2005.

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

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

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Claim Submission Guidelines for Medical Service and Hospital Claims

**I.D. No.** INS-45-04-00002-E

**Filing No.** 37

**Filing date:** Jan. 12, 2005

**Effective date:** Jan. 12, 2005

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

**Action taken:** Addition of Part 217 (Regulation 178) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

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

**Specific reasons underlying the finding of necessity:** Prior to the enactment of Chapters 637 and 666 of the Laws of 1997 (the "Prompt Pay Law"), establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs and PHSPs to pay claims or bills for healthcare services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The lack of specific statutory time frames for payment encouraged delayed payment of claims.

Chapter 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to settlement of claims for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42, or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers.

Since the effective date of the prompt payment statute, the Insurance Department has received over 88,000 complaints against insurers, HMO and PHSPs concerning late payment of claims. The Department also levied

periodic monetary penalties against insurers, HMOs and PHSPs for untimely payment and untimely denial of health care claims.

While insurers, HMOs and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs and PHSPs regarding when a claim should be considered clean and therefore ready for payment.

The Insurance Department convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. Regulation 178 is the result of several meetings, discussions and agreement, and represents a consensus of the Healthcare Roundtable. The Department believes that the clean claim provision in this regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient.

The Insurance Department and the Healthcare Roundtable continue to meet to discuss additional changes that might be necessary to further the prompt pay requirements. This regulation must be promulgated as an emergency measure so that, as discussions continue, the clean claim parameters can be put in place and assessed to determine what other claim payment guidelines are needed. Insurers, HMOs and PHSPs are ready to accept the guidelines, as they will improve insurers', HMOs', and PHSPs' relationships with the provider community, which is essential for the viability of health insurance in New York State.

This regulation has been in effect, on an emergency basis, since August 14, 2003. Concurrent with this emergency adoption, the regulation is being adopted on a permanent basis. The permanent regulation will not become effective until after the last emergency version of the regulation expires. For the reasons stated above, this rule must be kept in effect by promulgated it on an emergency basis for the furtherance of the public health and general welfare.

**Subject:** Claim submission guidelines for medical service and hospital claims submitted in paper form.

**Purpose:** To create claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

**Text of emergency rule:** Section 217.1 Definitions and applicability.

(a) For the purposes of this Part:

(1) "Payer" shall mean an insurer authorized to write accident and health insurance or that is licensed pursuant to Article 43 of the New York Insurance Law, or an entity certified pursuant to Article 44 of the Public Health Law.

(2) "Submitted on paper" shall include claims submitted on paper or by facsimile.

(b) This Part shall apply to all health care claims submitted under contracts or agreements issued or entered into pursuant to Articles 32, 42 or 43 of the Insurance Law or Article 44 of the Public Health Law.

Section 217.2 Health Insurance claim submission guidelines.

(a) A claim for payment of medical or hospital services submitted on paper shall be deemed complete if it contains the minimum data elements set forth in this Part. If the minimum data elements set forth are not present or accurate, the payer may, but need not, adjudicate the claim if the payer can determine, based on the information submitted, whether such claim should be paid or denied. Even if the claim is deemed complete, a payer may, pursuant to the provision of Section 3224-a(b) of the New York Insurance Law, request specific additional information, distinct from information on the claim form, necessary to make a determination as to its obligation to pay such claim.

(b)(1) In the case of a medical claim submitted on the national standard form known as a CMS 1500 (previously known as HCFA 1500 (New York State)), attached as an appendix (Appendix 26), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1a. Insured's I.D. Number
2. Patient's Name
3. Patient's Date of Birth and Gender
4. Insured's Name (Last Name, First Name)
5. Patient's Address
9. Other Insured's Name (if appropriate)
- 9a. Other Insured's Policy or Group Number (if appropriate)
- 9b. Other Insured's Date of Birth and Gender (if appropriate)
- 9c. Employer's Name or School Name (if appropriate)
- 9d. Insurance Plan Name or Program Name (if appropriate)
- 10a. Is Patient's Condition Related to Employment?

- 10b. Is Patient's Condition Related to Auto Accident?
  - 10c. Is Patient's Condition Related to Other Accident?
  11. Insured's Policy, Group or FECA Number (if provided on ID Card)
  - 11d. Is There Another Health Benefit Plan?
  12. Patient's or Authorized Person's Signature (Can be completed by writing "signature on file" where appropriate)
  13. Insured's or Authorized Person's Signature (if appropriate)
  17. Name of Referring Physician or Other Source (if appropriate)
  - 17a. I.D. Number of Referring Physician (if appropriate)
  18. Hospitalization Dates Related to Current Services (if appropriate)
  21. Diagnosis or Nature of Illness or Injury
  - 24A. Dates of Service
  - 24B. Place of Service
  - 24D. Procedures, Services, or Supplies
  - 24E. Diagnosis Code (refer to item 21)
  - 24F. \$ Charges
  - 24G. Days or Units (for Durable Medical Equipment) (if appropriate)
  25. Federal Tax I.D. Number
  28. Total Charge
  29. Amount Paid (if appropriate)
  30. Balance Due
  31. Signature of Physician or Supplier Including Degrees or Credentials (if not already on file, except as required by applicable Federal and State laws)
  33. Personal Identifying Number of the particular practitioner rendering the care plus, if practicing in a group, the Identifying Number of the group as well
- (2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.
- (c)(1) In the case of a hospital claim submitted on the national standard form HCFA 1450 (also known as UB-92), attached as an appendix (Appendix 27), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:
1. Provider Name and Address
  3. Patient Control Number
  4. Type of Bill
  5. Federal Tax Number
  6. Statement Covers Period
  7. Covered Days (if appropriate) (interim bill, etc.)
  8. Non-Covered Days (if appropriate)
  9. Coinsurance Days (if appropriate)
  10. Lifetime Reserve Days (if appropriate)
  11. Newborn Birthweight (if appropriate)
  12. Patient Name
  13. Patient Address
  14. Patient Birthdate
  15. Patient Sex
  17. Admission Date
  18. Admission Hour
  19. Type of Admission
  22. Discharge Status Code
  42. Revenue Codes
  43. Revenue Description
  44. HCPCS/CPT4 Codes
  45. Service Date
  46. Service Units
  47. Total Charges (by revenue code)
  48. Non-Covered Charges
  50. Payer Name
  51. Provider ID
  54. Other Insurance Payment (if appropriate)
  55. Estimated Amount Due (if appropriate)
  58. Insured's Name
  59. Patient Relationship
  60. Patient's Cert. SSN - HIC - ID No.
  62. Insurance Group Number (if on card) (where appropriate)
  67. Principal Diagnosis Code
  68. Code
  69. Code

- 70. Code
- 71. Code
- 72. Code
- 73. Code
- 74. Code
- 75. Code
- 76. Admitting Diagnosis Code
- 77. E-Code
- 78. DRG #
- 79. P.C.
- 80. Principal Procedure Code and Date
- 81. Other Procedures Code and Date
- 82. Attending Physician's ID Number

(2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(d) Nothing in this Part shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

A new Appendix 26 of Title 11 is adopted to read as follows: See Appendix in this issue of the Register.

A new Appendix 27 of Title 11 is adopted to read as follows: See Appendix in this issue of the Register.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. INS-45-04-00002-EP, Issue of November 10, 2004. The emergency rule will expire March 12, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Mike Barry, Insurance Department, 25 Beaver St., New York, NY 10004-2319, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

#### **Regulatory Impact Statement**

1. **Statutory Authority:** The Superintendent's authority for the adoption of Part 217 of Title 11 (Regulation 178) is derived from Sections 201, 301, 1109, 2403, 3224, 3224-a of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the Superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law. Section 2403 prohibits any person from engaging in any trade practice constituting a "defined violation", which pursuant to the provisions of Section 2402(b) includes a violation of Section 3224-a. Section 3224-a sets forth the timeframes for timely payment of undisputed claims for health care services under contracts issued by insurers pursuant to Articles 32, 42 and 43 of the Insurance Law and by health maintenance organizations (HMOs) or Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. Section 3224 gives the Superintendent the authority to establish a standard claim form for physicians or other health care providers to be used for accident and health insurance claims and by Article 43 corporations.

2. **Legislative Objectives:** Prior to the enactment of Chapters 637 and 666 of the Laws of 1997, establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs or PHSPs to pay claims or bills for health care services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The statement in support of the prompt payment legislation stated that HMOs and insurers did not pay claims and bills in a timely fashion, to the detriment of providers and patients alike. The lack of specific statutory provisions encouraged payers to delay payments to take advantage of interest, which can be earned on the moneys being withheld from payment. The intent of the prompt payment law was to provide protection to both patients and health care providers relative to the timely payment of health service claims by insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs.

Prior to the legislation, there were generally no repercussions for the late payment of claims. Healthcare providers complained that there were

no incentives for paying claims promptly or penalties for late payments. Consequently, hospitals were accumulating large receivables because of these late payments.

Chapters 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to the settlement of claims for health care and payment for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers. New Section 3224-a prescribed penalties in the form of interest payable on claims paid later than 45 days. The law also amended Section 2402, to include a violation of Section 3224-a as a defined violation, and amended Section 2406 to specifically provide for the Superintendent to levy daily monetary penalties against such insurers, HMOs and PHSPs for their failure to pay undisputed health claims within 45 days of receipt, untimely denials of claims, or requesting additional information needed to process the claim beyond 30 days of receipt of the claim. The Insurance Department established mechanisms for accepting complaints from health care providers and created procedures for levying monetary penalties against insurers, HMOs and PHSPs for violation of the prompt payment statute.

Since January 1998, the Department has received over 88,000 complaints from health care providers against insurers, HMOs and PHSPs regarding the timely payment of health care claims. The Department has collected monetary penalties of approximately 5 million dollars from insurers, HMOs and PHSPs for violations of Section 3224-a.

The powers granted to the Superintendent of Insurance to investigate and enforce compliance with the prompt payment requirements established by the law as well as the new interest and penalty sanctions, help ensure that payments are made in a timely manner. The purpose of this regulation is to facilitate the legislative intent of the Prompt Pay Law by establishing minimum requirements when claims are submitted on paper as to what constitutes a clean or undisputed claim, thereby resulting in more timely payment of claims by insurers, HMOs and PHSPs.

3. **Needs and Benefits:** While insurers, HMOs, and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs, and PHSPs regarding when a claim should be considered to be clean and therefore ready for payment.

The Superintendent of Insurance convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs, and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. The group agreed that the guidelines established by the State of Connecticut in the form of a regulation, which sets forth elements of a clean claim, would be a good starting point in determining what information must be included on a claim form in order for the claim to be considered complete.

Regulation 178 is the result of several meetings, discussions and agreements, and represents a consensus of the Healthcare Roundtable. Members of the Roundtable include the Medical Society of the State of New York, The Healthcare Association of New York, The Greater New York Hospital Association, The Conference of Blue Cross Blue Shield Plans, the Health Plan Association, the American College of Obstetricians and Gynecologists, and various provider representatives.

This regulation is similar to Connecticut's regulation in that the parameters are clear and consistent with the health care claims process for provider claims submitted on paper. The regulation provides clear standards with which insurers, HMOs, and PHSPs need to comply in processing health care claims submitted on paper. In this way, providers will know what information will be needed when submitting such claims to ensure prompt payment of the claims.

4. **Cost:** Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs, and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

5. Local Government Mandates: The proposed regulation does not impose any new mandates on any county, city, town, village, school district or fire district.

6. Paperwork: The proposed regulation does not impose any reporting requirements on insurers, HMOs, PHSPs, or health care providers. No additional paperwork will be required from insurers, HMOs, PHSPs or health care providers, other than what is already required by statute.

7. Duplication: The proposed regulation does not overlap or duplicate any other state regulations, or federal mandates.

8. Alternatives: Interest groups representing providers and payers met on numerous occasions to develop the parameters for determining what constitutes a substantially complete claim. Various alternatives were considered but all affected parties agreed that the regulation represents the best solution to resolve the question about what constitutes a clean claim.

9. Federal Standards: There are no federal laws that require timely payment of undisputed health care claims. There is a new claims payment regulation issued by the United States Department of Labor, which relates to the processing of claims under employer group contracts, but the federal regulation does not address timely payment of health care claims.

10. Compliance Schedule: Since interested parties representing providers, HMOs, PHSPs and insurers developed the regulation, these parties are aware of the regulatory provisions and will be able to bring practices into compliance with the requirements. Insurers, HMOs, and PHSPs are ready to accept the guidelines, as they will improve insurers', HMOs', and PHSPs' relationships with the provider community, which is essential for the viability of health insurance in New York State. The regulation has already been promulgated on an emergency basis and has been in effect for many months.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: The regulation will affect insurers paying claims under contracts written pursuant to Articles 32, 42, and 43 of the Insurance Law and health maintenance organizations (HMOs) and Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of insurers authorized to do business in New York and has concluded that insurers and HMOs do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act, because there are none which are both independently owned and have under 100 employees.

There are under 20 PHSPs in New York, some of which are small businesses. PHSPs are entities certified pursuant to Article 44 of the Public Health Law that provide Medicaid services in a managed care environment. However, they will not be negatively impacted by this regulation. The regulation establishes minimum requirements for the submission of claims on forms that the plans currently use. The establishment of these minimum requirements will assist the plans by reducing the administrative burden of requesting additional information on incomplete claims.

The regulation will also affect health care providers, many of which are small businesses, submitting claims on paper for payment for health care services submitted on the CMS 1500 claim form and the CMS 1450 form. It sets forth guidelines for determining when a claim that is submitted on paper is considered complete and ready for processing. This regulation is the result of meetings with representatives of health care providers, insurers, HMOs and PHSPs, and represents a consensus between the Department and the various interested parties as to what information is necessary for a claim to be considered substantially complete. The regulation does not apply to or affect local governments.

2. Compliance requirements: Prompt payment reporting, recordkeeping and other compliance requirements are imposed by statute. Insurers, HMOs, and PSHPs are already paying claims for healthcare services to providers. There are no compliance requirements for local governments. There are no compliance requirements for small businesses including health care providers other than clarifying what constitutes a substantially complete claim so as to facilitate payment of claims to them.

3. Professional services: Insurers, HMOs, and PHSPs are not required and should not need to obtain professional services to comply with this regulation. Health care providers do not need to obtain additional professional services as a result of this regulation.

4. Compliance costs: The relevant statutes, as amended by Chapters 637 and 666 of the Laws of 1997, require that insurers, HMOs, and PSHPs pay undisputed claims within 45 days of receipt, or deny the claim, or request additional information within 30 days of receipt. Insurers, HMO, and PSHPs are already responding to the mandates of the prompt payment statute. This regulation had been requested by interested parties in order to establish the framework for what is considered a substantially complete

claim that is ready for processing. The regulation does not impose any additional cost to insurers, HMOs, and PSHPs. As a result of this regulation, insurers, HMOs, and PSHPs should not need to request additional information as frequently, thereby reducing their costs of processing claims.

5. Economic and technological feasibility: Compliance with the regulation should be economically and technologically feasible for small businesses since no new procedures or requirements are added and the regulation merely establishes the minimum items needed to have a clean claim when using the standard form and adherence on the part of the health care provider will speed the processing of health care claims and curtail the various requests from insurers and HMOs for additional information.

6. Minimize adverse impact: The regulation is intended to help health care providers, many of which are small businesses. If claims are substantially complete when submitted, insurers, HMOs and PHSPs will not need to request additional information. Consequently, payment to providers will be faster, resulting in lower receivables on the books of health care providers. Differing compliance timetables or an exemption from coverage by the regulation are not feasible given existing statutory requirements for prompt payment of claims.

7. Small businesses and local government participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory agenda, accessible to small businesses and local governments. Interested parties representing HMOs, insurers, and PHSPs and providers developed the regulation with Department representatives during numerous meetings convened by the Department, and therefore interested parties had an opportunity to participate in the rule making process.

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

1. Types and estimated number of rural areas: Health maintenance organizations (HMOs), Prepaid Health Service Plans (PHSPs) and insurers to which this regulation is applicable do business in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Health care providers in New York State are comprised of mostly physicians, but include other health care providers in individual practices or small groups throughout the state.

2. Reporting, recordkeeping and other compliance requirements and professional services: This regulation requires no additional recordkeeping or reporting by insurers, HMOs, or PHSPs other than that which they are required to perform by statute. Although health care providers are being asked to include certain elements on the claim form when a claim is submitted on paper to make it substantially complete, these elements have always been required by insurers and HMOs for claims that are submitted on paper by health care providers. The regulation will not add any new reporting requirements for health care providers, and professional services will not be needed to comply with the proposed regulation.

3. Costs: Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

4. Minimize adverse impact: Because the same requirements apply to both rural and non-rural entities, the regulation will impact all affected entities in the same manner. In fact, the regulation has the potential to decrease insurers', HMOs' and PSHPs' expenses, possibly reducing rate increase requests. It will also accelerate payment to providers for the delivery of health care services. This acceleration of payment to health care providers will help keep local doctors in family practice in their respective communities, and will foster consumers' continued access to providers.

5. Rural area participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory agenda. In addition, interested parties representing insurers, HMOs, PHSPs, and providers, potentially located in rural areas, discussed the regulation during numerous meetings convened by the Department and therefore had an opportunity to participate in the rule making process.

**Job Impact Statement**

This regulation will not adversely affect jobs or employment opportunities in New York State. The regulation is intended to improve the relationship between payers and providers, ultimately getting payment to providers more quickly, and helping to keep providers in their communities. As a result of the regulation, insurers will spend less time requesting information from health care providers. The regulation will also lessen confusion as to whether insurers have exercised bad faith in requesting additional information.

There is no anticipated adverse impact on job opportunities in this state.

**NOTICE OF ADOPTION****Claim Submission Guidelines for Medical Service and Hospital Claims**

**I.D. No.** INS-45-04-00002-A

**Filing No.** 38

**Filing date:** Jan. 12, 2005

**Effective date:** Feb. 2, 2005

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

**Action taken:** Addition of Part 217 (Regulation 178) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

**Subject:** Claim submission guidelines for medical service and hospital claims submitted in paper form.

**Purpose:** To create claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. INS-45-04-00002-EP, Issue of November 10, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Mike Barry, Insurance Department, 25 Beaver St., New York, NY 10004-2319, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

Part 1917 - Marine Terminal Standards edition; July 1, 1988 edition  
Part 1918 - Longshoring Standards; July 1, 1988 edition  
Part 1926 - Construction Standards; July 1, 1988 edition  
Part 1928 - Agricultural Standards; July 1, 1988 edition  
Certain revisions to these standards, published in the Federal Register through December 31, 2003, have been adopted previously.

Since the standards were last updated, the Department of Labor has obtained one additional standard:

1. Controlled Negative Pressure REDON Fit Testing Protocol — 69:46986-46994.
2. Fire Protection in Shipyard Employment; Final Rule — 69:55667-55708.

**Text of proposed rule and any required statements and analyses may be obtained from:** Diane Wallace Wehner, Legal Assistant II, Department of Labor, Counsel's Office, Rm. 509, State Campus, Bldg. 12, Albany, NY 12240, (518) 457-4380, e-mail: usbdww@labor.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**

This amendment is necessary because Section 27-a(4)(a) of the Labor Law directs the Commissioner to adopt by rule, for the protection of the safety and health of public employees, all safety and health standards promulgated under the U.S. Occupational Safety and Health Act of 1970, and to promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to OSHA. This insures that public employees will be afforded the same safeguards in their workplaces as are granted to employees in the private sector.

**Job Impact Statement**

As the proposed action does not affect jobs and employment opportunities but simply affords workplace safety and health guidelines to improve job performance and safety, a job impact statement is not submitted.

**Public Service Commission****NOTICE OF ADOPTION****Long Term Indebtedness by Chautauqua Utilities, Inc.**

**I.D. No.** PSC-20-04-00013-A

**Filing date:** Jan. 12, 2005

**Effective date:** Jan. 12, 2005

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

**Action taken:** The commission, on Jan. 12, 2005, adopted an order in Case 04-G-0576 allowing Chautauqua Utilities, Inc. to issue notes and indebtedness for the construction of a natural gas pipeline.

**Statutory authority:** Public Service Law, sections 4(1) and 69

**Subject:** Request for long term indebtedness.

**Purpose:** To approve the financial arrangement for the construction of a natural gas pipeline.

**Substance of final rule:** The Commission approved a request by Chautauqua Utilities, Inc. for authority to incur indebtedness not to exceed \$1,700,000 for the construction of a natural gas pipeline in Chautauqua County, New York, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-G-0576SA1)

**Department of Labor****PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Public Employee Occupational Safety and Health Standards**

**I.D. No.** LAB-05-05-00002-P

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

**Proposed action:** This is a consensus rule making to amend section 800.3 of Title 12 NYCRR.

**Statutory authority:** Labor Law, section 27-a.4(a)

**Subject:** Public employee occupational safety and health standards.

**Purpose:** To incorporate by reference into New York State Occupational Safety and Health Standards those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Dec. 14, 2004.

**Substance of proposed rule:** The proposed rule amends Section 800.3 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York, which sets forth those standards of the Occupational Safety and Health Administration which are incorporated by reference into state regulations. It is amended so as to incorporate those standards revised as of December 14, 2004.

The material incorporated by reference in Part 800.3 contains the following parts of Title 29 of the Code of Federal Regulations, revised as of the dates following the title of each part:

Part 1910 - General Industry Standards; July 1, 1988 edition

Part 1915 - Shipyard Employment Standards; July 1, 1988 edition

## NOTICE OF ADOPTION

**Schedule for Gas Service by Orange and Rockland Utilities, Inc.****I.D. No.** PSC-35-04-00018-A**Filing date:** Jan. 12, 2005**Effective date:** Jan. 12, 2005

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

**Action taken:** The commission, on Jan. 12, 2005, adopted an order in Case 04-G-0999 approving amendments to Orange and Rockland Utilities, Inc.'s (O&R) schedule for gas service—P.S.C. No. 4.

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

**Subject:** Tariff filing by O&R.

**Purpose:** To remove the emergency service provisions from Service Classification Nos. 3 and 8 and add new eligibility requirements for customers commencing interruptible transportation service under Service Classification No. 8.

**Substance of final rule:** The Commission approved a request by Orange and Rockland Utilities, Inc. (O&R) to remove from its gas tariff the Emergency Service provisions applicable to S.C. No. 3 – Interruptible Sales Service and S.C. No. 8 – Interruptible Transportation Service and to establish additional eligibility requirements for customers commencing interruptible transportation service under S.C. No. 8 on or after February 1, 2005.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-G-0999SA1)

## NOTICE OF ADOPTION

**Flex Rate by the City of Jamestown****I.D. No.** PSC-40-04-00005-A**Filing date:** Jan. 13, 2005**Effective date:** Jan. 13, 2005

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

**Action taken:** The commission, on Jan. 12, 2005, adopted an order in Case 04-E-1105 approving amendments to Jamestown Board of Public Utilities' (JBPU) schedule for electric service—P.S.C. No. 6.

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

**Subject:** Tariff filing by JBPU.

**Purpose:** To allow JBPU to negotiate flexible rate contracts with individual Service Classification No. 3 commercial and industrial customers.

**Substance of final rule:** The Commission approved a flex rate tariff by Jamestown Board of Public Utilities (JBPU) to establish Service Classification No. 6 which would allow JBPU to negotiate flexible rate contracts with individual Service Classification No. 3 Commercial and Industrial customers, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-1105SA1)

## NOTICE OF ADOPTION

**Daily Balancing Service by Niagara Mohawk Power Corporation****I.D. No.** PSC-44-04-00008-A**Filing date:** Jan. 12, 2005**Effective date:** Jan. 12, 2005

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

**Action taken:** The commission, on Jan. 12, 2005, adopted an order in Case 04-G-1274 approving amendments to Niagara Mohawk Power Corporation's (Niagara Mohawk) schedule for gas service—P.S.C. No. 219.

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

**Subject:** Tariff filing by Niagara Mohawk.

**Purpose:** To allow Niagara Mohawk to clarify language applicable to its daily balancing service under Service Classification No. 11—Load Aggregation.

**Substance of final rule:** The Commission approved amendments to Niagara Mohawk Power Corporation's (Niagara Mohawk) Schedule P.S.C. No. 219 – Gas to clarify that all customers (not just S.C. No. 7 customers) participating in Niagara Mohawk's Daily Balancing Program, who leave a Marketer's Pool either voluntarily or involuntarily, cannot return to the sales service.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-G-1274SA1)

## NOTICE OF ADOPTION

**Distributed Generation by Consolidated Edison Company of New York, Inc.****I.D. No.** PSC-45-04-00016-A**Filing date:** Jan. 12, 2005**Effective date:** Jan. 12, 2005

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

**Action taken:** The commission, on Jan. 12, 2005, adopted an order in Case 04-E-1315 approving amendments to Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule P.S.C. No. 2—Electricity.

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

**Subject:** Revisions to Con Edison's standby service.

**Purpose:** To offer customers more opportunities to install environmentally-friendly distributed generation equipment.

**Substance of final rule:** The Commission authorized Consolidated Edison Company of New York, Inc. to revise its standby service in order to provide additional opportunities for customers to install environmentally-friendly distributed generation equipment.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-1315SA1)

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

**Interconnection Agreement between Sprint Communications Company L.P. and Independent Local Exchange Carriers**

**I.D. No.** PSC-05-05-00007-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Sprint Communications Company L.P. with Champlain Telephone Company, Inc., Margaretville Telephone Company, Inc., Newport Telephone Company, Inc., Oneida County Rural Telephone Company, Inc. and Oneida County Rural Telephone Company (Independent Local Exchange Carriers) for approval of a mutual traffic exchange agreement executed on Jan. 1, 2005.

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. with Champlain Telephone Company, Inc., Margaretville Telephone Company, Inc., Newport Telephone Company, Inc., Oneida County Rural Telephone Company, Inc. and Oneida County Rural Telephone Company (Independent Local Exchange Carriers) have reached a negotiated agreement whereby Sprint Communications Company L.P. and Independent Local Exchange Carriers will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

**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, 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.

(05-C-0036SA1)

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

**Eligible Biomass Resources by Taylor Recycling Facility LLC**

**I.D. No.** PSC-05-05-00008-P

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

**Proposed action:** The commission is considering the request of Taylor Recycling Facility LLC to revise the definition of eligible biomass resources pertaining to the implementation of the renewable portfolio standard (RPS) adopted in its order regarding retail renewable portfolio standard that was issued on Sept. 24, 2004.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 66(1) and (2)

**Subject:** Eligible biomass resources regarding the retail renewable portfolio standard.

**Purpose:** To include in the definition of eligible biomass resources economically unrecyclable paper, paperboard, textiles, food, leather, yard waste and leaves.

**Substance of proposed rule:** The Commission is considering the request of Taylor Recycling Facility LLC to add to the definition of eligible biomass in Appendix B of the Order Regarding Retail Renewable Portfolio Standard, issued on September 24, 2004, the category of "adulterated biomass," which would include economically unrecyclable paper, paperboard, textiles, food, leather, yard waste and leaves. The company is not seeking to use adulterated biomass as a feedstock for biomass combustion or partial-combustion conversion technologies. Rather, it is requesting RPS authorization to use any form of adulterated biomass or mix of

adulterated biomass materials as a feedstock for biogas or liquid biofuels conversion technologies only if it can be demonstrated that the technology employed would produce power with emissions comparable to that of biogas or liquid biofuels using only unadulterated sources as feedstock. The Commission may accept, reject or modify the proposed definition of biomass resource eligibility.

**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, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(03-E-0188SA6)

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

**Method Changes for Calculation of Bills by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island**

**I.D. No.** PSC-05-05-00009-P

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

**Proposed action:** The Public Service Commission is considering a proposal by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) to use new procedures for estimating and prorating gas consumption, and is considering whether to grant a waiver of the regulations governing calculation of the gas cost adjustment.

**Statutory authority:** Public Service Law, sections 65 and 66(12)

**Subject:** Method changes for calculation of bills designed and intended to improve the accuracy of bills for residential, multi-family, and commercial and industrial classifications.

**Purpose:** To approve the changes.

**Substance of proposed rule:** The Public Service Commission is considering a proposal by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) to use new procedures for estimating and prorating gas consumption, and is considering whether to grant a waiver of the regulations governing calculation of the gas cost adjustment.

**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, 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.

(05-G-0028SA1)

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

**Rules and Guidelines for the Exchange of Retail Access Data between Jurisdictional Utilities and Eligible ESCO/Marketers**

**I.D. No.** PSC-05-05-00010-P

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

**Proposed action:** The New York State Public Service Commission is considering modifications in the electronic data interchange (EDI) 820 payment order/remittance advice – utility consolidated billing standard to reflect modifications in the Uniform Business Practices underlying this

standard and to enable recipients of 820 transactions to readily distinguish between payments/adjustments due to, or from, ESCOs associated with customer payments received by the utility, payments or adjustments pertaining to utility purchase of an ESCO customer receivable and payments/adjustments due to, or from, an ESCO that are unrelated to customer accounts.

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

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

**Purpose:** To revise the TS820 payment order/remittance advice standard to enable recipients of 820 transactions to readily distinguish between different types of payments/adjustments and update the business process document to reflect revised Uniform Business Practices.

**Substance of proposed rule:** In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission directed the development of data exchange standards compatible with Electronic Data Interchange (EDI) systems for those transactions that would be necessary to support its retail access billing and payment processing practices, as described in orders issued in Case 98-M-1343, In the Matter of Uniform Business Practices.

Version 1.0 of the TS820 Payment Order/Remittance Advice Standard, consisting of an Implementation Guide and Business Process Document, for use in Utility consolidated billing models was published on July 31, 2002. Remittance transactions are used to communicate the disposition of customer payments received on consolidated bills and are initiated coincident with the transfer of funds to the ESCOs bank via, for example, an ACH or EFT transaction. For utilities using the Pay-As-You-Get-Paid model, an 820 remittance transaction has been used to communicate payment/adjustment details pertaining to the ESCOs share of customer payments on consolidated bills.

On November 21, 2003 the Commission issued revised Uniform Business Practices which modified, among other things, the practices associated with billing and payment processing for utility consolidated billing. In addition, some utilities previously using the pay-as-you-get-paid method of payment processing have, or will be, implementing the purchased receivables method. For Purchased Receivables the utility billing party will remit funds to the ESCO to effect a purchase of the ESCOs current customer receivable, on a schedule determined by the utility, whether or not the customer has paid the bill. In this model, the amount to be remitted to a specific ESCO by a specific utility is dependent upon whether the receivable will be purchased at a discount and whether funds advanced by the utility are subject to recourse when customers fail to pay consolidated bills.

Accordingly, it is now necessary to revise both the Remittance Advice Business Processes Document, to reflect modifications in the Uniform Business Practices, and the 820 Remittance Advice Implementation Guide to accommodate various scenarios associated with the implementation of the Purchased Receivables model. The proposed revisions would enable both utilities and ESCOs to readily distinguish between payments/adjustments related to customer payments collected by the utility from payments/adjustments related to purchase of the ESCOs customer receivable. Version 2.0 also reflects additional data elements such that the amount of any discount may be separately identified to facilitate ESCO reconciliation of amounts billed customer with the associated remittance transmitted by the utility billing party.

At the same time, Orange & Rockland Utilities, Inc. (O&R) requests a change in the REF\*QY segment (Commodity) in the Implementation Guide to distinguish between the payments/adjustments for the unmetered portion of service on an electric account, consistent with a similar change proposed for the 814 Enrollment, 814 Drop, and 814 History Request standards. In addition, O&R requests modifications in the 820 Standard such that remittance transactions may be used to communicate information on payments/adjustments due to, or from, the ESCO which are unrelated to a specific end use customer account such as fees for billing services, imbalance charges, etc.

**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:** Jaelyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (98-M-0667SA52)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Rules and Guidelines for the Exchange of Retail Access Data between Jurisdictional Utilities and Eligible ESCO/Marketers

**I.D. No.** PSC-05-05-00011-P

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

**Proposed action:** The New York State Public Service Commission is considering modifications in the Electronic Data Interchange (EDI) 814 enrollment request and response standard to clarify the content and business rules surrounding the exchange of customer data when customers are enrolled with an ESCO/marketer directly by a utility rather than through an EDI enrollment request transaction sent by an ESCO/marketer. These changes are necessary to support the implementation of utility sponsored programs that feature introductory price discounts to customers who choose to participate in retail access by contacting their distribution utility rather than enrolling directly with an ESCO/marketer. To accommodate these incentive programs, it will be necessary to revise the TS814 Enrollment Implementation Guide, the Enrollment Business Process Document and section 5 of the Uniform Business Practices. The 814 enrollment standard is also being modified to require that a customer type indicator be provided in all request transactions to identify the account being enrolled as either a residential or nonresidential account. This change is necessary to enable utilities to reject enrollment request transactions from ESCO/marketers who are not certified to serve residential customers in accordance with revised Home Energy Fair Practices regulations.

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

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

**Purpose:** To revise the TS814 enrollment request and response standard documents and the Uniform Business Practices.

**Substance of proposed rule:** In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission adopted various data exchange standards, compatible with Electronic Data Interchange (EDI) systems, necessary to enable customers to easily change their electric or gas commodity service provider. Following the initial publication of these EDI standards, it has been necessary to modify one or more standards to recognize changes in regulatory policies. In conjunction with implementation of amendments to the Home Energy Fair Practices Act (HEFPA), existing data standards must be revised to provide for the exchange of additional information between utilities and Energy Service Companies (ESCOs) to facilitate compliance with revised HEFPA requirements.

In this instance, comments are requested on version 1.6 of the Enrollment Request & Response Standards, which consists of an Implementation Guide, a Data Dictionary and a Business Process Document, and a minor change in Section 5 of the Uniform Business Practices. These changes are necessary to (1) ensure that a residential customer is not enrolled with an ESCO who is not authorized to serve residential customers in accordance with revised HEFPA regulations and (2) accommodate a customer enrollment process that is initiated by the utility rather than by an Enrollment Request transaction transmitted by the ESCO.

To ensure compliance with revised HEFPA requirements, Request transactions initiated by the ESCO would now contain an additional element in the N1 (Customer) segment that would identify the account being enrolled as either a residential or nonresidential customer. In addition, to accommodate implementation of customer incentive programs designed to stimulate interest in retail access programs, the use of certain segments/elements in the 814 Enrollment Standard must be modified to support instances in which the utility enrolls a customer without receiving a Request transaction from the ESCO.

Normally an ESCO uses an EDI 814 Enrollment Request transaction to enroll a customer for electric or gas commodity service and the Utility receiving the request would respond by transmitting an Enrollment Response transaction indicating acceptance or rejection of the request. To stimulate customer participation in retail access, Orange & Rockland Utilities, Inc. (O&R) offers its customers an opportunity to pay a reduced commodity price for a predetermined incentive period when the customer chooses, or agrees to be randomly assigned to, an eligible ESCO. In this

type of incentive program, customers are enrolled directly by the utility that then transmits an Enrollment Accept Response transaction to notify the ESCO of the enrollment.

The use of certain segments/elements in the utility Accept Response transaction must now be modified to enable ESCOs to distinguish between utility response transactions pertaining to utility enrollments on behalf of the ESCO versus response transactions pertaining to requests initiated by the ESCO.

**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, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(98-M-0667SA53)

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

**Franchising Process by the Town of Haverstraw**

**I.D. No.** PSC-05-05-00012-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 the Town of Haverstraw (Rockland County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Franchising process.

**Purpose:** To waive certain procedures in order to expedite the franchising process.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Haverstraw (Rockland County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**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, 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.  
(05-V-0027SA1)