RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Sanitation Requirements for Poultry Dealers and Poultry Transporters

I.D. No. AAM-46-04-00004-E
Filing No. 140
Filing date: Feb. 7, 2005
Effective date: Feb. 7, 2005

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) the type of poultry being moved;

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. AAM-46-04-00004-P, Issue of November 17, 2004. The emergency rule will expire February 24, 2005.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

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

2. Legislative objectives:

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

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

3. Needs and benefits:

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Costs:

(a) Costs to regulated parties:

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

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

None.

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

5. Local government mandates:

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

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

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

9. Federal standards:

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

10. Compliance schedule:

Immediate compliance by the industry is expected.

Regulatory Flexibility Analysis

1. Effect of rule:

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

The amendments will have no impact upon local governments.

2. Compliance requirements:

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

The amendments will have no impact upon local governments.

3. Professional services:

None.

4. Compliance costs:

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

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

5. Economic and technological feasibility:

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

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

The amendments will have no impact upon local governments.

6. Minimizing adverse impact:

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

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

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

The amendments will have no impact upon local governments.

7. Small business and local government participation:

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

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

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

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

5. Rural area participation:

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

Job Impact Statement

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

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

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

NOTICE OF ADOPTION

Sanitation Requirements for Poultry Dealers and Poultry Transporters

I.D. No. AAM-46-04-00004-A
Filing No. 142
Filing date: Feb. 7, 2005
Effective date: Feb. 23, 2005

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

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

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

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

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

Text or summary was published in the notice of proposed rule making, I.D. No. AAM-46-04-00004-P, Issue of November 17, 2004.

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

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

Assessment of Public Comment
The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Communicable Diseases List

I.D. No. HLT-08-05-00001-E
Filing No. 139
Filing date: Feb. 4, 2005
Effective date: Feb. 4, 2005

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

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

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

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

Specific reasons underlying the finding of necessity: Influenza causes respiratory illness affecting 5% to 20% of the U.S. population each year. Complications of influenza can be severe and lead to pneumonia, exacerbation of chronic medical conditions or death. The incidence of influenza is typically reduced by the widespread availability of influenza vaccine. The U.S. influenza vaccine supply for the 2004-05 influenza season has been reduced by half due to manufacturing problems. This season's shortage of influenza vaccine underscores the urgent need for public health officials to track the disease.

The typical New York state influenza season runs from October to March. As of January 7, 2005, 8 hospitals and 165 nursing home nosocomial outbreaks of influenza in the state have already been reported to the New York State Department of Health. The Centers for Disease Control and Prevention (CDC) monitors state influenza activity levels based on CDC defined criteria. Since December 11, 2004, influenza activity in New York State has been "widespread," meaning there is increased influenza-like illness (ILI) and/or institutional outbreaks (ILI or laboratory-confirmed) reported in at least half of the regions. New York State was the first state in the nation to report widespread activity this season.

The new reporting requirements will enable the NYSDOH to have more comprehensive and complete information on influenza cases and will permit the NYSDOH to systematically monitor influenza activity. This finer level of detail will enable us to detect earlier the geographic and temporal occurrence of influenza cases throughout the state. With time, we will be able to do season-to-season comparisons of the number of cases reported, by county and statewide, which will improve assessments of yearly variations in influenza activity. Moreover, if there is a pandemic or a novel or severe strain of influenza is detected, the enhanced data will permit decisions about disease control efforts to be made on a timely and more accurate basis. All of this information is of critical public health importance and will permit the State and local health departments to channel limited vaccines, anti-viral agents, and public health resources to those in greatest need during an influenza outbreak.

By adopting this rule, laboratory-confirmed influenza will be added to the list of communicable diseases. Immediate adoption of this rule is necessary for accurate identification and monitoring of laboratory-confirmed influenza.

Subject: Addition of laboratory-confirmed influenza to the communicable disease reporting list.

Purpose: To enable the Department of Health to have more comprehensive and complete information on influenza cases and permit the State and local health departments to channel limited vaccines, anti-viral agents and public health resources to those in greatest need during an influenza outbreak.

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

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

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

Amebiasis
Anthrax
Arboviral infection
Babesiosis
Botulism
Brucellosis
Campylobacteriosis
Chancroid
Chlamydia trachomatis infection
Cholera
Cryptosporidiosis
Cyclosporiasis
Diphtheria
E. coli 0157:H7 infections
Ehrlichiosis
Encephalitis
Giardiasis
Glanders
Gonococcal infection
Group A Streptococcal invasive disease
Group B Streptococcal invasive disease
Hantavirus disease
Hemolytic uremic syndrome
Hemophilus influenzae (invasive disease)
Hepatitis (A; B; C)
Hospital-associated infections (as defined in section 2.2 of this Part)

Influenza (laboratory-confirmed)
Legionellosis
Listeriosis
Lyme disease
Lymphogranuloma venereum
Malaria
Measles
Melioidosis
Meningitis
Aseptic
Hemophilus
Meningococcal
Other (specify type)
Meningococcemia
Monkeypox
Mumps
Pertussis (whooping cough)
Plague
Poliomyelitis
Psittacosis
Q Fever
Rabies
Rocky Mountain spotted fever
Rubella
Congenital rubella syndrome
Salmonellosis
Severe Acute Respiratory Syndrome (SARS)
Shigellosis
Smallpox
Staphylococcal enterotoxin B poisoning
Streptococcus pneumoniae invasive disease
Syphilis, specify stage
Tetanus
Toxic Shock Syndrome
Trichinosis
Tuberculosis, current disease (specify site)
Tularemia
Typhoid
Vaccinia disease: (as defined in Section 2.2 of this Part)
Viral hemorrhagic fever
Yersiniosis

* * *

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 May 4, 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:

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

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding laboratory-confirmed influenza to reportable disease requirements, thereby permitting enhanced monitoring of disease, prompt identification of unusual strains of influenza or dramatic increases in disease reporting that might indicate an influenza pandemic, and authorizing isolation and quarantine measures, if necessary, to prevent further transmission.

Needs and Benefits:

A. Background

Influenza is an orthomyxovirus causing respiratory illness affecting 5% to 20% of the U.S. population each year. It is readily transmitted from person to person via respiratory droplets and contaminated surfaces. Persons may be able to infect others beginning one day before developing symptoms and up to seven days after onset of symptoms. Influenza can lead to severe complications including bacterial pneumonia, dehydration and worsening of chronic medical conditions, such as congestive heart failure, asthma or diabetes.

It is estimated that 1 to 3.8 million New York State residents are infected with influenza annually, resulting in approximately 13,000 hospitalizations and 2,350 deaths among New York State residents each year. During the 2003 — 2004 influenza season, there were reports from other states of increased pediatric deaths due to influenza. In New York State, reporting of pediatric deaths began mid-season and eight pediatric deaths were reported.

The New York State influenza season typically runs from October through March and as of January 7, 2005, 8 hospitals and 165 nursing homes in the state have reported nosocomial outbreaks of laboratory-confirmed influenza and 56 counties have indicated there is influenza in the community.

The spread of influenza may be prevented or significantly slowed by timely vaccination with the influenza vaccine. New York State, like the nation, has been faced with a severe vaccine shortage this year due to manufacturing problems. Approximately 6.5 million New Yorkers (2.7 million in New York City and 3.8 million in New York State, exclusive of New York City) have been identified as high priority for influenza vaccination this season according to October 5, 2004, national guidelines (these individuals include adults 65 years old and above, children 6 to 23 months old, pregnant women, persons with certain chronic diseases, caregivers of children less than 6 months old, and health care workers with direct patient contact). As a result of the vaccine shortage, more New York State residents than usual will not receive the vaccine and will be more likely to be susceptible to infection and illness, including hospitalization and death, and potentially transmit influenza to others who will be similarly susceptible.

In addition to the need to detect and target limited vaccine supplies and antiviral agents to those most at risk from an outbreak of influenza, public health officials are concerned about the growing potential for an international influenza pandemic and are particularly alarmed by the growing number of Asian countries that have reported outbreaks of highly pathogenic avian influenza in chickens and ducks, which has the capacity to jump the species barrier and cause severe disease, with high mortality, in humans.

Historically, influenza surveillance in New York State has relied on a variety of disparate, predominantly voluntary, reporting systems. These systems include: voluntary reporting by 13 virology labs in the state (because the patient's county of residence is not reported, information on geographic areas impacted in the state is lacking); voluntary weekly reporting of influenza-like illness, by age group, by 77 upstate and 45 New York City providers through the Sentinel Physician Influenza Surveillance (because other respiratory viruses are circulating and reports are not laboratory-confirmed, this system lacks specificity for influenza); and nosocomial outbreak reporting by hospitals and nursing homes as required by public health regulations.

The addition of laboratory-confirmed influenza to the State Sanitary Code will greatly enhance influenza reporting and surveillance efforts and enhance State and local health department abilities to target vaccine supplies and anti-viral agents when necessary. This regulation will permit the Department to require reporting from all disease reporters subject to Part 2 of the Sanitary Code. It is our intent to implement it by requiring reporting from a subset of these reporters unless disease outbreak conditions indicate the need for widespread reporting. This will permit adequate disease monitoring under current conditions without unnecessarily burdening the disease reporting system.

B. Reporting of Laboratory-Confirmed Influenza: Rationale for a Targeted Implementation Approach

Estimated Number of Laboratory-Confirmed Influenza Reports. As previously mentioned, approximately 1 million to 3.8 million New York State residents contract influenza annually. Not all persons with influenza seek medical attention, and not all persons with influenza who seek medical attention are tested for influenza. Given this reality, if it is conserva-

tively assumed that 1 million New Yorkers will contract influenza and it is further assumed that only 5% of New Yorkers infected with influenza in a given year are tested and have positive results, approximately 50,000 laboratory and subsequent communicable disease reports would be generated yearly in New York State, including New York City. Clearly the estimate would be much higher, if the upper estimate of 4 million residents contracting influenza were used.

An alternative approach is to base New York's expected experience on Colorado which implemented influenza reporting in 2001 and received about 13,000 influenza laboratory reports annually. Extrapolating Colorado's experience to New York, it is estimated that New York State, including New York City, would receive approximately 55,000 reports annually.

Based on these calculations, it seems reasonable to assume that approximately 50-55,000 cases of laboratory-confirmed influenza cases are possible in a given year in New York State.

Impact on Providers, Laboratories and Local Health Departments (LHDs).

If reporting of laboratory-confirmed influenza is fully implemented, health care providers and laboratories will have to report the cases to the LHD, and the LHD, in turn, will have to report them to the New York State Department of Health (NYSDOH). All positive results reported to the LHD will be investigated, as is done with the other diseases on the communicable disease list in 10 New York Codes, Rules and Regulations (NYCRR) Section 2.1. The total number of communicable disease reports investigated would more than double from 30,000 statewide to the 80-85,000 reports, based on estimates in the previous section. The sheer volume of reports, during the six-month influenza season, and especially during periods of widespread influenza activity, would place an undue burden on providers, LHDs and the NYSDOH. Extra staff may have to be hired in order to generate, transmit, receive, and manage the tens of thousands of reports. While full reporting may be needed under certain conditions, e.g. if there is an avian influenza outbreak, the Department is presently planning on using a more targeted implementation.

At present, there are 219 laboratories currently offering influenza rapid testing and/or viral culture in New York State. Required laboratory data can be transmitted to the NYSDOH and LHDs through hard copy reports or, more recently, through an electronic clinical laboratory reporting system (ECLRS). ECLRS was implemented in New York State in 2001 on a voluntary basis and currently 94 out of the 219 laboratories offering influenza testing participate.

The objective of ECLRS is to automate the laboratory reporting process and, thereby, decrease the staff time required to submit the information and also improve the timeliness of reports. The ECLRS system automatically sorts the data by program area and disease and then routes the data to the proper local health department for follow-up. The NYSDOH provides laboratories with access to the ECLRS system at no cost. There are initial costs to laboratories such as internet access, Laboratory Information System (LIS) vendor support for possible file creation, and information technology at the laboratory. Minimal costs are incurred by NYSDOH.

Laboratories that are most efficiently and economically equipped to report influenza results are those that not only participate in ECLRS but also electronically upload daily test results (versus manual entry), and use a coding schema called Logical Observation Identifiers Names and Codes (LOINC). LOINC utilizes universal identifiers for laboratory and other clinical observations and automatically routes the test results to the appropriate disease control program. Twenty-five out of the 94 laboratories participating in ECLRS meet these criteria. Limiting the implementation of laboratory-confirmed influenza reporting to these 25 laboratories, at this time, maximizes the number of reports the NYSDOH will receive, while significantly diminishing the burden this requirement places on all providers, other laboratories, local health departments, and the NYSDOH. It should be noted that two of the 25 laboratories are large commercial laboratories that report 76% of all electronically reported communicable diseases; it is estimated that these two laboratories would report 42,000 influenza results with limited fiscal impact. The large sample of laboratory-confirmed influenza cases is sufficient for determining geographic and temporal trends.

C. Summary Description of Targeted Implementation Approach:

1) Laboratory-Confirmed Influenza Reporting through ECLRS using LOINCS Coding. At least during the current influenza season, data reporting efforts will focus on laboratories that are reporting through the NYSDOH ELCRS using the file upload method and necessary LOINC coding system. At this time, medical providers do not need to report individual cases of influenza or submit a confidential case report (DOH-389) to the local health department except for pediatric influenza-related deaths (see #2 below). The data obtained will be useful for determining geographic and temporal trends.

The following two surveillance systems will assist in determining the severity of disease.

2) Pediatric deaths due to suspected or confirmed influenza: Medical providers shall report suspect or confirmed cases of fatal influenza in patients less than 18 years of age by telephone to the local health department.

3) Weekly Reporting of the number of patients hospitalized with laboratory-confirmed influenza: Hospitals shall report the number of confirmed influenza cases by age group among hospitalized patients. Reporting is to occur electronically via the Health Emergency Response Data System (HERDS) each Wednesday for the previous week ending Saturday midnight. This should include both community-acquired and nosocomial cases of influenza. The age groups are aggregated into the following categories: 0-23 months, 2 to 18 years, 19 to 64 years and greater than 64 years.

Costs:

Costs to Regulated Parties:

The addition of all laboratory-confirmed influenza to the listing of reportable diseases could result in approximately 50-55,000 laboratory-confirmed influenza reports in New York State, including New York City. If fully implemented, the cost of this requirement will be moderate to significant, depending on the extent of each year's outbreak and the need to hire additional staff.

At this time, the Department plans to require reports of laboratory-confirmed influenza cases from (1) clinical laboratories that participate in ECLRS, electronically upload data and use LOINC coding; (2) clinicians who diagnose pediatric deaths, and (3) hospitals (most likely the infection control staff) that will report the number of persons with laboratory-confirmed influenza each week. The justification and cost analysis for each is discussed below.

1. Clinical laboratories will be required to report if they are enrolled in ECLRS, electronically upload data files and use LOINC coding. Limiting this reporting requirement to the 25 such laboratories maximizes the number of reports the NYSDOH will receive (at least 48,000), while significantly diminishing the burden this requirement places on laboratories, local health departments and the NYSDOH. Because these laboratories already report through this existing electronic system, the cost will be minimal to the laboratories to make the modest programming changes required.

2. Providers will be required to report suspected or confirmed influenza-associated pediatric deaths. Influenza-associated pediatric deaths received considerable attention last year, prompting the federal Centers for Disease Control and Prevention to request state and local health departments to report influenza-associated death in persons less than 18 years of age. Most of the children who died last year were less than 5 years of age. Because no similar national data were collected previously, any change in the number of pediatric deaths is unknown. With the increased reports of pediatric deaths in 2003, the Council of State and Territorial Epidemiologists approved a resolution to add pediatric influenza-associated deaths to the list of nationally notifiable conditions in June 2004.

Since only eight pediatric deaths were reported in NYS, including NYC, in 2003-2004, it is not anticipated that this reporting requirement will place an undue burden on providers.

3. Hospitals will be required to report the number of hospital admissions related to laboratory-confirmed influenza using the Health Emergency Response Data System (HERDS). HERDS is a secure data system designed to allow the NYSDOH to identify and monitor select public health incidents as they occur in hospitals. The NYSDOH used HERDS for disease surveillance and control for the first time last year to monitor pediatric influenza morbidity and mortality. HERDS is provided free of charge to hospitals by NYSDOH. All hospitals have access to HERDS and experience using it. It is anticipated that reporting of influenza confirmed hospital admissions through HERDS will have a negligible impact on hospitals. Only weekly reporting of aggregate data by age groups will be requested from hospital infection control practitioners, i.e., individual case reports are not being requested.

Costs to Local and State Governments:

The staff who will be involved in reporting and tracking influenza at the State and local health departments are the same as those currently involved with other communicable diseases listed in 10 NYCRR Section 2.1. If reporting requirements were implemented across all providers,

additional staff would need to be hired. The time expended by a local health department to investigate an influenza case is estimated to be at least 15 minutes to receive the report, obtain any missing information, and enter the report into the surveillance data system. Based on this estimate, it would add 18,000 person-hours to complete the additional reports. The equivalent of a public health representative (grade 16) would be needed to complete the investigation (90% of the estimated time — 16,200 hours) and a keyboard specialist (grade 6-9) would be needed to data enter the report (10% of the estimated time — 1,800 hours).

Targeted implementation should have a minimal impact on local and state governments associated with these requirements since the reports submitted through ECLRS are automatically generated into reports, hospital admissions are reported electronically through HERDS, and pediatric deaths are few in number. Case investigations would be done on pediatric deaths only, which are anticipated to be very low in number. Hospitalizations and laboratory-positive reports would not have case investigations conducted by the LHD.

By monitoring and preventing the spread of influenza, savings may include reducing costs associated with public health control activities, morbidity, treatment and premature death.

Costs to the Department of Health:

The NYSDOH already checks communicable disease reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of laboratory-confirmed influenza to the list of communicable diseases should not lead to substantial additional costs. Even if fully implemented across all providers, existing staff should be able to handle the workload. Targeted implementation will require some modifications by the NYSDOH to the electronic database querying systems, but the work required should be limited in scope and time required and will be handled by existing staff.

Paperwork:

The existing general communicable disease reporting form (DOH-389) will be revised. This form is familiar to and is already used by regulated parties. The DOH-389 and an approximately 2-page supplemental CDC form will be used only on pediatric deaths. Reporting of hospitalizations will use an electronic data entry screen on HERDS for aggregate reporting.

Local Government Mandates:

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports of laboratory-confirmed influenza will be required to immediately forward such reports to the State Health Commissioner. Targeted implementation will require the local health officer to forward only reports received from physicians in attendance on cases of pediatric death associated with laboratory-confirmed influenza.

Duplication:

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

Alternatives:

Voluntary reporting is existing practice in New York State. However, recent experience during the influenza vaccine shortage and concern about an influenza pandemic make reporting of cases of laboratory-confirmed influenza of critical importance to public health. Laboratories in twenty-eight states are legally required to report influenza. In addition, 16 states currently require reporting of pediatric deaths and 3 states mandate reporting of hospital admissions with laboratory-confirmed influenza.

Federal Standards:

Currently there are no federal standards requiring the reporting of all influenza. The Centers for Disease Control and Prevention (CDC), and the Council of State and Territorial Epidemiologists (CSTE) recommend the reporting of pediatric deaths caused by influenza.

Compliance Schedule:

Reporting of laboratory-confirmed influenza will be mandated upon filing of a Notice of Emergency Adoption of this regulation with the Secretary of State and made permanent by publication of a Notice of Adoption of this regulation in the New York *State Register*.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

This proposed rule will apply to physicians, hospitals, nursing homes, diagnostic and treatment centers and clinical laboratories. There are approximately 65,000 licensed and registered physicians in New York State; it is not known how many of them practice in small businesses. There are 219 laboratories currently offering influenza rapid testing and/or viral culture in New York State. Three hospitals, 100 nursing homes, 237 diagnostic and treatment centers, and 25 or fewer laboratories offering influenza testing employ less than 100 persons and qualify as small businesses.

Full implementation would require reporting of laboratory confirmed influenza by all such entities to the local health department in New York City and in the other 57 counties of the State.

Targeted implementation will minimally impact clinical laboratories since, at this time, it would be limited to laboratories that participate in ECLRS, electronically upload data files and use LOINC coding. The effect of targeted implementation on other small businesses (hospitals, clinics, nursing homes, and physicians) should be moderate given that hospitals will need to report weekly through HERDS. There should be little impact on small businesses and local governments from reporting pediatric deaths since they are very limited in number.

Compliance Requirements:

Existing reporting forms will be revised. Clinical laboratories that are small businesses will utilize the revised NYSDOH electronic reporting format.

Professional Services:

If this requirement is fully implemented, additional professional staff might be required on a seasonal basis to complete the required forms manually and mail to the local health department. The need for additional staff would be dependent on the extent of each year's outbreak.

No additional professional services will be required for targeted implementation since certified laboratories participating in ECLRS, electronically uploading data files, and using LOINC codes are expected to be able to utilize existing staff to report laboratory-confirmed influenza.

Compliance Costs:

No initial capital costs of compliance are anticipated.

If fully implemented, the cost of complying with required reporting will be dependent on the extent of the outbreak and include staff time to complete the necessary forms and mail to the respective local health department.

The reporting of laboratory-confirmed influenza by certified laboratories that already participate in ECLRS and electronically upload data files will not result in significant compliance costs.

Reporting of pediatric deaths or influenza hospital admissions should have a negligible to modest effect on the estimated cost of disease reporting by hospitals.

The annual cost of compliance will be determined by the extent of any outbreak.

Minimizing Adverse Impact:

The NYSDOH recognizes the workload and cost involved if all aspects of the requirement to report laboratory confirmed influenza were implemented because of the potential volume of reports.

Use of existing data collection and reporting systems (hardware and staff) will minimize adverse impact. In addition, targeted implementation will also minimize adverse impacts by limiting the reporting of laboratory-confirmed influenza cases to clinical laboratories that currently participate in ECLRS, electronically upload data files and use LOINC coding, providers reporting pediatric deaths, and hospitals reporting the number of hospital admissions for laboratory-confirmed influenza.

The approaches suggested in the State Administrative Procedure Act Section 202-b (1) were rejected as inconsistent with the purpose of the regulation.

Feasibility Assessment:

Use of existing reporting systems makes this proposal technologically feasible. Targeted implementation at this time, will ensure economic feasibility. It is anticipated that the reporting requirement will be fully implemented only if disease conditions require it.

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed rule will apply statewide. It is assumed that the distribution of laboratory-confirmed influenza will be approximately the same across the state (proportional to the population density), although outbreaks do occur at varying times and in differing locations throughout the state throughout the influenza season of October to March.

Compliance Requirements:

Compliance requirements are the same in rural areas as those in all other areas of the state. Existing reporting forms will be revised. Clinical laboratories will use the revised NYSDOH electronic reporting format.

Professional Services:

If this requirement is fully implemented, additional professional staff may need to be hired on a seasonal basis to complete the required forms

and mail to the county health department. The targeted implementation of this requirement should not result in the need for additional professional services; rural providers are expected to use existing staff to comply with the requirements of this regulation.

Compliance Costs:

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information. The annual cost of compliance will be determined by the extent of any outbreak.

Minimizing Adverse Impact:

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

Rural Area Input:

The New York State Association of County Health Officers (NYSACHO), including representatives of rural counties, has been informed about this change and has voiced no objections.

Job Impact Statement

This regulation adds laboratory-confirmed influenza to the list of diseases that clinical laboratories, clinicians, and hospitals must report to public health authorities. If fully implemented, these facilities may need to increase staff on a seasonal basis. Targeted implementation should not significantly increase the demands on existing staff nor increase the need to hire additional staff for laboratories, hospitals, and providers. The NYSDOH has determined that this regulatory change will not have a substantial adverse impact on jobs and employment.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Motor Vehicle Inspections

I.D. No. MTV-08-05-00012-P

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

Proposed action: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a); 301(d)(1), (f); 302(a) and (e)

Subject: Motor vehicle inspections.

Purpose: To change inspection requirements.

Substance of proposed rule (Full text is posted at the following State website: www.nysdmv.com): Provides that the OBD II emissions inspection fee in the New York Metropolitan Area (NYMA) shall be up to $27.00, which shall be the same fee for the dynamometer or idle test.

Provides that effective April 1, 2005, motor vehicles registered in the NYMA shall be subject to the OBD II test.

Provides that effective April 1, 2005, all high enhanced inspection stations must have a NYVIP CVIS and must perform OBD II inspections on all non-exempt motor vehicles using the NYVIP CVIS.

Provides that vehicles classified as homemade or custom on the certificate of registration are only subject to the gas cap inspection/test.

Makes technical conforming amendments to various sections of Part 79 to establish requirements for implementation of OBD II testing in the NYMA.

Text of proposed rule may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, Associate Counsel, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Section 301(a) of the Vehicle and Traffic Law provides that the Commissioner of Motor Vehicles shall require an annual safety inspection of every motor vehicle registered in New York State. Section 301(c) of such Law authorizes the Commissioner to establish those mechanisms and equipment subject to the safety inspection. Section 301(d) of such Law authorizes the Commissioner, in consultation with the Commissioner of the Department of Environmental Conservation, to implement a motor vehicle emissions inspection program. Section 301(f) of such Law authorizes the Commissioner to promulgate regulations necessary to implement a heavy duty vehicle inspection program. Section 302(a) of such Law provides that it shall be the duty of the Commissioner to administer the provisions of Article 5. Section 302(e) of such Law empowers the Commissioner to make reasonable rules and regulations for the administration and enforcement of Article 5 and the periods during which motor vehicles are required to be inspected. Section 304(b) of such Law requires the Commissioner to establish procedures for reporting the results of inspections and notifying owners. Section 304-a of such Law authorizes the Commissioner to establish standards for certified inspectors.

2. Legislative objectives: The Federal Clean Air Act of 1990, (42 U.S.C 7401 et. seq.) and the accompanying regulations at 40 CFR Part 51.351 require the states to incorporate a check of the onboard diagnostic (OBD) computer as part of the inspection and maintenance program by January 1, 2002; NYS previously requested an extension until January 1, 2003. These amendments will further the objectives of the Federal Clean Air Act of 1990 by reducing emissions that cause air pollution.

This regulation also meets the objectives set forth in Article 5 of the Vehicle and Traffic Law by insuring that motor vehicles registered in NYS meet the State's rigorous emissions inspection criteria. This furthers the State's objective of cleaner and healthier air.

3. Needs and benefits: The State must adopt an OBD II emissions test regulation on a statewide basis to remain in compliance with the Federal Clean Air Act of 1990 and the accompanying regulations at 40 CFR Part 51.351. Part 51.351 requires all 1996 and later light-duty vehicles (less than 8,501 pounds) equipped with certified OBD systems to be subject to an enhanced emissions OBD II test procedure. Failure to implement such testing may yet result in the loss of 2 billion dollars in federal highway funding, as we are already out of compliance. In addition, the Department of Environmental Conservation has listed OBD II testing as a key element of its State Implementation Plan (SIP). The SIP is submitted to the federal Environmental Protection Agency to document that the State has established a clean air program that meets the requirements of the Clean Air Act of 1990.

On Board Diagnostics refers to a system, within passenger cars and light trucks in 1996 and newer vehicles, which monitors system degradation as it relates to powertrain components and emission control devices.

The State currently has two different programs in place; one program in the 9 county New York Metropolitan Area (NYMA) and one program in the 53 county Upstate Area. The NYMA includes the counties of New York, Kings, Queens, Richmond, Bronx, Nassau, Suffolk, Westchester and Rockland. Each of these areas will require different regulation changes in order to incorporate the mandated OBD testing.

Effective September 1, 2004, all 1996 and newer vehicles outside the NYMA are currently checked for the operation and activation of the vehicle's OBD system monitors. These monitors are manufacturer specific and include the comprehensive component monitor, misfire monitor, fuel monitor, oxygen sensor monitor, fuel monitor, oxygen sensor monitor, the catalyst monitor, the EGR monitor, the EVAP monitor, and the AIR monitor. This regulation requires inspection stations in the NYMA to purchase and install the NYVIP OBD II emissions equipment that will perform the OBD II inspection on 1996 & newer vehicles registered in the NYMA by April 1, 2005. Many inspection stations in the NYMA have complained about the length and complexity of the dynamometer test. Where as the dynamometer test takes about 15 minutes to perform, the OBD II test, including data input and data communications, takes only 5 minutes or less. Other advantages of OBD testing, as determined by EPA and vehicle manufacturer studies include: vehicle emissions problems are being identified earlier, scan tool equipment which provides valuable diagnostic information to the inspector in the form of fault codes that facilitate identifying the cause of the emissions problem, and a less intrusive testing methodology of the EVAP system. Presently EVAP system testing is a pressure test of the gas cap in the NYMA. The pressure test is time consuming and the tester requires calibration and maintenance, and neither check is as accurate as an OBD II system check which tests the entire fuel system for leaks. In addition, OBD typically identifies problems earlier than a traditional dynamometer test, therefore emissions related

problems can be corrected sooner, generally at a lower cost and before the vehicle produces harmful emissions.

Currently, with OBD II testing in the upstate area, if the on board diagnostic malfunction indicator light (MIL) does not operate properly it has been deemed a basis to fail the emissions portion of the inspection. Currently, in the NYMA, if the MIL does not operate properly, the vehicle owner is merely given advice to have the vehicle serviced soon. This will also be a failure criteria in the NYMA effective with OBD II testing.

This regulation is also beneficial to inspection station facilities (and their customers), because it clarifies many provisions of Part 79 without making substantive changes. For example, the regulation clarifies the equipment requirements for each classification of inspection station and clarifies the basis for passing or failing various parts of the safety and/or emissions inspection.

The proposed regulation will benefit the general public by enhancing to State's efforts to reduce air pollution caused by motor vehicles. This benefits the health and welfare of all New Yorkers. In addition, there is some evidence from the experience with emissions testing in Vermont, that there may be a lower failure rate with the OBD II test. This is due in part because educated vehicle owners notice that the MIL is improperly illuminated, and repair their vehicles' emission system prior to the emissions test. In addition, NYMA residents that have an OBD enabled vehicle can now get a single vehicle inspection anywhere in the state, rather than requiring them to receive a low enhanced, and subsequent high enhanced inspection when they return to the NYMA. This will benefit college students, vacation property owners and other segments of the population that regularly travel the state.

4. Costs: a. to regulated parties: As of January 2004, there were 4,400 licensed inspection stations in the NYMA, approximately 3,800 of which are actively transmitting inspection data monthly. The current dynamometer test is more lengthy and complex than the OBD II emissions test. The dynamometer test takes about 15 minutes, where as the OBD II scan test, including data input and data communications, only takes 5 minutes or less. Thus, there will be a significant savings in labor resources. In addition, long-term maintenance of the OBD II testing equipment is less costly than maintenance of the dynamometer. DMV estimates that approximately 51% of the vehicles registered in the NYMA are eligible for the OBD II test. The other 49% will still be subject to the tailpipe testing. However, the number of vehicles subject to OBD II is increasing at a rate of 6-8% annually.

The cost to an inspection station to purchase the required NYVIP equipment is $1664.02 for the basic unit capable of performing all required functions. There are optional upgraded equipment packages that a station may wish to buy. In addition, each station will need to have a dedicated telephone line for the unit to use, but the phone numbers dialed will be toll free; there will be no long distance charges. Inspection stations in the NYMA already have such a phone line for the NYTEST equipment, so there is no additional expense. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection. This per-call fee includes all regular maintenance of the unit for the life of the contract (approximately seven years). There will be a positive cost impact on all inspection stations in light of the new requirement that a vehicle will fail the emissions inspection if the malfunction indicator light is illuminated. This will result in an increase in the number of repairs needed to correct this malfunction. In the NYMA, the failure rate is likely to be comparable to the current failure rate, as we are replacing one test with another.

b. cost to the State, the agency and local governments: As stated in 4a, local governments that have their own certified inspection program will have to purchase the same equipment as a public station. The Department estimates that there are approximately 800 localities statewide that perform their own inspections.

The Department of Motor Vehicles will incur minimal costs in implementation of this regulation. The Department already has a system in place that receives transmissions from the inspection stations regarding the passing/failing of motor vehicles subject to the inspection. The Department will revise the CR-79 form, which essentially updates revisions to the Commissioner's Regulations. The cost to the Department shall be considerably decreased as the inspection system will be able to transmit revisions to the inspection stations that have the equipment. Stations that are exempt from purchasing the equipment will be mailed printed copies at a cost of $35,000 to the Department. Failure to implement the OBD II program may result in the loss of 2 billion dollars in federal highway funding to the State and delay reduction in vehicle emissions required in the SIP.

c. source: DMV's Office of Vehicle Safety and the Department of Environmental Conservation.

d. Cost to vehicle registrants. Individuals who have their vehicles inspected in the NYMA, shall pay the same emissions inspection fee that is currently charged-$27. Although the OBD II is quicker and more efficient, the Department is retaining this fee because NYMA stations must still perform the dynamometer based test on older vehicles. The stations are still incurring maintenance and operating expenses in relation to the NYTEST, justifying the $27 fee across the board. However, under this proposal a NYMA station is no longer required to charge $27, but may charge up to $27. Thus, stations, particularly those bordering non-NYMA counties, may choose to charge a lower inspection fee as a means to attract customers. In addition, stations may charge up to $10 for the safety inspection.

5. Local government mandates: Local governments in the NYMA that conduct their own emissions testing program may be required to purchase the OBD II testing equipment at a cost of $1,664.02. The Department estimates that there are about 800 localities performing their own inspections.

6. Paperwork: The reporting requirements are greatly simplified by this rule. There are no additional requirements for stations in the NYMA. Sticker inventory will also be kept in the new equipment, making it much easier for the station to comply with issuing and security rules.

7. Duplication: This proposed regulation does not duplicate or conflict with any State or Federal rule. It does require the implementation of the OBD II emissions test that is required by the Clean Air Act of 1990 and the accompanying regulations at 40 CFR Part 51.

8. Alternatives: The Department did not consider a no action alternative because the OBD II emissions test is required by Federal law. Failure to implement such a test may result in the loss of 2 billion dollars in federal highway funds.

9. Federal standards: The rule does not exceed the Federal emission standards set forth in the Clean Air Act of 1990 or its accompanying regulations at 40 CFR Part 51.

10. Compliance schedule: All NYMA stations must begin OBD II emissions testing by April 1, 2005 in order to be in compliance with Federal law.

Regulatory Flexibility Analysis

1. Effect of rule: The Department estimates that approximately 95% of the inspection stations in New York State are considered small businesses. There are approximately 11,000 (about 7,600 of which are active) licensed inspection stations in the Upstate Region of the State, and 4,400 (about 3,800 of which are active) in the New York Metropolitan Area (NYMA).

Approximately 800 political subdivisions in NYS perform their own inspections.

2. Compliance requirements: All NYMA public inspection stations will have to obtain the requisite equipment to perform the OBD II emissions inspection. Similarly, local governments who perform their own vehicle emissions inspections will have to obtain such equipment. Local governments that do not have sufficient vehicles subject to an emissions inspection may be exempt from purchasing the equipment. There are no additional recordkeeping or reporting requirements associated with this proposal. Both inspection stations and local governments will have to report test results to DMV, but reports will be electronic and automatic, as will sticker inventory and issuing reports.

All Upstate inspection stations currently fail vehicles if the OBD II check indicates a failure in the system. Once implemented in the NYMA, all inspection stations in the State will fail vehicles for OBD II system failure.

3. Professional services: The vendor, selected by a competitive procurement, who manufactures the OBD inspection equipment will be required to install and service the OBD II equipment for inspection stations and political subdivisions that perform their own inspections. Minimum training will be required for proper use of the equipment, and will be available at no additional cost. No other professional services shall be needed.

4. Compliance costs: Inspection stations and local governments, who inspect their own vehicles will be required to purchase the OBD II equipment at a cost of $1,664.02. On the beneficial side, NYMA inspection stations will save time performing the OBD II test, which is far less complex than the current dynamometer test. Where as the dynamometer test takes about 15 minutes to perform, the OBD II test, including data input and data communications, takes only 5 minutes. DMV estimates that approximately 51% of vehicles in the NYMA are currently subject to the OBD II test, increasing at an annual rate of 6-8% annually. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection, when the stations transmits the inspection information over a toll free line.

This per-call fee includes all regular maintenance of the unit for the life of the contract (seven years).

5. Economic and technological feasibility: Currently, inspection stations and political subdivisions in the NYMA employ a tailpipe emissions test. This test is complex and lengthy in nature. Since the OBD test is far simpler and quicker to perform, it will be technologically feasible. Although the NYMA stations may have to make an initial investment of up to $1,664, the relative speed and ease of the test will produce savings in the long run.

6. Minimizing adverse impact: This rule is the direct result of a federal requirement found in the Clean Air Act of 1990. Other than seeking to minimize the implementation cost of the OBD II inspection system by optimizing system arrangement to meet the federal requirements, no further means can be designed to minimize economic impacts. The effect on local governments from the rule will be no different from other regulated parties. The Department will assist inspection stations in obtaining the appropriate training to run the OBD equipment.

7. Small business and local government participation: The Department has consulted with the Long Island Gasoline Retailers Association, the Gasoline & Service Dealers Association, the Service Station Dealers of Greater NY, the Long Island Petroleum Dealers Association and the Greater New York Dealers Association. A series of informational sessions about the new programs and requirements are currently being conducted in the NYMA. We also consulted with State and Federal DOT, Federal EPA and the State Department of Environmental Conservation.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The technical clarifications incorporated into the proposed rule apply to the entire State. However, the primary focus of the rule, the purchase of new OBD II emissions testing equipment, only applies to stations in the New York Metropolitan Area (NYMA), which includes the counties of Nassau, Suffolk, Kings, Queens, Bronx, Richmond, New York, Westchester and Rockland. Upstate stations have already purchased emissions testing equipment and are not required to purchase equipment at this time.

2. Reporting, recordkeeping and other compliance requirements: All light duty public inspection stations in the NYMA area will be required to purchase and use the new OBD II equipment. Competitive bidding has resulted in a unit that will perform the inspection at a cost of $1664.02, which is a very reasonable cost compared with surrounding states, and one that is in line with other diagnostic and repair equipment purchased by such stations. The provisions in this rule that clarify safety inspection requirements apply to stations throughout the State.

3. Costs: The cost to a NYMA station to purchase the required equipment is $1664.02 for the basic unit capable of performing all required functions. There are optional upgraded equipment packages that a station may wish to buy. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection. This per-call fee includes all regular maintenance of the unit for the life of the contract (approximately seven years). There will be no additional maintenance costs, unless the equipment is damaged through abuse or misuse.

4. Minimizing adverse impact: This rule primarily affects the State's non-rural areas. However, industry surveys, consultation with repair associations and industry representatives indicate that the costs to rural stations are well within typical costs of other station equipment.

5. Rural area participation: The Department has consulted with the Long Island Gasoline Retailers Association, the Gasoline & Service Dealers Association, the Service Station Dealers of Greater NY, the Long Island Petroleum Dealers Association and the Greater New York Dealers Association. A series of informational sessions about the new programs and requirements are currently being conducted in the NYMA. When the OBD II program was adopted in September of 2004 in the Upstate, the Department consulted with the NYS Dealers Association and the NYS Gasoline Retailers Association, which represent inspection stations located in rural areas.

Job Impact Statement

1. Nature of impact: This regulation primarily affects the 3,800 active inspection stations in the New York Metropolitan Area (NYMA). They will see labor savings as the result of using the OBD II emissions testing system on 1996 and newer vehicles, because the OBD test is both simpler and quicker than the dynamometer test. This will free up inspectors to perform other tasks, such as repairs, which are more remunerative for such stations. The Department anticipates no other effects on employment opportunities as the result of this rule. In addition, in the past, when new emissions testing technology has been introduced, many automotive technicians seek training regarding the new technology. Although OBD has been a part of the industry since 1994, this parameter as a failure criterion for vehicle inspections is likely to spur some short term growth in the technician training industry.

2. Categories and numbers affected: There are approximately 3,800 active inspection stations in the NYMA, employing about 23,000 emissions inspectors.

3. Regions of adverse impact: The Department anticipates no adverse impact in any regions of the State.

4. Minimizing adverse impact: OBD II testing requirements are required by the Federal Clean Air Act of 1990. No adverse impact on job creation is anticipated as the result of this rule. Therefore, the Department had no need to minimize the impact of the rule.

5. Self-employment opportunities: Not applicable.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Citizens Telecommunications Company of New York, Inc., Frontier Citizens of New York, Inc. and Nextel of New York, Inc.

I.D. No. PSC-08-05-00003-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Citizens Telecommunications Company of New York, Inc. and Frontier Citizens of New York, Inc. with Nextel of New York, Inc. for approval of an interconnection agreement executed on Nov. 16, 2004.

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: Citizens Telecommunications Company of New York, Inc. and Frontier Citizens of New York, Inc. with Nextel of New York, Inc. have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. and Frontier Citizens of New York, Inc. with Nextel of New York, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until November 16, 2005, or as extended.

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

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

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

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

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

(05-C-0133SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Payment of Interest on Customer Overcharges by Niagara Mohawk Power Corporation

I.D. No. PSC-08-05-00004-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric—P.S.C. No. 207.

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

Subject: Rule No. 33—payment of interest on customer overcharges.

Purpose: To revise Rule No. 33 in regards to the manner the company refunds customer overpayments and interest when the overpayments were caused by a company error.

Substance of proposed rule: Niagara Mohawk Power Corporation proposes to revise Rule No. 33 — Payment of Interest on Customer Overcharges in its electric tariff schedule, P.S.C. No. 207, in regards to the manner the company refunds customer overpayments and interest when the overpayments were caused by a company error.

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

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

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

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

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

(05-E-0147SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Merchant Function Backout Credit and Transition Balancing Account by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York

I.D. No. PSC-08-05-00005-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, a proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12.

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

Subject: Merchant function backout credit and transition balancing account.

Purpose: To allow the account to continue until Nov. 1, 2006.

Substance of proposed rule: The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York proposes changes to its Schedule P.S.C. No. 12 — Gas to allow its Merchant Function Backout Credit and Transition Balancing Account to continue through November 1, 2006.

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

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

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

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

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

(99-G-1469SA9)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Merchant Function Backout Credit and Transition Balancing Account by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island

I.D. No. PSC-08-05-00006-P

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

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

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

Subject: Merchant function backout credit and transition balancing account.

Purpose: To allow the account to continue until Nov. 1, 2006.

Substance of proposed rule: KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island proposes changes to its Schedule P.S.C. No. 1 — Gas to allow its Merchant Function Backout Credit and Transition Balancing Account to continue through November 1, 2006.

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

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

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

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

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

(99-G-1469SA10)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Charges by Valley Energy, Inc.

I.D. No. PSC-08-05-00007-P

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

Proposed action: The commission is considering a petition from Valley Energy, Inc. to institute a revenue neutral modification to the minimum charges to gas sales customers taking service under Service Classification Nos. 1 and 4 and which clarified the charges to large volume gas transportation customers taking service under Service Classification No. 5. The commission may adopt, modify or reject, in whole or in part, the relief requested.

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

Subject: Minimum charges.

Purpose: To approve modifications to minimum charges.

Substance of proposed rule: The Commission is considering a petition from Valley Energy, Inc. to institute a revenue neutral modification to the minimum charges to gas sales customers taking service under service classification nos. 1 and 4, and which clarifies the charges to large volume gas transportation customers taking service under service classification no. 5. The Commission may adopt, modify or reject, in whole or in part, the relief requested.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-G-0821SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Retail Access Plan by Orange and Rockland Utilities, Inc.

I.D. No. PSC-08-05-00008-P

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

Proposed action: The Public Service Commission is considering a retail access plan filed by Orange and Rockland Utilities, Inc. on Jan. 27, 2005 in response to the statement of policy on further steps toward competition in retail energy market issued Aug. 25, 2004 in Case 00-M-0504.

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

Subject: The retail access plan filed by Orange and Rockland Utilities, Inc.

Purpose: To consider the plan.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, the Retail Access Plan by Orange and Rockland Utilities, Inc. filed January 27, 2005 pursuant to the Statement of Policy on Further Steps Toward Competition in Retail Energy Markets in Case 00-M-0504, issued and effective August 25, 2004. The Retail Access Plan outlines Orange and Rockland Utilities, Inc.'s proposed next steps to facilitate retail access in its service territory.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(00-M-0504SA14)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Electric Safety Standards

I.D. No. PSC-08-05-00009-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 whether to modify its electric safety standards based on several petitions for rehearing that have been filed with the commission. The commission may also consider other matters related to the application and implementation of the safety standards.

Statutory authority: Public Service Law, sections 2, 5, 65, 66

Subject: Electric safety standards and related matters.

Purpose: To consider revisions to the electric safetly standards applicable to all New York electric utilities subject to the commission's jurisdiction and matters related thereto.

Substance of proposed rule: The Public Service Commission (Commission) adopted safety standards on January 5, 2005 that apply to all electric utilities subject to its jurisdiction, both investor-owned and municipal. Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation (NYSEG), Niagara Mohawk Power Corporation, and Rochester Gas and Electric Corporation (RG&E), acting jointly, and Orange and Rockland Utilities, Inc., individually, filed petitions for rehearing of the safety standards; NYSEG and RG&E also jointly filed a separate petition for rehearing of the safety standards. If the Commission grants one or more of the petitions, it will consider whether and how to modify the safety standards. Among the issues raised are the timing of the testing required by the standards, the appropriateness of the revenue adjustments associated with failure to comply with the standards, the scope of the inspections, and the details of the certification requirements. The Commission may also consider other matters related to the application and implementation of the safety standards.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-M-0159SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Prescription Drug and Medicare Improvement Act of 2003

I.D. No. PSC-08-05-00010-P

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

Proposed action: As discussed in an order clarifying prior policy statement and order, instituting a proceeding, and soliciting comments issued Feb. 2, 2005 in Case 04-M-1693, the commission is considering whether any modifications are needed to its statement of policy and order concerning the accounting and ratemaking treatment for pensions and post-retirement benefits other than pensions, to accommodate the provisions of the Prescription Drug and Medicare Improvement Act of 2003.

Statutory authority: Public Service Law, sections 64; 65(1); 66(1), (4), (5), (9) and (10); 78; 79(1); 80(1), (3), (4), (7) and (8); 89-a; 89-b(1); 89-c(1), (3), (4), (7) and (8); 90(1); 91(1); 94(1), (2) and (3); and 95(2)

Subject: Accounting and ratemaking treatment relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003.

Purpose: To adopt modifications.

Substance of proposed rule: As discussed in an Order Clarifying Prior Policy Statement and Order, Instituting a Proceeding, and Soliciting Comments issued February 2, 2005 in Case 04-M-1693, the Commission is considering whether any modifications are needed to its Statement of Policy and Order Concerning the Accounting and Ratemaking Treatment for Pensions and Post-Retirement Benefits Other Than Pensions, to accommodate the provisions of the Prescription Drug and Medicare Improvement Act of 2003.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-M-1693SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Loan Agreement by Saratoga Water Services, Inc.

I.D. No. PSC-08-05-00011-P

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

Proposed action: The commission is considering the petition of Saratoga Water Services, Inc. for approval to enter into two loan agreements with The Adirondack Trust Company for a total amount up to $1,103,000.

Statutory authority: Public Service Law, section 89-f

Subject: Issue of stock, bonds and other forms of indebtedness.

Purpose: To allow Saratoga Water Services, Inc. to enter into a loan agreement.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the petition of Saratoga Water Services, Inc. for approval to enter into two loan agreements with Adirondack Trust Company for a total amount of $1,103,000. One loan will refinance two outstanding loans (approximately $285,000) and would be for seven years. The second loan for $818,000 would mature in 15 years and fund the construction of needed facilities, including a 750,000 gallon water storage tank and to expand a well field.

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

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

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

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

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

(05-W-0154SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Post-Race Blood Gas Testing Procedures for Thoroughbred and Harness Race Horses

I.D. No. RWB-08-05-00013-E
Filing No. 143
Filing date: Feb. 4, 2005
Effective date: Feb. 4, 2005

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

Action taken: Addition of sections 4043.8, 4043.9, 4043.10, 4038.18(f), 4120.13, 4120.14, 4120.15 and 4109.7(f) to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305, 401, 405 and 902; Unconsolidated Laws, section 8162(1)

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

Specific reasons underlying the finding of necessity: In January 2005, the U.S. Justice Department arrested a New York-licensed thoroughbred trainer and a prominent New York-licensed harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

Subject: In order to detect and deter the practice known as "milkshaking," which involves the administration of a mixture of sodium bicarbonate and sugar to a horse, the rule establishes post-race blood gas testing procedures for thoroughbred and harness race horses to detect excess levels of total carbon dioxide (TCO2). The subject of the rule also includes proscribed penalties for excess levels of TCO2 and procedures for voidable claims.

Purpose: To detect and deter the prohibited practice known as "milkshaking."

Substance of emergency rule: 4043.8(a) Establishes method of testing thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter.

4043.8(b) Establishes penalties for excess TCO2 violations in a thoroughbred race horse ranging from a 60-day license suspension and $1,000 fine to a maximum 60-day license suspension with a $5,000 fine with a possible one-year Board-imposed license suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4043.8(c) Establishes procedures for stewards to grant relief in cases where excess TCO2 levels are found, to allow a thoroughbred horse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4043.8(d) Establishes that any person participating in the thoroughbred racehorse blood gas testing or thoroughbred racehorse guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4043.8(e) Establishes minimum standards for guarded quarantine of a thoroughbred race horse at a race track operated by a track association.

4043.9(a) Establishes a post-race blood gas-testing program for thoroughbred race horses, and pre-race guarded quarantine procedures and requirements for thoroughbred horses that have been tested and found to have excess TCO2 levels.

4043.9(b) Establishes pre-race guarded quarantine for horses under the care of a trainer who has been found to have had a horse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4043.9(c) Establishes pre-race guarded quarantine requirements for a thoroughbred horse that has been tested and found to have excess TCO2 levels.

4043.10 Establishes punishment for failure to cooperate in the thoroughbred post race gas-testing program.

4038.18 Allows claimants in a claiming race to void a claim on a thoroughbred horse that is subsequently found to have excess TCO2 levels.

4120.13(a) Establishes method of testing harness racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter.

4120.13(b) Establishes penalties for excess TCO2 violations in a harness racehorse ranging from a 60-day license suspension and $1,000 fine to a maximum one-year license suspension with a $5,000 fine with a possible one-year Board-imposed suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4120.13(c) Establishes procedures for judges to grant relief in cases where excess TCO2 levels are found, to allow a harness racehorse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4120.13(d) Establishes that any person participating in the harness racehorse blood gas testing or thoroughbred guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4120.13(e) Establishes minimum standards for guarded quarantine of a harness racehorse at a race track operated by a track association.

4120.14(a) Establishes a post-race blood gas-testing program for harness racehorses, and pre-race guarded quarantine procedures and requirements for harness racehorses that have been tested and found to have excess TCO2 levels.

4120.14(b) Establishes pre-race guarded quarantine for harness racehorses horses under the care of a trainer who has been found to have had a harness racehorse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4120.14(c) Establishes pre-race guarded quarantine requirements for a harness racehorse that has been tested and found to have excess TCO2 levels.

4120.15 Establishes punishment for failure to cooperate in the harness post race gas testing program.

4109.7(f) Allows claimants in a claiming race to void a claim on a harness racehorse that is subsequently found to have excess TCO2 levels.

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 May 4, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Mark A. Stuart, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206, (518) 453-8460, e-mail: mstuart@racing.state.ny.us

Regulatory Impact Statement

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, §§ 101, 207, 227, 301, 305, 401, 405, 902; Unconsolidated Laws, § 8162(1).

(b) Legislative objectives. This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

(c) Needs and benefits. This rulemaking is necessary to assure the public's confidence and continue the high degree of integrity in racing at the pari-mutuel betting tracks. This rulemaking will detect and deter the administration of alkali agents to thoroughbred racehorses and harness racehorses for the purpose of affecting the performance of such horse during a pari-mutuel wagering race.

The administration of alkali agents into a racehorse is commonly known as "milkshaking," where a person administers a mixture of sodium bicarbonate, sugar and water to a horse prior to a race mitigate the effects of lactic acid on the horse's muscles during the race, thereby gaining an advantage. Lactic acid is a naturally occurring byproduct of intense muscular exercise in mammals, and the accumulation of lactic acid in such muscles causes fatigue. Some people associated with racehorses believe that the administration of an alkaline substance, such as bicarbonate of soda, can neutralize the effect of lactic acid in a horse's muscles. This has resulted in the use of alkalizing agents, or "milkshakes" which are administered to a racehorse in an attempt to alter the performance of the horse. Based on this belief, people have administered milkshakes to racehorses on the day of a race with the intent to gain a racing advantage.

This rulemaking is necessary to establish empirical standards and testing procedures for the enforcement of Board Rule 4043.3(d) and Board Rule 4120.3(d), which apply to thoroughbred and harness racehorses respectively and state "No person shall, attempt to, or cause, solicit, request, or conspire with another or others to. . . administer a mixture of bicarbonate of soda and sugar in any of their forms in any manner to a horse within 24 hours of a racing program at which such horse is programmed to race. It shall be the trainer's responsibility to prevent such administration."

Horses that have received an alkalizing agent will exhibit elevated levels of TCO2 over and above normal levels. This rulemaking will establish the ion selective electrode method with a clinical auto analyzer as a standard means of detecting elevated TCO2 in horses, and 37 millimoles per liter as the threshold level for TCO2.

In January 2005, the U.S. Justice Department arrested a New York licensed thoroughbred trainer and a prominent New York harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

This rulemaking will benefit thoroughbred and harness racing by ensuring the betting public that horses that compete in pari-mutuel races have not been tampered with through the administration of alkali agents, thereby ensuring that no extraordinary advantage has been given to the horse through prohibited substances.

(d) Costs.

(i) Thoroughbred horse owners may be subject to the cost of a pre-race guarded quarantine imposed upon any single horse found to have excess TCO2 levels that has not been determined to be physiologically normal for such horse. The track association sponsoring the race is responsible for making available a pre-race quarantine stall, and for maintaining an access log system in either paper or electronic form. The length of time for such quarantine shall be determined by the stewards, and will have an impact on the cost of guarded quarantine. The cost of a paper log is approximately $10 retail for a ring binder and 500 pages of paper. The cost of an electronic record, such as a personal computer or laptop computer, starts at $400 in ordinary retail stores.

(ii) There are no costs imposed upon the Racing & Wagering Board, the state or local government because the TCO2 testing program will be implemented utilizing the Board's existing medication testing program, personnel and facilities.

(iii) The Board cannot fully provide a statement of costs the trainers for pre-race guarded quarantine because the actual cost of establishing a pre-race guarded quarantine varies greatly from location to location in New York State, and the physical characteristics of the buildings within which a horse of quarantined. All horses that race at a New York State thoroughbred or harness racetrack are currently afforded stable space for free, so the only added cost that can be expected will be the cost of a guard. A pre-race guarded quarantine may require one guard per horse, or one guard for many horses, depending upon the access points that need to be controlled for an effective guarded quarantine. The Board's rulemaking requires that the subject horse is kept in an area where access to the subject horse is restricted to authorized licensed trainers, owners and veterinarians as submitted by the owner, that guards maintain a record of all licensed persons who have had access to the horse while in guarded quarantine, along with the time and purpose of the visit. In addition to the distinctive limitations that the guarded quarantine barn will have upon the cost, the wages of a guard varies depending upon the racetrack itself. According to track representatives, the hourly cost of guard may range from $7 per hour up to $20 per hour, depending on the individual racetrack, experience required for the specific duties (*e.g.*, a stable guard who is responsible for surveillance only compared to a quarantine supervisor who is responsible for also identifying illegal paraphernalia, treatments or procedures) and local pay scale. The minimum time that a horse is to be quarantined is six hours, and the maximum time for quarantine is 72 hours.

(e) Paperwork. Owners of any horse that has been found to have an excess levels of TCO2 will be required to submit a letter to the steward or judge of the track where the subject horse is to race, stating that the subject horse has a normally elevated level of TCO2. Such a letter is necessary for a horse to continue racing while under a guarded quarantine. Track associations will be required to maintain access logs, either paper or electronic, for a period of 90 days after the guarded quarantine period.

(f) Local government mandates. This rulemaking will not impose any program, service, duty, or responsibility upon any county, city, town, village, school district fire district or other special district.

(g) Duplication. Since the New York State Racing & Wagering Board is the exclusively responsible for the regulation of pari-mutuel wagering activities in New York State, there are no other relevant rules or other legal requirements of the state or federal government regarding total carbon dioxide testing of thoroughbred racehorses and harness racehorses in New York State.

(h) Alternative approaches. The Board did not consider any other significant alternatives because no other significant alternates are available. The rulemaking is based upon an established TCO2 testing program already adopted and in use by the New Jersey Racing Commission. To date, New Jersey is the only state that conducts TCO2 testing and there are no other TCO2 testing methods adopted in any other state. The testing procedure included in this rulemaking is the only TCO2 test that has been reviewed and declared reliable by a state court, in this case, the New Jersey Supreme Court recognized the reliability of the Beckman test generally and as applied by the New Jersey Racing Commission (Campbell v. New Jersey Racing Commission, New Jersey Supreme Court, 169 N.J. 579, 781 A.2d 1035, October 11, 2001.)

(i) Federal standards. There are no federal standards applicable to the subject area of state-regulated pari-mutuel wagering activity.

(j) Compliance schedule. The practice known as "milkshaking" of horses in already prohibited by rule under 9E NYCRR 4043.3 for thoroughbred racehorses and 9E NYCRR 4120.3 for harness racehorses. All of the provisions of this rulemaking shall be effective immediately upon filing with the Department of State.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for small businesses and governments is not attached because it is apparent from the nature of the rulemaking that the rulemaking will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small business or local governments. The TCO2 test mirrors existing medication testing programs, and while some horse owners may be required to bear the cost of a guarded quarantine, the costs are elective based upon the licensed owner's or trainer's decision to determine the horse's excess TCO2 levels prior to entering the horse in a race.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not attached because it is apparent from the nature of the rulemaking that the rulemaking will not impose any adverse economic impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

This rulemaking will not have an adverse impact on jobs and employment opportunities as apparent from its nature and purpose. This rulemaking utilizes existing testing personnel and facilities. This rulemaking may create jobs for guards who are experienced and trained in detention barn

security procedures insofar as such skills are necessary in securing a guarded quarantine.

Department of Taxation and Finance

NOTICE OF ADOPTION

Refunds and Credits for Vessel Operators Engaged in Local Transit Service

I.D. No. TAF-50-04-00004-A
Filing No. 141
Filing date: Feb. 7, 2005
Effective date: Feb. 23, 2005

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

Action taken: Amendment of section 534.4(a) and (b) and addition of section 534.10 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 1119, subd. (b); 1142, subd. (1) and (8); 1250 (not subdivided); and L. 2004, ch. 60, part M

Subject: Refunds and credits of sales and compensating use taxes for vessel operators engaged in local transit service.

Purpose: To implement L. 2004, ch. 60, part M on a permanent basis.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. TAF-50-04-00004-EP, Issue of December 15, 2004.

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

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

Assessment of Public Comment

On January 27, 2005, Mr. Mark R. Baker, the chief business officer of New York Water Taxi (hereafter NYWT), submitted written comments on the proposed rule to the Department of Taxation and Finance. NYWT engages in two relevant types of waterborne transportation services: interstate commerce transportation services between a point in New York and a point in New Jersey, and transportation services between points in New York.

Mr. Baker provided NYWT's view of the background for the amendments enacted in Part M of Chapter 60 of the Laws of 2004, upon which the rule is based.

The Legislation was adopted by the Legislature to address an imbalance that had arisen in the sales taxation treatment of purchases for vessels engaged in waterborne transportation in New York. Under the existing exemption for vessels operating in interstate commerce, ferry and water taxi operators primarily traveling between a point in New York and a point in New Jersey receive a 100% New York sales tax exemption on vessel purchases, but, prior to the adoption of the Legislation, ferry and water taxi operators traveling between points in New York received no exemption.

The legislation was designed to change this imbalance by providing a New York sales tax exemption on vessel purchases for operators providing local transit service between points in New York.

Mr. Baker refers to the exemption from sales and compensating use taxes in section 1115(a)(8) of the Tax Law for "[c]ommercial vessels primarily engaged in interstate or foreign commerce." This exemption is addressed in 20 NYCRR 528.9 and is distinct from the local transit service refund or credit provisions pursuant to section 1119(b) of the Tax Law at issue here.

Mr. Baker explained that if NYWTs vessels were engaged primarily (50 percent or more [see 528.9(a)(4)]) in interstate commerce between New York and New Jersey, its purchases of such vessels would be completely exempt from tax under section 1115(a)(8). Also, he pointed out that if NYWTs vessels were engaged solely in local transit service between points in New York, its purchases of the vessels would be completely "exempt" by virtue of the refund and credit provisions under section 1119(b) of the Tax Law.

Mr. Bakers concern is that since NYWT provides both types of services, the "sales tax exemption is diminished by a percentage and is less than complete" under the proposed rule. In his analysis of the proposed rule, Mr. Baker continued:

The Proposed Regulations eliminate from the definition of 'local transit service in this state' any local transit service which is interstate in character, and we believe that this exclusion is appropriate and consistent with the Legislation. [See section 534.10(a)(3) of the rule.]

The Legislation then requires that a percentage be calculated, which is the proportion that an operators vessel 'hours spent in local transit service in this state' bear to 'total hours operated in this state'. However the Proposed Regulations, which eliminate interstate travel from 'hours spent in local transit service in this state', requires that the vessel hours spent in interstate travel in New York State waters be included in 'total hours operated in this state'.

By eliminating the interstate travel hours from the numerator of the percentage, but by adding a portion of those hours to the denominator, the Proposed Regulations lead to the undesired result that an operator engaged solely in interstate travel and local transit service in this state, both completely exempt under the tax law, finds itself with less than a complete sales tax exemption.

This result is not required by the Legislation, which only requires that the denominator of the percentage be calculated as 'total vessel hours operated in this state' and which does not require the inclusion of any vessel hours spent in interstate commerce in that calculation. If the Proposed Regulations treated interstate commerce vessel hours consistently, eliminating them both from 'hours spent in local transit in this state' and from 'total hours operated in this state', then the percentage would be properly calculated and the undesired result eliminated.

This suggested approach is consistent with the treatment of interstate commerce generally, which is not to be regulated by the states, as opposed to commerce wholly within the state, which may be.

Mr. Baker also provided an illustration regarding two vessel operators having the same number of hours in local transit service in the State as well as the same total number of hours in interstate commerce, but a different amount of hours spent in New York waters during the interstate trips.

Mr. Baker suggested that the rule be revised to eliminate "the hours spent in interstate commerce from both the definition of 'hours spent in local transit service in this state' [*i.e.*, the numerator] and the definition of 'total hours operated in this state' [*i.e.*, the denominator]. Alternatively the portion of hours spent in the waters of New York State while engaged in interstate commerce could be added to both 'local transit service in this state' and 'total hours operated in this state.'"

Part M of Chapter 60 of the Laws of 2004 amended section 1119(b) of the Tax Law, in pertinent part, to read as follows (underlined text added):

Any such omnibus carrier or vessel operator must provide local transit service in this state... The amount of such refund or credit shall be determined by first computing the local transit service percentage which shall be the proportion that, in the case of such a carrier, such carrier's vehicle mileage or, in the case of such an operator, such operator's vessel hours in local transit service in this state... bears to such carrier's total mileage operated in this state... or such operator's total hours operated in this state...

The rule as a whole was patterned after 20 NYCRR 534.4, "Refunds and credits for omnibus carriers engaged in local transit service" and long-standing Department policies. Based on the plain language in section 1119(b) of the Tax Law (*i.e.*, "bears to such carrier's total mileage operated in this state... or such operator's total hours operated in this state..." [emphases added]), both section 534.4(a)(5), "Total mileage operated," of the existing regulations and section 534.10(a)(5), "Total hours operated" of this rule have been written with obvious meanings, without interpretation or construction beyond what is expressed in the Tax Law. Accordingly, the Department considers the suggestion to eliminate hours spent in interstate commerce from the definition of "total hours operated in this state" to be contrary to the plain statutory language, and no changes have been made to the rule in this regard. It is noted that under the rule, such hours are not included in local transit service.

Mr. Baker has indicated (*supra*) that the rule "eliminate[s] from the definition of 'local transit service in this state' any local transit service which is interstate in character, and we believe that this exclusion is appropriate and consistent with the Legislation." The Department also believes that this is a correct reading of the statute and consistent with the legislative intent, and with long-standing Department regulations and policies (*e.g.*, 534.4[a][3]). Therefore, no changes have been made to the rule to add the portion of hours spent in the waters of New York State while engaged in interstate commerce to the definition of "local transit service in

this state." It is noted that under the rule, such hours are included in the total hours operated in this State.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel

I.D. No. TAF-08-05-00002-P

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

Proposed action: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

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

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

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning April 1, 2005, and ending June 30, 2005, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xxxviii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xxxvii) January - March 2005					
13.1	21.1	36.3	14.5	22.5	35.95
(xxxviii) April - June 2005					
12.1	*20.1*	*35.3*	*13.9*	*21.9*	*35.35*

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

Data, views or arguments may be submitted to: Marilyn M. Katlenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153

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

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

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