

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 Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-05-00008-A
Filing No. 711
Filing date: June 27, 2005
Effective date: July 13, 2005

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

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

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Temporary State Commission of Investigation.

Text was published in the notice of proposed rule making, I.D. No. CVS-15-05-00008-P, Issue of April 13, 2005.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-05-00009-A
Filing No. 712
Filing date: June 27, 2005
Effective date: July 13, 2005

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

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

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-15-05-00009-P, Issue of April 13, 2005.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-05-00010-A
Filing No. 709
Filing date: June 27, 2005
Effective date: July 13, 2005

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

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

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-15-05-00010-P, Issue of April 13, 2005.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-15-05-00011-A**Filing No.** 714**Filing date:** June 27, 2005**Effective date:** July 13, 2005

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To classify a position in the non-competitive class in the Executive Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-15-05-00011-P, Issue of April 13, 2005.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-15-05-00012-A**Filing No.** 713**Filing date:** June 27, 2005**Effective date:** July 13, 2005

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete positions from the non-competitive class in the Department of Health.**Text was published in the notice of proposed rule making, I.D. No.** CVS-15-05-00012-P, Issue of April 13, 2005.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-15-05-00014-A**Filing No.** 708**Filing date:** June 27, 2005**Effective date:** July 13, 2005

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete positions from and classify positions in the non-competitive class in the Department of Family Assistance.**Text was published in the notice of proposed rule making, I.D. No.** CVS-15-05-00014-P, Issue of April 13, 2005.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-15-05-00015-A**Filing No.** 710**Filing date:** June 27, 2005**Effective date:** July 13, 2005

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete positions from and classify positions in the non-competitive class in the Insurance Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-15-05-00015-P, Issue of April 13, 2005.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

Education Department

NOTICE OF ADOPTION

Homeless Children**I.D. No.** EDU-05-05-00013-A**Filing No.** 716**Filing date:** June 28, 2005**Effective date:** July 14, 2005

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

Action taken: Amendment of Parts 275 and 276 and section 100.2(x) of Title 8 NYCRR.**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 310 (not subdivided), 311 (not subdivided), 3202(1) and (8), 3209(7), and 3713(1) and (2)**Subject:** Homeless children.**Purpose:** To modify the procedures concerning appeals involving homeless children that are brought pursuant to Education Law section 310, to conform the commissioner's regulations to the Federal McKinney-Vento Homeless Education Assistance Act (42 O.S.C. sections 11431 *et seq.*), as amended by the Federal No Child Left Behind Act of 2001 (NCLB) [Pub. L. 107-1101].**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. EDU-05-05-00013-EP, Issue of February 2, 2005.**Final rule as compared with last published rule:** No changes.**Revised rule making(s) were previously published in the State Register** on April 27, 2005.**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov**Assessment of Public Comment**Since publication of a Notice of Revised Rule Making in the *State Register* on April 27, 2005, the State Education Department received the following public comment:

1. COMMENT:

The name, address and telephone number of the LEA liaison should be included on the form petition to ensure better access to the liaison. The revised proposed rule's provision that this information be included in the district's written explanation of its determination to decline to enroll and/

or transport a homeless child is insufficient because many districts fail to issue written decisions.

DEPARTMENT RESPONSE:

The State Education Department believes that inclusion of liaison information in the district's written explanation is sufficient to ensure access to the liaison. School districts are already required pursuant to existing provisions in 100.2(x)(7)(iv)(b) to provide written explanations of their determinations to decline to enroll and/or transport homeless children. The comment's concerns can be adequately addressed through the Department providing guidance and technical assistance to the LEAs regarding the requirements in the existing provision, as modified by the revised proposed rule, rather than by imposing an additional requirement as requested in the comment.

2. COMMENT:

It is recommended that the form petition should be made available in all schools, district offices, shelters and all entry points into the shelter system.

DEPARTMENT RESPONSE:

The Department believes that this recommendation is unworkable for a number of reasons. Shelters generally serve homeless children from a number of school districts. Thus, each school district within a 50-mile radius would have to distribute copies of the form petition with their liaison's contact information to all the shelters within 50 miles of them. It would be difficult, if not impossible, for school districts to determine how many form petitions should be distributed to each shelter and to maintain sufficient supplies of these petitions at each shelter. Also, the school districts might have a difficult time gaining access to shelters to distribute the form petitions and would be denied access to domestic violence shelters due to confidentiality and safety issues. In addition, having form petitions with various school districts' liaisons contact information on them may lead to confusion regarding which school district's liaison a homeless family or unaccompanied youth should be contacting.

The Department reiterates its concern that a wider dissemination of the form petition would undermine the ability of the LEA liaison to assist homeless families and unaccompanied youths with the appeal process, by encouraging the filing of appeals without the LEA liaisons' assistance. This, in turn, could lead to the dismissal of such appeals on procedural grounds, or even on the merits, because the homeless families and youths will be unaware of the procedural and substantive legal requirements for commencing appeals and obtaining a favorable decision. These requirements are not mere "hurdles" to be "addressed" in some unspecified way, as characterized in the comment, but are legally necessary to ensure compliance with due process and the ability of petitioners' to sustain their burden of proof. It would be of little avail to facilitate the filing of appeals, if those appeals must ultimately be dismissed as legally defective.

3. COMMENT:

It is recommended that homeless families and unaccompanied youths be permitted to mail the pleadings to the liaison or deliver pleadings to the principal or assistant principal at the school where the dispute arose.

DEPARTMENT RESPONSE:

The State Education Department designed the amendments to foster interaction between homeless families/unaccompanied youths and liaisons by requiring liaisons to, inter alia, assist homeless families and unaccompanied youths in commencing appeals. The Department believes that these families and youths would greatly benefit from the assistance of the liaisons. To permit service to be made on principals and assistant principals would undermine this goal and would be administratively burdensome for schools. Additionally, contrary to the public comment's contention, the principals and assistant principals could not just accept delivery of the pleadings and then forward them to the liaisons who would then accept service of them. The principals and assistant principals would have to sign affidavits acknowledging that they had accepted service of the pleadings, provide the homeless families and unaccompanied youth with copies of these affidavits, and then forward all the documents to the liaisons.

4. COMMENT:

It is recommended that in order to ensure that schools actually enroll students before the dispute resolution process begins, in conformity with the McKinney-Vento Act, 42 U.S.C. § 11432(g)(3)(E)(i), the proposed regulation be revised to require each school district to immediately admit the homeless child or youth to the school in which enrollment is sought if a dispute arises over school selection or enrollment in a school.

DEPARTMENT RESPONSE:

The proposed amendment is unnecessary because both Education Law § 3209(2)(e)(1) and 8 NYCRR § 100.2(x)(4)(1) state that, after receiving

the designation form, the designated school district must immediately admit the homeless child or youth. Although it is alleged that not all school districts use the designation form or STAC form, all of them are required to use it under existing law and regulations. The Department believes that, in lieu of adding another regulatory requirement, this alleged compliance deficiency should be addressed through guidance to the field and/or professional development training sessions for liaisons and other school personnel.

5. COMMENT:

It is recommended that homeless students be entitled to remain in the school in which enrollment is sought pending resolution of an Education Law § 310 appeal to the Commissioner without having to file a stay request.

DEPARTMENT RESPONSE:

The State Education Department believes that this change would require an amendment to the authorizing statute. Education Law § 3209, as added by Chapter 101 of the Laws of 2003, was meant to incorporate into State law the federal requirements for the education of homeless children. 42 U.S.C. § 11432(g)(3)(E) only requires pendency during the LEA dispute resolution process. The public comment correctly states that 42 U.S.C. § 11432(g)(1)(C) requires each SEA's state plan to include a dispute resolution process. However, McKinney-Vento does not require pendency during the SEA dispute resolution process. Also, the State Education Department's state plan, which included information regarding the 310 appeal process, was approved by the U.S. Department of Education. Thus, the Department's dispute resolution process is in compliance with McKinney-Vento. Therefore, since Education Law § 3209 incorporated the federal requirements into State law, to the extent the federal provisions do not require pendency during the SEA dispute resolution process, the Department believes that a change in the State statute would be necessary in order for it to impose such requirement.

In addition, requiring homeless families and unaccompanied youths to file stay requests as part of their appeals is not overly burdensome. The stay application is part of the form petition and is not difficult to fill out. The form petition and stay request were designed to prompt homeless families and accompanied youths to provide information that will help them sustain their burden of proof. The stay application further enables SED to determine whether there is any merit to a request before granting pendency. The stay application provides SED with a means of preventing individuals from possibly abusing the 310 appeal process by claiming to be homeless in order to circumvent residency requirements.

NOTICE OF ADOPTION

No Child Left Behind Act of 2001—School/District Accountability

I.D. No. EDU-15-05-00007-A

Filing No. 717

Filing date: June 28, 2005

Effective date: July 14, 2005

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

Action taken: Amendment of section 100.2(p) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

Subject: No Child Left Behind Act of 2001 (Pub.L. 107-110) school/district accountability.

Purpose: To establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the Federal No Child Left Behind Act of 2001 relating to academic standards and school/district accountability.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-15-05-00007-P, Issue of April 13, 2005.

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

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

Assessment of Public Comment

The agency received no public comment.

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

School Health Services

I.D. No. EDU-28-05-00008-P

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

Proposed action: Amendment of sections 136.1, 136.2 and 136.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 901(1) and (2); 902(1), (2) and (3); 903(1) and (2); 904(1) and (2); 905(1), (2), (3) and (4); 906(1) and (2); 911(1); 913 (not subdivided); 914(1) and L. 2004, ch. 477

Subject: School health services.

Purpose: To implement and otherwise conform the commissioner's regulations to L. of 2004, ch. 477.

Substance of proposed rule (Full text is posted at the following State website: <http://emsc32.nysed.gov/sss/>): The Commissioner of Education proposes to amend sections 136.1, 136.2 and 136.3 of the Regulations of the Commissioner of Education, effective September 29, 2005, relating to school health services. The following is a summary of the substance of the proposed amendment:

Section 136.1, relating to definitions used in Part 136, is amended to delete outdated definition language and add definitions for "health professionals", "school nurse", "director of school health services", "school health services", "commencement of the school year", "thirty days" and "ninety days."

Section 136.2, relating to general regulations for school health services, is amended to replace references to "medical inspection" with "school health services", "pupils" with "students", "trained registered nurse" with "professional nurse", "physical defects" with "disability", "competent physician as a medical inspector" with "director of school health services". The proposed amendment also revises certain terms to ensure grammatical consistency.

The existing section 136.3, relating to school health services, is repealed and a new section 136.3 is added.

Section 136.3(a) establishes general duties of trustees and boards of education with respect to the provision of school health services.

Section 136.3(b) establishes provisions for the examination and health history of students enrolled in public schools, except in the city school districts of the cities of New York, Buffalo and Rochester and requires that boards of education to ensure that each student enrolled in its schools has a satisfactory health examination by the student's family physician, physician assistant or nurse practitioner upon the student's entrance into school at any grade level and for each student entering pre-kindergarten or kindergarten, and in the 2nd, 4th, 7th and 10th grades. Such examination shall be acceptable if it is administered not more than 12 months prior to the commencement of the school year in which the examination is required. An examination and health history may be required at any time in the discretion of local school authorities to promote the student's educational interests. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate.

Section 136.3(c) establishes requirements for health certificates and proof of immunization. Each student, within 30 days after entrance into school or within 30 days after entry into the 2nd, 4th, 7th and 10th grades, shall submit a health certificate to the principal or principal's designee. The health certificate shall meet certain specified requirements and shall be filed in the student's cumulative record. The principal or designee shall send a notice to parents or persons in parental relation of any student who does not present a health certificate, unless there has been an accommodation on grounds of religious belief pursuant to section 136.3(f), that if the certificate is not furnished within 30 days from the date of the notice, an examination by health appraisal of the student will be made by the director of school health services.

Section 136.3(d) establishes requirements for examinations by health appraisal. Each principal or designee shall report to the director of school health services the names of students who have not furnished health certificates or who are students with disabilities. The director shall cause such students to be examined. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall

determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate. If it is ascertained that any students have defective sight, hearing, or other physical disability, including sickle cell anemia, the principal or designee shall notify the students' parents or persons in parental relation. If the parents or persons in parental relation are unable or unwilling to provide the necessary relief and treatment for the student, such fact shall be reported by the principal or designee to the director of school health services, whose duty it shall be to provide relief for such students.

Section 136.3(e) establishes requirements for health screenings, including: (1) scoliosis screening at least once each school year for all students in grades 5 through 9, (2) vision screening for all students who enroll in a school of this State for minimum color perception, distance acuity, near vision and hyperopia within 6 months of admission, and all students shall be screened for distance acuity in grades kindergarten, 1, 2, 3, 5, 7 and 10; and (3) hearing screening to all students within 6 months of admission and in grades kindergarten, 1, 3, 5, 7 and 10.

Section 136.3(f) establishes provisions for accommodation of religious beliefs and provides that no examinations, health history, examinations for health appraisal, immunizations, screening examinations for sickle cell anemia and/or other health screenings shall be required where a student or the parent or person in parental relation objects on grounds that such examinations, health history, immunizations and/or screenings conflict with their genuine and sincere religious beliefs. A written and signed statement from the student or the student's parent or person in parental relation that such person holds such beliefs shall be submitted to the principal or designee and shall be deemed to constitute sufficient proof of such beliefs.

Section 136.3(g) provides that the health records of individual students shall be kept confidential in accordance with the federal Family Educational Rights and Privacy Act (FERPA) and any other applicable federal and State laws.

Section 136.3(h) provides for the exclusion from school of a student who shows symptoms of a communicable or infectious disease reportable under the Public Health Law and for the examination of any student who returns to school following an absence due to illness or unknown cause, who is without a certificate from a local public health officer, a duly licensed physician, physician assistant or a nurse practitioner, to determine that such student does not pose a threat to the school community.

Section 136.3(i) provides for health evaluations of school employees, buildings and premises.

Section 136.3(j) provides that boards of education or trustees that elect to make condoms available to pupils as part of its program of school health service shall assure that adequate personal health guidance is provided to each pupil receiving condoms in the manner prescribed by section 135.3(c)(2)(ii) of the Commissioner's Regulations.

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

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 901, as amended by Chapter 477 of the Laws of 2004, requires school health services to be provided by each school district for all students attending the public schools in this State, except in the city school districts of the cities of New York, Buffalo and Rochester.

Education Law section 902, as amended by Chapter 477 of the Laws of 2004, provides for the employment of health professionals by school districts, and requires districts to employ a director of school health services to perform and coordinate the provision of health services in the public schools and to provide health appraisals of students attending its schools.

Education Law section 903(1), as amended by Chapter 477 of the Laws of 2004, requires that health certificates be furnished by each student in the

public schools upon entrance into the grades prescribed by the Commissioner in regulations.

Education Law section 904, as amended by Chapter 477 of the Laws of 2004, provides that the principal or principal's designee shall report to the director of school health services the names of all students who have not furnished health certificates or who are children with disabilities, and the director shall cause such students to be examined.

Education Law section 905(1), as amended by Chapter 477 of the Laws of 2004, requires screening examinations for vision, hearing and scoliosis at such times and as defined in the regulations of the Commissioner. Section 905(3) provides for a waiver by the Commissioner of such requirement upon specified conditions and upon rules and regulations established by the Commissioner.

Education Law section 906, as amended by Chapter 477 of the Laws of 2004, provides for the exclusion and examination upon readmittance of students showing symptoms of communicable or infectious disease reportable under the Public Health Law, and for the evaluation of teachers and other school employees and school buildings and premises as deemed necessary to protect the health of students and staff.

Education Law section 911(1), as amended by Chapter 477 of the Laws of 2004, provides that it shall be the duty of the Commissioner to enforce the provisions of Article 19 of the Education Law, and the commissioner may adopt rules and regulations not inconsistent herewith, after consultation with the Commissioner of Health, for the purpose of carrying into full force and effect the objects and intent of such Article.

Education Law section 913, as amended by Chapter 477 of the Laws of 2004, provides for medical examinations of teachers and other employees to safeguard the health of children attending public schools.

Education Law section 914, as amended by Chapter 477 of the Laws of 2004, provides that each school shall require every child entering or attending school to submit proof of immunization against certain specified diseases.

Chapter 477 of the Laws of 2004 amended and repealed certain sections in Education Law Article 19, regarding the provision of school health services in New York State schools, to extend the period of time in which students may obtain physical examinations and health certificates for school in order to facilitate and provide flexibility of scheduling for pediatricians and parents, and to update the terminology and standards to be consistent with current medical and health care practice.

LEGISLATIVE OBJECTIVES:

Consistent with the above statutory authority, the proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004.

NEEDS AND BENEFITS:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004. School health services staff in New York State public schools will be able to provide services that are consistent with current standards in medical and health care practice and State law.

COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional costs beyond those imposed by the statute. Because the requirements relating to screenings for hearing, vision and scoliosis are fewer than existing requirements, there will be a net decrease in cost to local school districts.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional program, service, duty or responsibility on school districts or other local governments beyond those imposed by the statute.

Section 136.3(b) establishes provisions for the examination and health history of students enrolled in public schools, except in the city school districts of the cities of New York, Buffalo and Rochester and requires boards of education to ensure that each student enrolled in its schools has a satisfactory health examination by the student's family physician, physician assistant or nurse practitioner upon the student's entrance into school at any grade level and for each student entering pre-kindergarten or kindergarten, and in the 2nd, 4th, 7th and 10th grades. Such examination shall be

acceptable if it is administered not more than 12 months prior to the commencement of the school year in which the examination is required. An examination and health history may be required at any time in the discretion of local school authorities to promote the student's educational interests. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate.

Section 136.3(d) establishes requirements for examinations by health appraisal. Each principal or designee shall report to the director of school health services the names of students who have not furnished health certificates or who are students with disabilities. The director shall cause such students to be examined. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate. If it is ascertained that any students have defective sight, hearing, or other physical disability, including sickle cell anemia, the principal or designee shall notify the students' parents or persons in parental relation. If the parents or persons in parental relation are unable or unwilling to provide the necessary relief and treatment for the student, such fact shall be reported by the principal or designee to the director of school health services, whose duty it shall be to provide relief for such students.

Section 136.3(e) establishes requirements for health screenings, including: (1) scoliosis screening at least once each school year for all students in grades 5 through 9, (2) vision screening for all students who enroll in a school of this State for minimum color perception, distance acuity, near vision and hyperopia within 6 months of admission, and all students shall be screened for distance acuity in grades kindergarten, 1, 2, 3, 5, 7 and 10; and (3) hearing screening to all students within 6 months of admission and in grades kindergarten, 1, 3, 5, 7 and 10.

Section 136.3(g) provides that the health records of individual students shall be kept confidential in accordance with the federal Family Educational Rights and Privacy Act (FERPA) and any other applicable federal and State laws.

Section 136.3(h) provides for the exclusion from school of a student who shows symptoms of a communicable or infectious disease reportable under the Public Health Law and for the examination of any student who returns to school following an absence due to illness or unknown cause, who is without a certificate from a local public health officer, a duly licensed physician, physician assistant or a nurse practitioner, to determine that such student does not pose a threat to the school community.

Section 136.3(i) provides for health evaluations of school employees, buildings and premises.

Section 136.3(j) provides that boards of education or trustees that elect to make condoms available to pupils as part of its program of school health service shall assure that adequate personal health guidance is provided to each pupil receiving condoms in the manner prescribed by section 135.3(c)(2)(ii) of the Commissioner's Regulations.

PAPERWORK:

Section 136.3(c) establishes requirements for health certificates and proof of immunization. The board of education shall require that each student, within 30 days after entrance into school or within 30 days after entry into the 2nd, 4th, 7th and 10th grades, shall submit a health certificate to the principal or principal's designee. The health certificate shall meet certain specified requirements and shall be filed in the student's cumulative record. The principal or designee shall send a notice to parents or persons in parental relation of any student who does not present a health certificate, unless there has been an accommodation on grounds of religious belief pursuant to section 136.3(f), that if the certificate is not furnished within 30 days from the date of the notice, an examination by health appraisal of the student will be made by the director of school health services.

Section 136.3(f) establishes provisions for accommodation of religious beliefs and provides that no examinations, health history, examinations for health appraisal, immunizations, screening examinations for sickle cell anemia and/or other health screenings shall be required where a student or the parent or person in parental relation objects on grounds that such examinations, health history, immunizations and/or screenings conflict with their genuine and sincere religious beliefs. A written and signed statement from the student or the student's parent or person in parental relation that such person holds such beliefs shall be submitted to the

principal or designee and shall be deemed to constitute sufficient proof of such beliefs.

DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations and is necessary to conform the Commissioner's regulations to Chapter 477 of the Laws of 2004.

ALTERNATIVES:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, which will become effective on September 1, 2005.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to school health services and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment applies to all public school districts and boards of cooperative educational services (BOCES) in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional any additional compliance requirements on school districts beyond those imposed by the statute.

Section 136.3(b) establishes provisions for the examination and health history of students enrolled in public schools, except in the city school districts of the cities of New York, Buffalo and Rochester and requires boards of education to ensure that each student enrolled in its schools has a satisfactory health examination by the student's family physician, physician assistant or nurse practitioner upon the student's entrance into school at any grade level and for each student entering pre-kindergarten or kindergarten, and in the 2nd, 4th, 7th and 10th grades. Such examination shall be acceptable if it is administered not more than 12 months prior to the commencement of the school year in which the examination is required. An examination and health history may be required at any time in the discretion of local school authorities to promote the student's educational interests. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate.

Section 136.3(d) establishes requirements for examinations by health appraisal. Each principal or designee shall report to the director of school health services the names of students who have not furnished health certificates or who are students with disabilities. The director shall cause such students to be examined. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate. If it is ascertained that any students have defective sight, hearing, or other physical disability, including sickle cell anemia, the principal or designee shall notify the students' parents or persons in parental relation. If the parents or persons in parental relation are unable or unwilling to provide the necessary relief and treatment for the student, such fact shall be reported by the principal or designee to the director of school health services, whose duty it shall be to provide relief for such students.

Section 136.3(e) establishes requirements for health screenings, including: (1) scoliosis screening at least once each school year for all students in grades 5 through 9, (2) vision screening for all students who enroll in a school of this State for minimum color perception, distance acuity, near vision and hyperopia within 6 months of admission, and all students shall be screened for distance acuity in grades kindergarten, 1, 2, 3, 5, 7 and 10; and (3) hearing screening to all students within 6 months of admission and in grades kindergarten, 1, 3, 5, 7 and 10.

Section 136.3(g) provides that the health records of individual students shall be kept confidential in accordance with the federal Family Educational Rights and Privacy Act (FERPA) and any other applicable federal and State laws.

Section 136.3(h) provides for the exclusion from school of a student who shows symptoms of a communicable or infectious disease reportable under the Public Health Law and for the examination of any student who returns to school following an absence due to illness or unknown cause, who is without a certificate from a local public health officer, a duly licensed physician, physician assistant or a nurse practitioner, to determine that such student does not pose a threat to the school community.

Section 136.3(i) provides for health evaluations of school employees, buildings and premises.

Section 136.3(j) provides that boards of education or trustees that elect to make condoms available to pupils as part of its program of school health service shall assure that adequate personal health guidance is provided to each pupil receiving condoms in the manner prescribed by section 135.3(c)(2)(ii) of the Commissioner's Regulations.

Section 136.3(c) establishes requirements for health certificates and proof of immunization. The board of education shall require that each student, within 30 days after entrance into school or within 30 days after entry into the 2nd, 4th, 7th and 10th grades, shall submit a health certificate to the principal or principal's designee. The health certificate shall meet certain specified requirements and shall be filed in the student's cumulative record. The principal or designee shall send a notice to parents or persons in parental relation of any student who does not present a health certificate, unless there has been an accommodation on grounds of religious belief pursuant to section 136.3(f), that if the certificate is not furnished within 30 days from the date of the notice, an examination by health appraisal of the student will be made by the director of school health services.

Section 136.3(f) establishes provisions for accommodation of religious beliefs and provides that no examinations, health history, examinations for health appraisal, immunizations, screening examinations for sickle cell anemia and/or other health screenings shall be required where a student or the parent or person in parental relation objects on grounds that such examinations, health history, immunizations and/or screenings conflict with their genuine and sincere religious beliefs. A written and signed statement from the student or the student's parent or person in parental relation that such person holds such beliefs shall be submitted to the principal or designee and shall be deemed to constitute sufficient proof of such beliefs.

PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional costs beyond those imposed by the statute. Because the requirements relating to screenings for hearing, vision and scoliosis are fewer than existing requirements, there will be a net decrease in cost to local school districts.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional any additional compliance requirements or costs on school districts beyond those imposed by the statute. The proposed amendment has been carefully drafted to meet these specific statutory requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, comments were solicited from the Statewide Center for School Health Services, the New York State Association of School Nurses and selected pediatricians, nurse practitioners, and school health personnel providing school health services.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the

71 towns in urban counties with a population density of 150 per square mile or less.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional any additional compliance requirements on school districts beyond those imposed by the statute.

Section 136.3(b) establishes provisions for the examination and health history of students enrolled in public schools, except in the city school districts of the cities of New York, Buffalo and Rochester and requires boards of education to ensure that each student enrolled in its schools has a satisfactory health examination by the student's family physician, physician assistant or nurse practitioner upon the student's entrance into school at any grade level and for each student entering pre-kindergarten or kindergarten, and in the 2nd, 4th, 7th and 10th grades. Such examination shall be acceptable if it is administered not more than 12 months prior to the commencement of the school year in which the examination is required. An examination and health history may be required at any time in the discretion of local school authorities to promote the student's educational interests. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate.

Section 136.3(d) establishes requirements for examinations by health appraisal. Each principal or designee shall report to the director of school health services the names of students who have not furnished health certificates or who are students with disabilities. The director shall cause such students to be examined. In all school districts, the physician, physician assistant or nurse practitioner administering the examination shall determine whether a one-time test for sickle cell anemia is necessary or desirable and, if so determined, shall conduct such test and include the results in the student's health certificate. If it is ascertained that any students have defective sight, hearing, or other physical disability, including sickle cell anemia, the principal or designee shall notify the students' parents or persons in parental relation. If the parents or persons in parental relation are unable or unwilling to provide the necessary relief and treatment for the student, such fact shall be reported by the principal or designee to the director of school health services, whose duty it shall be to provide relief for such students.

Section 136.3(e) establishes requirements for health screenings, including: (1) scoliosis screening at least once each school year for all students in grades 5 through 9, (2) vision screening for all students who enroll in a school of this State for minimum color perception, distance acuity, near vision and hyperopia within 6 months of admission, and all students shall be screened for distance acuity in grades kindergarten, 1, 2, 3, 5, 7 and 10; and (3) hearing screening to all students within 6 months of admission and in grades kindergarten, 1, 3, 5, 7 and 10.

Section 136.3(g) provides that the health records of individual students shall be kept confidential in accordance with the federal Family Educational Rights and Privacy Act (FERPA) and any other applicable federal and State laws.

Section 136.3(h) provides for the exclusion from school of a student who shows symptoms of a communicable or infectious disease reportable under the Public Health Law and for the examination of any student who returns to school following an absence due to illness or unknown cause, who is without a certificate from a local public health officer, a duly licensed physician, physician assistant or a nurse practitioner, to determine that such student does not pose a threat to the school community.

Section 136.3(i) provides for health evaluations of school employees, buildings and premises.

Section 136.3(j) provides that boards of education or trustees that elect to make condoms available to pupils as part of its program of school health service shall assure that adequate personal health guidance is provided to each pupil receiving condoms in the manner prescribed by section 135.3(c)(2)(ii) of the Commissioner's Regulations.

Section 136.3(c) establishes requirements for health certificates and proof of immunization. The board of education shall require that each student, within 30 days after entrance into school or within 30 days after entry into the 2nd, 4th, 7th and 10th grades, shall submit a health certificate to the principal or principal's designee. The health certificate shall meet certain specified requirements and shall be filed in the student's cumulative record. The principal or designee shall send a notice to parents or persons in parental relation of any student who does not present a health

certificate, unless there has been an accommodation on grounds of religious belief pursuant to section 136.3(f), that if the certificate is not furnished within 30 days from the date of the notice, an examination by health appraisal of the student will be made by the director of school health services.

Section 136.3(f) establishes provisions for accommodation of religious beliefs and provides that no examinations, health history, examinations for health appraisal, immunizations, screening examinations for sickle cell anemia and/or other health screenings shall be required where a student or the parent or person in parental relation objects on grounds that such examinations, health history, immunizations and/or screenings conflict with their genuine and sincere religious beliefs. A written and signed statement from the student or the student's parent or person in parental relation that such person holds such beliefs shall be submitted to the principal or designee and shall be deemed to constitute sufficient proof of such beliefs.

The proposed amendment will not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional costs beyond those imposed by the statute. Because the requirements relating to screenings for hearing, vision and scoliosis are fewer than existing requirements, there will be a net decrease in cost to local school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement and otherwise conform the Commissioner's Regulations to Chapter 477 of the Laws of 2004, and will not impose any additional any additional compliance requirements or costs on school districts beyond those imposed by the statute. The proposed amendment has been carefully drafted to meet these specific statutory requirements. Since these statutory requirements apply to all schools throughout the State, it was not possible to establish different compliance and reporting requirements for school districts in rural areas, or exempt them from provisions of the proposed amendment.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. In addition, comments were solicited from the Statewide Center for School Health Services, the New York State Association of School Nurses and selected pediatricians, nurse practitioners, and school health personnel providing school health services.

Job Impact Statement

The proposed amendment relates to school health services and is necessary to implement, and otherwise conform the Commissioner's Regulations to, Chapter 477 of the Laws of 2004. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Chartering, Incorporation and Registration of Museums, Historical Societies and Cultural Agencies

I.D. No. EDU-28-05-00009-P

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

Proposed action: Repeal of sections 3.27 and 3.30 and addition of new sections 3.27 and 3.30 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 216 (not subdivided) and 217 (not subdivided)

Subject: Chartering, incorporation and registration of museums, historical societies and cultural agencies.

Purpose: To provide chartered museums, historical societies and cultural agencies with criteria they must meet to be incorporated and registered by the Board of Regents; require boards to adopt mission statements and a code of ethics; obtain IRS tax-exempt status; require audit committee reviews; provide new protections for facilities and collections; and allow historical societies without collections to exchange a charter for a Regents certificate of incorporation.

Substance of proposed rule (Full text is posted at the following State website: www.nysm.nysed.gov/charter/): The State Education Department proposes to amend sections 3.27 and 3.30 of the Rules of the Board of Regents, effective September 29, 2005. The following is a summary of the provisions of the proposed rule.

In general, section 3.27 is amended to establish criteria for Regents chartering and registration of museums and historical societies with collections, and section 3.30 is amended to provide criteria for the incorporation and registration of historical societies without collections and cultural agencies.

The substantive amendments are as follows:

Section 3.27(a) provides for definitions of terms used in section 3.27, including an expanded definition of "museum" to also include "halls of fame, zoos, aquariums, botanical gardens and arboretums" and to include among objects ordinarily owned, exhibited or maintained, and utilized, "artifacts, art, and specimens, including non-tangible electronic, video, digital and similar art." Definitions are also provided for "historical society with collections", "institution", "accessible", "accession", "catalogue", "collection", "collection care", "collection management", "deaccession", "diversity", "education/public programs and exhibitions", "hours of operation", "interpretation", "mission statement", "operating budget", an expanded definition of "professional staff" including an exception to the existing requirement for paid staff, for institutions having an operating budget of \$100,000 or less, "public trust", and "research".

Section 3.27(b) prescribes requirements for the provisional and absolute chartering of museums and historical societies with collections.

Section 3.27(c) prescribes requirements for the registration of museums and historical societies with collections, including requirements relating to organization, mission, governance, finance, facilities, collections care and management, and education, interpretation and presentation.

Section 3.27(c)(1) establishes organizational criteria including requirements that an institution seeking registration be chartered, incorporated or in operation a minimum of 5 years, be in compliance with all applicable local, state and federal laws and regulations; maintain a mailing address within New York State adequate for legal service, have sufficient financial and physical resources, and be open and accessible to the public on a regular basis, including a requirement that institutions having an operating budget in excess of \$100,000 per year shall be open to the public a minimum of 1,000 hours per year.

Section 3.27(c)(2) prescribes requirements relating to the mission of the museum or historical society with collections, including requirements for a written mission statement, that the mission statement be reviewed, and revised as necessary, at least every 5 years.

Section 3.27(c)(3) establishes governance criteria, including requirements that a board of trustees shall have no more than one-third (1/3) of its members related to each other by birth, marriage or domicile; that in any instance where there is a relationship between the institution and another entity, there shall be no more than a one-third (1/3) overlap between the officers and/or directors; that the museum or historical society with collections have a written and board-approved code of ethics that applies to trustees, administrators, staff and volunteers and is reviewed each year; and that the institution effectively advances diversity of membership and participation in the institution's mission.

Section 3.27(c)(4) establishes finance criteria, including requirements for a board-constituted audit committee for all institutions regardless of size of operating budget; for an independent audit by a certified public accountant for institutions whose operating budget exceeds \$250,000; and for an independent review by a certified public accountant if the institution's operating budget is at least \$100,000 but no more than \$250,000. There is no requirement for an independent audit or review if the institution's operating budget is below \$100,000. An institution will conduct its financial affairs in such a way as not to jeopardize the ownership or integrity of its collections; and will obtain and maintain tax-exempt status under section 501(c)(3) or other applicable section of the Internal Revenue Code.

Section 3.27(c)(5) establishes criteria for facilities, including requirements for accessibility to those with disabilities, emergency action and disaster preparedness plans, an adequate, working alarm system, and a requirement that a historic structure be restored and/or maintained according to accepted historic preservation practices.

Section 3.27(c)(6) adds criteria for collections care and management, including a statement that collections or proceeds derived therefrom shall not be used as collateral for a loan; a requirement that collections shall not be capitalized; and a provision that no institution may acquire property known or reasonably suspected to have problematic or unclear provenance

including, but not limited to, actions to recover property allegedly stolen or otherwise misappropriated during the Nazi period, defined as occurring during the period January 30, 1933 through May 8, 1945, inclusive.

Section 3.27(c)(6) retains existing language that the acquisition and deaccessioning of collections by a museum shall be consistent with the mission and purposes of the museum; that requires a collection management policy; and requires that all or any part of proceeds from deaccessioning of collections may not be used for any purpose other than acquisition, preservation, protection or care of collections.

Section 3.27(c)(6) eliminates an existing provision that the Regents may grant an exception on application by a museum that wishes to apply all or any part of proceeds from deaccessioning of collections to any purpose other than acquisition, preservation, protection or care of collections.

Section 3.27(c)(7) adds new criteria for education, interpretation and presentation.

Section 3.27(d) requires each museum and historical society with collections to file annual reports with the Commissioner.

Section 3.27(e) provides criteria for the use of corporate names by a museum or historical society with collections, including use of the terms "National," "American," "United States," "World," "International," and similar geographically descriptive terms in a corporate name, and restricts use of the word "library" and "museum" in a corporate name unless the institution's charter provides authority to operate such and the library or museum operation meets the requirements of the Regents Rules and Commissioner's Regulations.

Section 3.27(f) requires a museum or historical society with collections to comply with State law relating to dissolution and distribution of assets.

Section 3.30 is amended to provide criteria for the incorporation and registration of historical societies without collections and cultural agencies.

Section 3.30(a) provides additional definitions, including a revised definition for "historical society without collections"; a definition for "cultural agency"; new definitions for "corporation", "accessible," "diversity", "education", "mission statement", and "operating budget", and a revised definition for "hours of operation" to replace the existing definition of "regular schedule."

Section 3.30(b) prescribes criteria for incorporation of historical societies without collections and cultural agencies by means of a Regents certificate of incorporation.

Section 3.30(c) prescribes criteria for registration of historical societies without collections and cultural agencies, including those relating to organization, mission, governance, finance, facilities, and education and interpretation.

Section 3.30(c)(1) establishes organizational criteria including requirements that a historical society without collections and a cultural agency be in compliance with all applicable local, state and federal laws and regulations; maintain a mailing address within New York State adequate for legal service, and be open and accessible to the public on a regular basis, including a requirement that corporations having an operating budget in excess of \$100,000 per year shall be open to the public a minimum of 1,000 hours per year.

Section 3.30(c)(2) prescribes requirements relating to the mission of historical societies without collections and cultural agencies, including requirements for a written mission statement, that the mission statement be reviewed, and revised as necessary, at least every 5 years.

Section 3.30(c)(3) prescribes governance criteria of historical societies without collections and cultural agencies, including a statement that the corporation's leadership consist of at least one person, paid or unpaid, who commands an appropriate body of knowledge and the ability to plan and implement programs of educational benefit to the public and which reflect the purpose of the corporation; that a board of trustees shall have no more than one-third (1/3) of its members related to each other by birth, marriage or domicile; that in any instance where there is a relationship between the corporation and another entity, there shall be no more than a one-third (1/3) overlap between the officers and/or directors; that the corporation have a written and board-approved code of ethics that applies to trustees, administrators, staff and volunteers and is reviewed each year; and that the corporation effectively advances diversity of membership and participation in the corporation's mission.

Section 3.30(c)(4) establishes financial criteria of historical societies without collections and cultural agencies, including requirements for a board-constituted audit committee for all corporations regardless of size of operating budget; for an independent audit by a certified public accountant for corporations whose operating budget exceeds \$250,000; and for an

independent review by a certified public accountant if the corporation's operating budget is at least \$100,000 but no more than \$250,000. There is no requirement for an independent audit or review if the corporation's operating budget is below \$100,000. A corporation will obtain and maintain tax-exempt status under section 501(c)(3) or other applicable section of the Internal Revenue Code.

Section 3.30(c)(5) establishes criteria for facilities of historical societies without collections and cultural agencies, including requirements for accessibility to those with disabilities, emergency action and disaster preparedness plans, an adequate, working alarm system, and a requirement that a historic structure be restored and/or maintained according to accepted historic preservation practices.

Section 3.30(c)(6) adds new criteria for education and interpretation conducted by historical societies without collections and cultural agencies.

Section 3.30(d) requires that each historical society without collections and each cultural agency file an annual report with the Commissioner.

Section 3.30(e) prescribes criteria for the use of corporate names by historical societies without collections and cultural agencies.

Section 3.30(f) requires historical societies without collections and cultural agencies to comply with State law relating to dissolution and distribution of assets.

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

Data, views or arguments may be submitted to: Clifford A. Siegfried, Assistant Commissioner for Museums, New York State Museum, Rm. 3023, Cultural Education Center, Albany, NY 12230, c/o Museum Chartering Office, (518) 473-3131, e-mail: dpalmqui@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 215 authorizes the Regents, the Commissioner, or their representatives, to visit, examine and inspect education corporations and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 216 authorizes the Board of Regents to incorporate educational institutions, including museums and other institutions for the promotion of science, literature, art, history or other department of knowledge, with such powers, privileges and duties, and subject to such limitations and restrictions, as they Regents may prescribe.

Education Law section 217 empowers the Board of Regents to grant a provisional charter to an institution, which shall be replaced by an absolute charter when the conditions for such absolute charter have been fully met.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by prescribing criteria for the chartering, incorporation and registration of museums, historical societies and cultural agencies, to ensure that such institutions carry out their governance, financial, auditing, collections management, program and ethical responsibilities, consistent with generally accepted professional and ethical standards within the museum and historical society communities.

3. NEEDS AND BENEFITS:

The proposed amendment is needed to ensure that museums, historical societies and cultural agencies that are chartered or otherwise incorporated by the Board of Regents carry out their fiduciary responsibilities for the benefit of the public, and in accordance with generally accepted professional and ethical standards within the museum and historical society communities. The proposed amendment will also permit historical societies that do not hold collections to operate under less restrictive requirements than historical societies that hold collections.

4. COSTS:

(a) Costs to the State: None.

(b) Costs to local governments: None.

(c) Costs to private, regulated parties: There will be costs to museums and historical societies to file IRS Form 1023 and to maintain IRS tax-exempt status under the Internal Revenue Code. If the institution's average annual gross receipts have exceeded or will exceed \$10,000 annually over a four-year period, the fee is \$500; if gross receipts have not exceeded or will not exceed \$10,000 annually over a four-year period, the fee is \$150. These costs are based upon information provided by the Internal Revenue Service on its web site. In 2003, there were 109 chartered or incorporated institutions that did not hold tax-exempt status and 848 that did.

Costs to convene an audit committee made up of members of the Board of Trustees will be negligible, as it involves one or more meetings, phone calls, and writing of a brief report.

Costs to conduct an annual independent audit by a certified public accountant by those institutions with an annual operating budget that exceeds \$250,000 will be approximately \$5,571 per institution. In 2003, there were 8 chartered or incorporated institutions with an operating budget of at least \$250,000 that did not report conducting such an audit; but none of the eight institutions had an operating budget higher than \$425,000. Costs to conduct an annual independent review by a certified public accountant by those institutions whose annual operating budgets are at least \$100,000 but no more than \$250,000 will be approximately \$4,448 per institution. In 2003, there were 26 chartered or incorporated institutions at that budget level that did not report conducting such an audit. Cost to conduct an annual independent audit or an annual independent review by a certified public accountant were established by the State Education Department's Museum Chartering office on June 27, 2005, based on an analysis of actual audit and outside accounting costs reported by complying institutions on their IRS Forms 990. Figures on the number of institutions which did not conduct an annual independent audit or an annual independent review were derived from 2003 annual report data collected by the State Education Department from its chartered or incorporated museums and historical societies.

(d) Costs to regulating agency for implementation and continued administration of this rule: there will be minimal costs to the State Education Department involving some increased clerical work. It is anticipated that any implementation costs will be absorbed using existing staff and resources.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to museums, historical societies and related cultural agencies chartered, or otherwise incorporated by, the Board of Regents and does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. PAPERWORK:

The State Education Department's annual report for chartered or incorporated museums and historical societies beginning in 2005 would ask new questions relating to compliance with the requirement to have a mission statement and a disaster plan. The report already asks questions relating to tax-exempt status, audit, and extent of facility access to the disabled. Chartered or incorporated museums and historical societies would be required to apply for IRS tax-exempt status; implement the work of an audit committee; appoint an outside auditor where required by budget amount; adopt an ethical statement, disaster plan and a mission statement, and review, and revise if necessary, the mission statement every five (5) years.

7. DUPLICATION:

Although incorporating commonly held professional principles within the historical and museum communities, and requiring the filing and maintaining of tax-exempt status and implementation of audit procedures, the proposed amendment duplicates no existing state or federal requirements.

8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no applicable federal standards regarding the chartering and registration of museums and historical societies by the Board of Regents.

10. COMPLIANCE SCHEDULE:

It is anticipated that chartered or incorporated museums and historical societies would apply for IRS tax-exempt status within 12 months of adoption of the amended rule; appoint and implement the work of an audit committee and appoint an outside auditor where required by the end of the appropriate fiscal year; and draft, adopt an ethical statement, disaster plan and a mission statement within 12 months of adoption of the amended rule.

Regulatory Flexibility Analysis

The proposed amendment applies to museums, historical societies and related cultural agencies chartered, or otherwise incorporated by, the Board of Regents and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse financial impact, on small businesses or local governments. Because it is evident from the nature of the rules that it does not affect small businesses or local governments, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis**1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment will apply to most of the 467 museums and 754 historical societies in New York State (source: New York State Museum chartering database as of May 2005), including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS' AND PROFESSIONAL SERVICES:

The proposed amendment would add language that spells out minimum requirements that a museum or historical society chartered by the Regents must meet in order to be granted an absolute charter, and to carry out their governance, financial, auditing, collections management, program and ethical responsibilities, consistent with generally accepted professional and ethical standards within the museums and historical community. Chartered or incorporated museums and historical societies would be required to apply for IRS tax-exempt status; implement the work of an audit committee; appoint an outside auditor where required by budget amount; adopt an ethical statement, disaster plan and a mission statement, and review, and revise if necessary, the mission statement every five (5) years. The State Education Department's annual report for chartered or incorporated museums and historical societies beginning in 2005 would ask new questions relating to compliance with the requirement to have a mission statement and a disaster plan. The report already asks questions relating to tax-exempt status, audit, and extent of facility access to the disabled.

The proposed amendment provides two important exceptions for institutions with operating budgets under \$100,000 a year: they are not required to open any facility under their care for a minimum number of hours, and historical societies will be allowed to operate a museum with qualified volunteer staff without the requirement of paid staff. The proposed amendment provides a simpler means of incorporation for historical societies that do not hold collections, offering a Regents certificate of incorporation in lieu of a charter. The proposed amendment would require no additional professional services other than auditing services for institutions with operating budgets of over \$100,000, but few museums or historical societies in rural areas would fall into this budget category. Otherwise, the proposed amendment would require no additional professional services beyond those already provided by staff or volunteers of the institution.

3. COMPLIANCE COSTS:

The proposed amendment provides mitigation for costs to museums and historical societies with operating budgets of under \$100,000 as described above; otherwise it imposes costs that are uniform across the State.

There will be costs to museums and historical societies to file IRS Form 1023 and to maintain IRS tax-exempt status under the Internal Revenue Code. If the institution's average annual gross receipts have exceeded or will exceed \$10,000 annually over a four-year period, the fee is \$500; if gross receipts have not exceeded or will not exceed \$10,000 annually over a four-year period, the fee is \$150. These costs are based upon information provided by the Internal Revenue Service on its web site. In 2003, there were 109 chartered or incorporated institutions that did not hold tax-exempt status and 848 that did.

Costs to convene an audit committee made up of members of the Board of Trustees will be negligible, as it involves one or more meetings, phone calls, and writing of a brief report.

Costs to conduct an annual independent audit by a certified public accountant by those institutions with an annual operating budget that exceeds \$250,000 will be approximately \$5,571 per institution. In 2003, there were 8 chartered or incorporated institutions with an operating budget of at least \$250,000 that did not report conducting such an audit; but none of the eight institutions had an operating budget higher than \$425,000. Costs to conduct an annual independent review by a certified public accountant by those institutions whose annual operating budgets are

at least \$100,000 but no more than \$250,000 will be approximately \$4,448 per institution. In 2003, there were 26 chartered or incorporated institutions at that budget level that did not report conducting such an audit. Cost to conduct an annual independent audit or an annual independent review by a certified public accountant were established by the State Education Department's Museum Chartering office on June 27, 2005, based on an analysis of actual audit and outside accounting costs reported by complying institutions on their IRS Forms 990. Figures on the number of institutions which did not conduct an annual independent audit or an annual independent review were derived from 2003 annual report data collected by the State Education Department from its chartered or incorporated museums and historical societies.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to ensure that museums, historical societies and related cultural agencies in the State carry out their governance, financial, auditing, collections management, program and ethical responsibilities, consistent with generally accepted professional and ethical standards within the museums and historical community. Since the Regents policy upon which the proposed amendment is based applies to all such institutions in the State, it was not possible to establish different compliance and reporting requirements for institutions in rural areas, or exempt them from the provisions. The proposed amendment provides a simpler means of incorporation for historical societies that do not hold collections, offering a Regents certificate of incorporation in lieu of a charter, and would allow them to operate under less restrictive requirements than historical societies that hold collections.

5. RURAL AREA PARTICIPATION:

The proposed amendment is based on a Regents Policy Conference held to explore concepts and ideas based on a guidelines and best practices document produced in cooperation with the Museum Association of New York. The agency mailed the first draft to its entire mailing list of approximately 1,800 institutions; placed the draft on the Museum Association and State Museum web sites; and held nine regional meetings in summer 2004 across the state (in Schenectady, Glens Falls, Syracuse, Mumford [Rochester], Buffalo, New Paltz, New York City, Binghamton and Stony Brook) attended by a total of approximately 200 individuals.

Job Impact Statement

The proposed amendment applies to museums, historical societies and related cultural agencies chartered, or otherwise incorporated by, the Board of Regents and will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION**Harvest Limit for Surfclams****I.D. No.** ENV-18-05-00007-A**Filing No.** 715**Filing date:** June 28, 2005**Effective date:** July 13, 2005

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

Action taken: Amendment of Subpart 43-2 of Title 6 NYCRR.**Statutory authority:** Environmental Conservation Law, sections 13-0308 and 13-0309**Subject:** Harvest limit for surfclams.**Purpose:** To allow the department to make a mid-year adjustment to the 2005 annual harvest limit for surfclams taken from the Atlantic Ocean by mechanical means.**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-18-05-00007-P, Issue of May 4, 2005.

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

Text of rule and any required statements and analyses may be obtained from: Maureen Davidson, Department of Environmental Conservation, 205 N. Belle Mead Rd., Suite 1, East Setauket, NY 11733, (631) 444-0496, e-mail: mcdauids@gw.dec.state.ny.us

Additional matter required by statute: A negative declaration has been prepared pursuant to the State Environmental Quality Review Act and is available for review.

Assessment of Public Comment

The Department received public comments on the proposed rulemaking. The comments submitted to the Department concerning the proposal are summarized below, followed by the Department's response:

Comment 1: Comments were received suggesting that the Department modify the proposed regulations to reflect additional changes requested by members of the surfclam industry. These changes include allowing the consolidation of two permits with one vessel, requiring the Department to conduct biannual surfclam population surveys, and specifying only biannual adjustments to the annual harvest limit.

Department response: The suggested changes are beyond the original scope and intent of the proposed rule making. The purpose of the proposed rule is to allow the Department to make a midyear adjustment to the 2005 annual harvest limit for surfclams. This proposed rule was presented as such by the Department to the Surfclam/Ocean Quahog Management Advisory Board and was a topic of discussion at several board meetings. Furthermore, the changes suggested by these comments represent major revisions to the existing Fishery Management Plan for the Mechanical Harvest of the Atlantic Surfclam in New York State Waters of the Atlantic Ocean. Such revisions can not be acted upon by the Department without first being brought before the Surfclam/Ocean Quahog Advisory Board for discussion, voted on by the Board, and then presented by the Board to the Department as recommendations. The Department also notes that the issue of permit consolidation has been discussed by the Board in the past and was not resolved to the satisfaction of a majority of the Board members. Consequently, the Department declines to modify the text of the proposed amendments as suggested by these comments.

Comment 2: Comments were received opposing the comments described in Comment 1 above and reiterating the point that any revisions to the management plan and associated regulations must first be a matter brought before the Surfclam Advisory Board.

Department response: These comments are likewise beyond the original scope and intent of the proposed rule making. As noted above, the Department declines to modify the text of the proposed amendments as suggested in Comment 1.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Access to Records

I.D. No. ENV-28-05-00007-P

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

Proposed action: Amendment of Part 616 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, section 3-0301(2)(a); Public Officers Law, sections 87, 89, 92, 94, 95 and 96; L. 2005, ch. 22

Subject: Access to records.

Purpose: To bring the regulation into conformity with the Public Officers Law regarding agency response to requests for records and with respect to records containing information on critical infrastructure and/or trade secrets as well as correct outdated information and clarify protocols on providing access to records.

Substance of proposed rule (Full text is posted at the following State website: <http://www.dec.state.ny.us/website/regs/part616.html>): The proposed rule will amend, repeal, and replace sections of Part 616, as it currently appears in 6 NYCRR. These amendments will update information such as Department addresses and internet access. In addition, the amendments will clarify and conform section 616.7 to existing law. Section 616.7 governs access to records that are identified as containing trade secrets, confidential commercial information, or critical infrastructure information. In 2003, the Legislature amended Public Officers Law (POL) section 89 (5)(1-a) to address handling of agency records containing critical infrastructure. To be consistent with this statutory amendment, the Department has proposed this rule change.

Persons submitting records to the Department may identify records or portions of records as containing critical infrastructure information pursuant to POL section 89(5)(1-a). The statute sets forth procedures for handling these records so identified. POL sections 89(5)(1-a)(3).

The proposed rule will bring the regulatory definition of trade secrets into conformity with POL section 87(d).

The amendments also make the Department's Access to Records regulations current with Laws of New York 2005 with respect to agency obligations to respond to freedom of information law (FOIL) requests.

The amendments conform the regulations to section 94 of the Personal Privacy Protection Act of the POL with respect to duties of the Department's privacy compliance officer and staff with respect to handling of personal information.

The proposed rule also clarifies, consistent with law, that requests for access to records must be in writing and that in situations in which the description of the records sought is so unclear that the Department cannot retrieve the information without resorting to extraordinary means that the Department staff shall so notify the requester pursuant to POL section 89(3).

The proposed rule amendment also makes gender neutral certain language concerning appeals.

The Department is authorized by Environmental Conservation Law section 3-0301(a), General Functions, Powers, Duties and Jurisdiction and POL sections 87 and 89, Freedom of Information Law and POL sections 92, 94, 95 and 96, the Personal Privacy Protection Law to make these regulatory amendments. These laws govern state agency responsibilities with respect to providing the public with access to agency records.

These amendments will ensure that the Department's regulations governing access to records are in accord with New York State law. The benefits to these amendments are that they will eliminate confusion engendered by any current disparities between the law and the Department's regulations and will clarify the obligations of the Department and its protocols with respect to FOIL requests.

Text of proposed rule and any required statements and analyses may be obtained from: Helene Goldberger, Office of Hearings and Mediation Services, 625 Broadway, Albany, NY 12233, (518) 402-4003, e-mail: hggoldbe@gw.dec.state.ny.us

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

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

Additional matter required by statute: Pursuant to art. 8 of the Environmental Conservation Law, the State Environmental Quality Review Act (SEQRA), the department has completed a short environmental assessment form (EAF) and issued a negative declaration in which it has determined that there will be no environmental effects resulting from this action.

Regulatory Impact Statement

1. **Statutory authority:** The authority for the proposed amendments to Part 616 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York is found within the Environmental Conservation Law (ECL) § 3-0101(2)(a), General Functions, Powers, Duties and Jurisdiction and Public Officers Law (POL) §§ 87 and 89, Freedom of Information Law (FOIL), and POL §§ 92, 94, 95 and 96, the Personal Privacy Protection Law. These laws govern state agency responsibilities with respect to providing the public with access to agency records. Based upon changes to POL §§ 89(5)(a), (1-a) concerning information relating to critical infrastructure, it is incumbent upon the Department to amend its regulations to conform with the statutory changes. L. 2003, c. 403. Very recent changes to POL §§ 89(3) and (4) concerning the timeliness of agency response to FOIL requests have also been incorporated into these proposed amendments. L. 2005, c. 22. In addition, the amendments also conform other sections of Part 616 to Articles 6 and 6A of the Public Officers Law, make gender neutral certain language, as well as correct outdated information such as personnel and address changes.

2. **Legislative objectives:** FOIL seeks to provide access to agency records to ensure a responsive government. POL § 84. Recent events in society have caused the Legislature to become concerned about the timeliness of agency response to FOIL requests and about protecting certain information related to critical infrastructure in order to protect the public. POL §§ 89 (3), (4), (5)(1-a). In addition, FOIL has always provided certain exceptions from disclosure in order to protect trade secrets, privacy, and the public safety, among others. POL § 87(2). Accordingly, the Department seeks to amend Part 616 to conform with these statutory goals. Moreover, in order to meet FOIL's goals of providing access to information, it is essential that the Department's regulations are clear and provide

current information with respect to office locations and the identification of personnel. The proposed amendments will ensure that the Department conforms with this intent.

3. Needs and benefits: The necessity for these amendments is to ensure that the Department's regulations governing access to records are in accord with New York State law. The benefits to these amendments are that they will eliminate confusion engendered by any current disparities between the law and the regulations and will clarify the obligations of the Department and its protocols with respect to FOIL requests.

The Department has provided the following organizations and individuals with informal notice of its proposed amendment:

Ken Pokalsky, Director, Environmental & Manufacturing Programs
The Business Council of New York State
Helen Lewis
New York State Association of Towns
Peter Savage
New York State Association of Counties
David Brennan, Esq.
Sunshine Newsletter
Robert J. Freeman, Esq.
Executive Director
Committee on Open Government
New York Public Interest Group
Robert J. Moore, Executive Director
Environmental Advocates
Albany Law School
Government Law Center

In addition, the Department has provided outreach with publication of a summary of the intended amendments in:

Environmental Notice Bulletin
State Register

4. Costs: There are no costs associated with the proposed amendments, because they primarily involve the obligations of this Department to provide access to its records pursuant to FOIL. There will be no change in Department procedures governing its compliance with FOIL. The purposes of the amendments are to make the regulations conform to current law and to clarify and update the regulations. This rulemaking does not impose any regulatory mandates on the regulated community nor does it require any businesses or local governments or any other organization to purchase or modify any equipment, purchase any permit or license, or modify the means by which they conduct their business. Consequently, there are no financial impacts attributable to this rule change. There are no costs projected for state government, local government, private regulated parties or for DEC.

5. Local government mandates: There are no local government mandates associated with these amendments. The amendments address the Department's obligations and protocols under FOIL.

6. Paperwork: We do not anticipate that the proposed amendments will change the Department's procedures pursuant to FOIL and therefore should not create additional paperwork. The proposed amendments reflect the current law. Current law provides that individuals or entities that submit records to an agency and seek to identify that such records contain information concerning critical infrastructure make that request to the agency. POL § 89(5)(1-a). DEC's proposed amendment does not add to that requirement but instead codifies it within DEC's regulatory framework.

FOIL requires state agencies to provide access to government records when requested by members of the public. Therefore, in most cases, it is the Department that bears the burden of paperwork in this instance. The Public Officers Law does require that requests for records be in writing. Currently, the Department's regulations allow for oral requests. In order to be consistent with the law, the proposed regulations require written requests. See, POL §§ 89(3), 95(1)(a) and 96(1)(a).

Chapter amendments of 2005 require that if an agency cannot provide documents within twenty days of a request that it has determined it will release in whole or part it must provide the reason for the delay and a date certain for release within a reasonable time. Again, these requirements add responsibility to DEC's response to requests for access to records but do not add any burdens to the public. Instead, these changes clarify that failure to adhere to these requirements will mean that the agency will be deemed to have denied access to the records. See, L. 2005, c. 22.

7. Duplication: There will not be duplication created by these amendments because they apply to the Department's obligations and protocols pursuant to FOIL. As POL §§ 87 and 94 require agencies to promulgate

and maintain regulations that implement FOIL and the POL, this amendment is in accord with legislative goals.

8. Alternatives: The alternative is to allow the Department's regulations to be inconsistent with the law. Because this proposal is based upon the objective of making the regulations conform to law and to simplify their use, we do not think a no-action alternative is preferable. And, given these goals, there is no other alternative to the proposed action.

9. Federal standards: There are no applicable federal standards. The federal Freedom of Information Act (FOIA) applies to federal records. While FOIL is patterned after FOIA, because it applies to state government records, there is not duplication of regulation.

10. Compliance schedule: The regulations primarily govern the Department's responsibilities and protocols for administering FOIL. There is no compliance schedule at issue.

Regulatory Flexibility Analysis

1. Effect of rule: The purpose of these proposed amendments is to conform the Department of Environmental Conservation's Part 616 regulations with the Public Officers Law (POL) - Freedom of Information Law - concerning access to government records. Because the requirements of the law are already in effect, the amendment to these regulations will not create any new responsibilities or costs on any persons or entities including small businesses or local governments.

Specifically, the proposed amendments are in response to changes in POL § 89(5)(1-a) concerning records containing information on critical infrastructure. The proposed amendments seek to incorporate the statutory requirements into Part 616. The amendments also include recent changes to the POL pursuant to the Laws of New York 2005, Chapter 22 concerning the timeframes within which state agencies must respond to freedom of information requests. In addition, the proposed amendments seek to clarify other portions of the regulations that are vague or redundant, make gender neutral certain language, as well as to update information concerning personnel and addresses.

2. Compliance requirements: The requirements of these regulations are already in effect and are primarily borne by the Department in its protocols with respect to public access to information retained by DEC. The regulations will not require any new recordkeeping by small businesses or local governments. The Department currently keeps business records that are sometimes considered trade secrets and/or confidential commercial information and that are supplied by businesses. The proposed amendments seek to clarify procedures that the Department must utilize when a request is made, pursuant to the Freedom of Information Law, to review such information. However, the proposed amendments do not make any new requirements and the changes are consistent with current law. The regulations will clarify that freedom of information requests must be made in writing. This requirement is already the law pursuant to POL § 89(3).

3. Professional services: Because the proposed amendments to Part 616 do not create any new requirements for small businesses or local governments, there will be no need to retain professional services to comply with the amendments.

4. Compliance costs: Because the amendments do not create any new obligations on the part of small businesses or local governments, there will not be any compliance costs related to this rulemaking.

5. Economic and technological feasibility: The proposed amendments to Part 616 concern the Department's obligations pursuant to the Freedom of Information Law - access to government records. As stated above, because these changes are for the purpose of conforming the regulations to existing law, clarifying the regulations, and correcting outdated information, there are no new requirements for small businesses and local governments. Accordingly, there are no issues related to economic and technological feasibility.

6. Minimizing adverse impact: There will be no adverse impacts arising from this amendment as the purpose of the rulemaking is to clarify the regulations and conform them to existing law.

7. Small business and local government participation: The Department has published the notice of the proposed rule in the *State Register*, in the *Sunshine* newsletter and in the Department's on-line *Environmental Notice Bulletin*. In addition, the Committee on Access to Government, the Association of Towns, the Association of Counties, the Business Council, Environmental Advocates, the New York Public Interest Group and the Government Law Center of Albany Law School were notified of this proposal prior to publication in the *State Register*.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The purpose of these proposed amendments is to conform the Department of Environmental Conservation's Part 616 regulations with the Public Officers Law (POL) -

Freedom of Information Law - concerning access to governments records. Because the requirements of the law are already in effect statewide, the amendment to these regulations will not create any new responsibilities or costs on individuals, local governments, or businesses in any rural areas.

Specifically, the proposed amendments are in response to changes in POL Section 89(5)(1-a) concerning records containing information on critical infrastructure. The proposed amendments seek to incorporate the statutory requirements into Part 616. The proposed amendments also reflect a recent change to the POL as a result of the Laws of New York 2005, Chapter 22 requiring state agencies to respond to requests for access to records within designated timeframes. In addition, the proposed amendments seek to clarify other portions of the regulations that are vague or redundant, make gender neutral certain language, as well as to update information concerning personnel and addresses.

2. Reporting, recordkeeping and other compliance requirements: The requirements of these regulations are already in effect and are borne primarily by the Department in its protocols with respect to public access to information retained by DEC. The regulations will not require any new recordkeeping by persons, local governments, or entities in rural areas. The Department currently keeps business records that are sometimes considered trade secrets and/or confidential commercial information and that are supplied to the Department by businesses. The proposed amendments seek to clarify procedures that the Department must utilize when a request is made, pursuant to the Freedom of Information Law, to review such information or to have the Department deem the records trade secrets. However, the proposed amendments do not make any new requirements and the changes are consistent with current law. The regulations will clarify that freedom of information requests must be made in writing. This requirement is already the law pursuant to POL section 89(3). The regulations also reflect the new requirements in state law that require access to records within certain time frames or the provision of a date certain when such records will be made available. These statutory changes also provide that if appeals are not decided within 10 days of receipt, they may be deemed a denial of access to the records sought.

3. Costs: Because the proposed amendments to Part 616 do not create any new requirements for individuals, businesses or local governments in rural areas or elsewhere, there will be no new costs associated with this rulemaking.

4. Minimizing adverse impact: Because the proposed amendments do not create any new responsibilities but rather seek to conform the Department's regulations with existing law and to clarify Part 616, there are no adverse impacts on rural areas.

5. Rural area participation: The Department has published notice of the proposed rule in the *State Register*, the Sunshine newsletter and on the Department's on-line Environmental Notice Bulletin. In addition, the Committee on Access to Government, the Association of Towns, the Association of Counties, the Business Council, Environmental Advocates, New York Public Interest Group, and the Government Law Center of Albany Law School were notified of this proposal prior to publication in the *State Register*.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposed amendments to Part 616 will have no adverse impact on existing or future jobs and employment opportunities. The proposed requirements already exist in the law and primarily involve the records access obligations of this Department. This proposed rulemaking relates to agency response to requests for records and to the disclosure of certain public records; specifically, it would amend the Department's Access to Records regulations in order to update them to be consistent with the State's Freedom of Information Law (FOIL). The amendments would make Part 616 consistent with the Public Officers Law (POL) section 89 in regard to identification and potential exemption of certain public records containing critical infrastructure information. The amendments also make the Department's Access to Records regulations current with the Laws of New York 2005, Chapter 22 with respect to agency obligations to respond to FOIL requests. In addition, this proposal would bring the regulatory definition of trade secrets into conformity with the statute. The amendments would also update outdated information, make gender neutral certain language, and clarify some provisions. This proposal does not impose any regulatory mandate on the regulated community, nor does it require any businesses to purchase or modify any equipment, purchase any special permit or license or modify the means by which they conduct their business. Consequently, there could be no adverse impact on existing or future jobs and employment opportunities.

This conclusion was reached based on the Department's determination that there will be no adverse cost impact from this action.

Department of Health

EMERGENCY RULE MAKING

Cytotechnologists Work Standard

I.D. No. HLT-28-05-00002-E

Filing No. 703

Filing date: June 22, 2005

Effective date: June 22, 2005

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

Action taken: Amendment of section 58-1.12(b)(7) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 576-a

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

Specific reasons underlying the finding of necessity: New York Public Health Law Section 576-a establishes work standards for cytotechnologists who examine cytology slides at clinical laboratories. After initial enactment of Section 576-a, the Department adopted the first regulations in the United States establishing cytotechnologist workload limits, a registration process for cytotechnologists, quality standards for cytology slides, as well as operational standards for clinical laboratories performing cytopathology testing. Since that time, the Department has worked closely with 285 clinical laboratories holding permits in the category of cytology (and which employ approximately 1,100 registered cytotechnologists full-time and part-time). The Department has gained significant experience in applying workload standards at these clinical laboratories.

Public Health Law Section 576-a also authorizes the Department to promulgate regulations to increase the maximum number of cytology slides that may be examined in a workday by cytotechnologists who use cytology slide examination or preparation technologies approved by the federal Food and Drug Administration (FDA). The Department has become aware of recent advances in cytology slide preparation and examination technology, which, according to recent studies conducted with the involvement of device manufacturers, improve detection of serious diseases (*i.e.*, cervical cancers). These new technologies also vastly increase the rate at which cytotechnologists can effectively examine slides. The Department has examined claims made by developers of these new technologies and has considered the potential impact that they could have on public health and welfare.

The vast majority of New York permitted clinical laboratories are not acquiring and using these costly new slide examination technologies. Use of these technologies by cytotechnologists at workload levels currently authorized by New York law is not cost effective. Increased workload standards are essential to ensure that clinical laboratories can afford, and immediately acquire and use these important, potentially life saving technologies. Therefore, the Department must immediately authorize, pursuant to this proposed emergency rulemaking, clinical laboratories to increase the workload limits for its cytotechnologists who use this new technology. This proposed rule making allows needed flexibility in increasing workload limits for cytotechnologists using FDA approved slide preparation and/or examination devices, as soon as they become commercially available for use by clinical laboratories.

The Department is committed to ensuring that New York residents and laboratories promptly benefit from new technologies with potential to improve gynecological cytology test methods without adding significantly to health care costs. This proposed rule making, once adopted, would promote use of new technologies that hold promise for more accurate, efficient and effective cervical cancer diagnosis, without compromising accuracy and reliability.

For the foregoing reasons, the Department finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest and welfare. The alternative—to promulgate this proposed

rulemaking pursuant to SAPA section 202(1) would unreasonably delay and hinder the Department's ability encourage appropriate use of new, and perhaps better, technology. To avoid unnecessary and potentially detrimental delay in the Department's implementation of appropriate work standards for cytotechnologists using new technologies for cervical cancer detection and diagnosis, the amendment to 10 NYCRR Section 58-1.12(b) is hereby proposed for adoption by emergency promulgation.

Subject: Cytotechnologists work standard.

Purpose: To provide flexibility to the department in establishing work standards that consider new technologies for pap smear screening.

Text of emergency rule: Paragraph (7) of subdivision (b) of Section 58-1.12 is amended to read as follows:

(7) Exceptions. (i) Each laboratory [must] *shall* evaluate the performance of each cytotechnologist *in its employ*, and establish an appropriate examination volume limitation based on *the cytotechnologist's* experience, documented accuracy[, and performance in proficiency testing, or [for] on other reasons, including false-negative or false-positive interpretations [reports]. Under no circumstances [should] *shall* this volume be exceeded, even if it is [less] *lower* than the maximum work standard.

(ii) A cytotechnologist may exceed the work standard by [10] *twenty* (20) percent, with the written approval of the department. The laboratory director may request such approval based on each cytotechnologist's experience, documented accuracy, including false-negative or false-positive [reports] *interpretations*, and a performance *score* in proficiency testing of not more than two (2) errors. Documentation of [this] *department* approval [must] *shall* be available in the laboratory, and may be revoked by the department with prior notice to the laboratory, based on a cytotechnologist's performance in proficiency testing or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. The laboratory director [must] *shall* monitor the performance of each cytotechnologist and advise the department [when the] *whenever the* approval is to be revoked based on on-the-job performance.

(iii) Cytotechnologists who qualify as supervisors under section 58-1.4 of this Subpart may re-examine up to [20] *twenty* (20) slides per day [separate from] *in addition to* the workload standard, *provided the combined total number of slides does not exceed one-hundred (100)*, as part of the [quality control-] quality assurance program of the laboratory, with the prior approval of the department, based on documented accuracy, including [false negative or positive reports] *false-negative and false-positive interpretations*, and performance in proficiency testing. Such approval may be revoked, with prior notice to the laboratory, based on proficiency testing performance or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. Records [must] *shall* be maintained to document the *examination* volume and hours worked by *each cytotechnologist*.

(iv) *The department may increase the cytotechnologist work standard beyond the level already authorized elsewhere in this section for cytotechnologists using a federal Food and Drug Administration (FDA)-approved device in the preparation or examination of cytology slides:*

(a) *in determining whether to increase the cytotechnologist work standard with respect to a particular device, the department shall consider the following: the FDA's approved use of the device; studies of the accuracy, reliability and appropriate use of the device; input from clinical laboratories using the device; recommendations of experts in the field of cytology and/or cytotechnology; and other relevant information as appropriate;*

(b)(1) *the department may require a clinical laboratory wishing to exceed the cytotechnologist work standard set forth elsewhere in this section to request in writing the department's approval. The department may also require the applicant laboratory to provide, in a form acceptable to the department, some or all of the following information regarding the device in use at the laboratory: the device manufacturer's recommendations, if any, regarding the quantity (i.e., slide volume), speed or manner of slide examination, and the basis for such recommendations; documentation of training for each cytotechnologist using the device; each cytotechnologist's experience using the device, including false-negative and false-positive interpretations, workload, and number of hours spent examining slides; each cytotechnologist's performance on proficiency testing; as well as any other information as determined appropriate by the department to assess device capacity and user capability; and*

(2) *the department shall provide written notice of the authorized work standard established pursuant to this subparagraph. The department may set a work standard in writing that applies to one or more cytotechnologists.*

(c) *laboratories shall maintain documentation of approval pursuant to this subparagraph for a minimum of two (2) years after use of the device is discontinued;*

(d) *if the department determines that a cytotechnologist work standard authorized pursuant to this subparagraph increases the rate of errors or compromises the reliability of results, the department shall adjust the standard as it deems appropriate and shall notify the affected clinical laboratories in writing of such change. Clinical laboratories that find the adjustment unacceptable may request only in writing that the department reconsider its determination; and*

(e) *notwithstanding the foregoing, any cytotechnologist work standard authorized by the department pursuant to this subparagraph shall be at least as stringent as the federal standards promulgated under the federal clinical laboratory improvement amendments of nineteen hundred and eighty-eight (1988) and/or other applicable law(s).*

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 September 19, 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:

Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The statute established standards for cytotechnologists' workload, a registration requirement for individuals engaged in initial examination of slides, and quality standards for preparing and examining the slides. Regulations adopted as 10 N.Y.C.R.R. Sections 58-1.12 and 58-1.13 pursuant to that legislation have been in effect since 1989. Public Health Law, Article 5, Title V was amended by Chapter 436 of the Laws of 1993. Section 576-a of that legislation modified the state's cytotechnologist work standard, (*i.e.*, a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist may examine during a work day) to effect parity with federal standards in the Clinical Laboratory Improvement Amendments of 1988 (CLIA '88). Section 576-a also includes a provision authorizing the Department to increase the cytotechnologist work standard in response to technological advances in instrumentation and devices for assisted examination of cytology slides.

Legislative Objectives:

In 1988, media reports made the public aware of problems associated with inordinate cytotechnologist workloads in clinical laboratories examining gynecologic slides (Pap smears) for evidence of cervical cancer. At that time, New York was the only state with a comprehensive program of oversight of these laboratories, including review of cytotechnologist qualifications, and on-site assessment of laboratory operations and proficiency testing. While excessive testing volumes had not been reported in New York State, the Legislature determined that additional steps were required to protect women residents of the State, and Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The legislation established a work standard for initial examination of cytologic specimens (*i.e.*, a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist or pathologist may examine during a work day), a registration requirement for individuals engaged in slide examination, and quality standards for the slides. Chapter 436 of the Laws of 1993 modified the State's cytotechnologist work standard for parity with federal standards in CLIA '88; specifically, the Legislature enacted an increase of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day, from the previous limit of 10 percent above the 80-slide limit, or 88 slides.

Needs and Benefits:

After initial enactment of Section 576-a, the Department adopted the first regulations in the country establishing cytotechnologist workload standards, a registration process for cytotechnologists, requirements for the quality of slides, as well as general standards for operation of cytopathology laboratories. The Department has not revised these regulations since their promulgation in 1990. During that time, the Department has gained significant experience in applying workload standards for 285 clinical laboratories with a permit in the cytology testing category that employ more than 1,200 registered cytotechnologists full-time and part-time.

The Food and Drug Administration (FDA) has approved for marketing a cytology slide screening device that increases the number of slides a cytotechnologist can accurately and reliably examine per day. The Depart-

ment needs to consider, on a case by case basis and in the most expeditious manner possible, establishment of a cytotechnologist workload limit other than that set earlier to promote accurate and reliable slide examination by the conventional (manual) method. The Department must now ensure that New York residents and laboratories benefit from new technologies with the potential to improve gynecological cytology test methods without adding significantly to health care costs. To this end, it is proposed to amend existing regulations, and allow needed flexibility for increasing the workload limit for cytotechnologists using automated slide preparation and/or examination methods as new methods are approved by the FDA and become available for use by clinical laboratories.

Technological advances have permitted automation to make inroads in the discipline of cytology, a field of laboratory medicine that historically has relied solely on the joint expertise of cytotechnologists and pathologists for accurate and reliable diagnosis of cancers and other abnormalities detectable at the cellular level. Slides for cervical cancer screening, once prepared in the physician's office, can now be produced in the laboratory as a clean preparation of target cells, free of any obscuring blood or inflammation debris, deposited on a glass slide in a single layer, well-separated and with little or no overlap of cells to interfere with a cytotechnologist's ability to locate and identify aberrant cell types indicative of cervical cancer and other abnormalities. The FDA's approval of several automated systems for cytology slide preparation (*i.e.*, fix-and-stain material on microscopic slides) as *in-vitro* diagnostic devices, and overwhelming acceptance of the devices by the clinical laboratory industry and women's health practitioners and advocates have opened the door to further advances in the science of cytology, specifically, development of computerized algorithms for detection of cells not meeting criteria as normal. The purported advantage of this new technology is that it allows cytotechnologists to focus on accurate interpretation, resulting not only in increased productivity but, more importantly, the potential to improve diagnostic performance.

During conventional (manual) slide examination, the cytotechnologist must use locator skills to detect cells that are abnormal according to pre-established criteria for nuclear density and other factors, such as the relative size of the cell nucleus compared to the rest of the cell. Several device manufacturers have programmed a computer with an algorithm similar to that used by cytotechnologists to identify abnormal cells, thereby allowing a computer to take over the tiresome task of scanning numerous slides to look for the usually rare abnormal cell. The algorithms are sophisticated, but, as yet, are not capable of definitively classifying cells as pre-cancerous or indicative of malignancy. Devices that locate and mark suspect cells, guiding the cytotechnologist to them for interpretation, have already received FDA approval. Another device approved by the FDA classifies as within normal limits slides with no to very low probability of an abnormal finding, allowing up to 25 percent of gynecologic specimens to be reported as within normal limits without human review.

New slide preparation and screening technologies are changing the way laboratories diagnose cervical cancer and other malignant diseases detectable at the cellular level. Clinical trial data and preliminary data from laboratories using location guidance devices for detection of cancerous cells may increase by 50 percent or more the number of slides a cytotechnologist may reliably examine during a given time period. More importantly, evidence is emerging that this technology can increase the probability that no truly abnormal cell, however rare, would be missed due to human factors, such as fatigue and momentary lapses in vigilance, which have been widely recognized as capable of compromising result reliability. Manufacturers' claims that this technology can better locate cells typical of low- and high-grade squamous intraepithelial lesions (LSIL and HSIL, respectively), the most clinically important findings other than squamous cell carcinoma, are of particular interest to the Department in fulfilling its mandate to promote and protect the public health, because such claims, if proved correct, signal the potential to reduce morbidity in women who are routinely screened for cervical cancer.

Moreover, the Department has been informed that laboratories are reluctant to purchase automated devices for cytology examinations if the instrumentation cannot be utilized to near-full potential or in an otherwise cost-effective manner. This proposed rulemaking to increase the workload limit would better enable laboratories to acquire new technologies that hold promise for more efficient and effective cervical cancer diagnosis without compromising safety, accuracy and reliability.

In addition to allowing flexibility to change cytology workload standards without repetitive rulemaking, the proposed regulation would also provide affected parties with Department criteria for setting such standards, and make clear that, at the Department's discretion, laboratories

may be required to request and be granted device-specific approval to examine Pap smears applying a workload standard other than that in place for conventional (manual) examination methods. Moreover, the proposed amendment establishes the Department's authority to make an immediate adjustment to any work standard pursuant to the rule upon a determination that error rates have increased or the reliability of results has been compromised following approval of an increased work standard.

The proposed amendment would also make the regulation consistent with its authorizing statute as modified by Chapter 436 of the Laws of 1993, which provided for an increase in the work standard of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day. Existing regulation must be changed, as it set the previous restriction as 10 percent above the 80-slide limit, or 88 slides, and, as such, does not accurately reflect the Department's practice of authorizing up to 96 slides to be examined per work day.

Several housekeeping modifications were also proposed to facilitate compliance. The Department has received numerous inquiries related to the allowance for cytotechnologists' qualified supervisors to examine up to 20 slides beyond the work standard, and finds it necessary to clarify that the combined total number of slides may not exceed 100. In three instances, the term "reports" has been changed to "interpretations" to make clear that the Department considers all errors as relevant to approval (*i.e.*, false-negatives and false-positives), including errors in the cytotechnologist's interpretation, regardless whether corrected during re-examination or slide review by a pathologist prior to reporting - and not only erroneous results (typically false-negatives) reported to medical practitioners and discovered through retrospective review following a finding of HSIL or an equivalent, or malignancy.

Costs:

Costs to private regulated parties:

Since the proposed rulemaking does not require purchase or use of any devices for preparation and/or examination of cytology slides, this proposed rulemaking does not require private affect parties to incur costs. To the contrary, several clinical laboratories operating in New York State and using or considering use of new technology for examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that specimen throughput may be increased, which, in turn, would allow for increased reimbursement for cytopathology services and potentially increased profits.

Costs for implementation and administration of the rule:

Costs to State government:

State government is not expected to incur costs attributable to this proposed amendment.

Costs to the Department:

The Department is not expected to incur costs attributable to this proposed amendment. A system is already in place for review of laboratories' requests for qualified cytotechnologists to exceed the existing workload limit by 20 percent, and it is expected that the few additional requests submitted as a direct result of this amendment would be able to be processed under the same system and using the same personnel.

Costs to local government:

Local government-operated clinical laboratories would have the opportunity to increase reimbursement and profits by increasing throughput of cytology examination specimens under the provisions of this proposal, as described for private regulated parties.

Paperwork:

The Department may experience a minimal increase in paperwork from the intermittent need to communicate new standards to affected laboratories in writing. The Department already has an established system for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and expects few additional requests as a direct result of this amendment.

Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

Duplication:

These rules do not duplicate any other law, rule or regulation.

Alternative Approaches:

In drafting this proposed rule, the Department has considered the diversity of technological approaches to automating Pap smear examinations already in place and those known to be in development. The only consistent feature of these devices appears to be generalized use of a computerized algorithm to simulate human decision-making. The Department believes it is not feasible to arrive at a single, universally applicable

work standard that could be set forth in regulation for all existing and future Pap examination technologies. The alternative — promulgation of revised regulations to establish workload limits each time a device is granted FDA approval — would be unacceptably burdensome to the Department, and would possibly delay the use of technology in New York that could more effectively identify cancerous and precancerous cells.

Federal Standards:

Federal workload standards for cytotechnologists performing conventional (manual) examination of cytology slides have been promulgated under CLIA '88. Both the FDA and U.S. Centers for Medicaid and Medicare Services (CMS) have declined to set in federal regulation standards specific to any current commercial automated slide examination device. This proposed amendment contains a provision that any cytotechnologist work standard authorized by the Department pursuant to the amendment must be at least as stringent as the respective federal standards.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, efficient and effective tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester-Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using automated devices, and there appears to be no potential for organized opposition. Regulated parties should be able to comply with these amendments as of their effective date, upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This proposed amendment to allow needed flexibility to increase workload limits for cytotechnologists using automated slide preparation and/or examination methods would affect clinical laboratories operated as small businesses or by local government, provided such facilities hold or are seeking a permit in the category of cytology, and opt to use U.S. Food and Drug Administration (FDA)-approved devices for automated slide preparation and/or examination. Of the 253 clinical laboratories holding a Department permit in cytology, 44 have declared themselves to be small businesses in permit applications submitted to the Department, and local governments, including the City of New York, operate seven such laboratories.

Compliance Requirements:

The Department expects that affected clinical laboratories operated as small businesses or by local governments would experience minimal impact from this proposal's adoption. Most of these facilities engaged in the examination of cytologic material, including Pap smears, do not process the high number or type of specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased automated devices for preparation and/or examination of cytology slides would benefit from the flexibility this amendment would afford.

The Department has a system already established for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and anticipates few, if any, additional requests as a direct result of this amendment from laboratories operated as small businesses or by a local government. Therefore, the Department expects that this small segment of the affected regulated parties would be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

This rulemaking does not impose any additional costs on clinical laboratories operating as small businesses or by a local government since it does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State, and using or considering use of such devices have conveyed to the Department their desire to have

cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing for increased reimbursement for cytopathology services and potentially increased profits. This potential benefit may also apply to any small business or local government laboratory operator opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that operate clinical laboratories affected by this amendment. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, automated devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties that are small businesses or operated by local governments to comply with Department requirements for cytotechnologist work standards.

Small Business and Local Government Participation

This amendment is being proposed as an emergency rule. Notifying small businesses or local government affected parties about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would incur unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those operated as small businesses or by local government, are being notified of the provisions of this amendment, and, following its adoption, will be invited to provide comments and otherwise participate in the development of standards for workload limits.

Compliance Schedule:

The director of the Department's Wadsworth Center and his staff, including the director for Regulatory Affairs, held discussions with representatives of the Governor's Office, the Commissioner of Health's Office, firms that manufacture and/or distribute automated devices for cytological examinations, and regulated parties (*i.e.*, clinical laboratories) currently using such devices. Various Department groups, including the Office of Medicaid Management and the Office of Managed Care, have been working together in an ongoing effort to ensure adequate reimbursement for cytological examinations, including Pap smears, using FDA-approved cytological screening devices.

This amendment does not impose any new or more stringent requirements on regulated clinical laboratories; rather, it affords flexibility to laboratories that handle medium- to high-volumes of cytology specimens, and wish to use automated devices to examine increased numbers of slides without compromising testing accuracy and reliability. Strong support for the amendment is expected from clinical laboratories holding or seeking a permit in the category of cytology, and patient advocacy organizations, especially those focused on women's health; indications of support have been expressed by the medical community at large, which has just begun to become educated in the availability and reliability of the new technologies for cytological examination. The Department will continue to work with interested and affected parties in carrying out this amendment's provisions, and will notify laboratories in an unequivocal and timely manner of any changes affecting the cytotechnologists' workload standard or exceptions to that standard following adoption of this proposal.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technologies, and no potential of organized opposition is apparent. Consequently, regulated parties, including those operated as a small business or by local government, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Rural Area Flexibility Analysis

Effect of Rule:

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. Of the 253 clinical laboratories holding a permit in the category of cytology, 88, many of which are hospital-based, are located in rural areas.

Compliance Requirements:

The Department expects that affected clinical laboratories located in and serving rural areas will experience minimal impact by anticipated adoption of this proposal. With the possible exception of one or two large

rural hospital pathology departments, most laboratories operated in rural areas and engaged in examination of cytologic material, including Pap smears, do not process the high volume and type of cytologic specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased such automated devices will be able to take advantage of the flexibility this amendment would afford. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with this amendment as of its effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

Clinical laboratories operating in rural areas are not required to incur additional costs as a result of this proposed amendment, since this rulemaking does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State and using or considering use of devices for the examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing increased reimbursement for cytopathology services and potentially increased profits. This benefit may also apply to laboratories located in rural areas, especially larger hospital-based pathology laboratories opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for cytotechnologist work standards.

Participation by Parties in Rural Areas:

This amendment is being proposed as an emergency rule. Notifying affected parties in rural areas about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would cause unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those located in rural areas, are being notified of this amendment's provisions, and, following its adoption, will be invited to provide comments and otherwise participate in development of standards for workload limits.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, effective, and efficient tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester—Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technology, and no potential for organized opposition is apparent. Regulated parties, including those operating in rural areas, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Job Impact Statement

Nature of Impact:

This proposed rulemaking would have an impact on the productivity of cytotechnologists who use the new cytology slide preparation and examination technology. The proposed rule would authorize cytotechnologists using such technologies to increase, with Department approval, the number of slides that can be effectively reviewed in a given time period.

In addition, the proposed rulemaking would make it more financially attractive for clinical laboratories to acquire new cytology slide preparation and examination technology. Therefore, more cytotechnologists will

use such technology. Experienced cytotechnologists will have to receive on the job training to use some of the new technologies, while persons studying to become cytotechnologists will learn to use the new technology as part of their course work. However, given workforce shortage of cytotechnologists nationally and in New York, the Department does not expect that the use of the new technologies will have an adverse impact on employment opportunities for cytotechnologists.

Category and Numbers Affected:

Cytotechnologists working in New York licensed clinical laboratories may be affected by this rule. There are approximately 1,100 registered cytotechnologists working (on a part time or full time basis) in New York licensed clinical laboratories. However, many of these cytotechnologists work in clinical laboratories that are not located in New York State. It is unclear how many cytotechnologists will use new technologies pursuant to this proposed rulemaking to review more slides than is currently permissible.

Regions of Impact:

Cytotechnologists work in laboratories throughout New York State. However, as described below, the Department of Health does not believe that this proposed rulemaking would have a significant adverse impact on employment opportunities for cytotechnologists.

Likelihood of Adverse Impact:

The Department expects that the proposed rulemaking, if implemented, will increase cytotechnologists' productivity, and it will not adversely affect job opportunities for cytotechnologists. There is currently a significant workforce shortage of cytotechnologists in the United States, including New York. This workforce shortage is expected to worsen in coming years as large numbers of cytotechnologists retire and relatively few are being trained to replace them. The federal Clinical Laboratory Advisory Committee, the US Department of Labor and several health care professional organizations have acknowledged this workforce shortage problem. Some clinical laboratories have urged the Department to promulgate this regulation to alleviate cytotechnologist-staffing shortages.

EMERGENCY RULE MAKING

EPIC Program

I.D. No. HLT-28-05-00003-E

Filing No. 704

Filing date: June 22, 2005

Effective date: June 22, 2005

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

Action taken: Amendment of section 9600.4(c) of Title 9 NYCRR.

Statutory authority: Elder Law, sections 244, 245 and 246

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

Specific reasons underlying the finding of necessity: The specific reason underlying the finding of necessity to adopt as an emergency rule: The proposed regulation will require EPIC to share data with OTDA so that OTDA can match the data against its files of individuals who are in receipt of Food Stamp benefits. The match will enable an automated increase in Food Stamp benefits for those EPIC participants enrolled in the Medicare prescription drug discount program who are also Food Stamp beneficiaries. In order to obtain a deduction for medical expenses that will result in this increased benefit for calendar year 2004, the exchange of data must take place before the end of the calendar year. There is not enough time to canvas all EPIC participants for their consent to release of data. An emergency regulation mandating the sharing of data is the only way to ensure that those EPIC participants enrolled in the Medicare prescription drug program who are Food Stamp eligible will have the opportunity to get their medical deduction before the end of this calendar year and that the sharing of the data does not violate the confidentiality requirements of HIPAA. For these reasons, the Department finds that the immediate adoption of the regulation is necessary for the preservation of the public health, safety and general welfare and that compliance with the procedural requirements of the State Administrative Procedure Act (SAPA) 202(1) would be contrary to the public interest.

Subject: EPIC Program.

Purpose: To enable the provision of information to OTDA by EPIC regarding participants who are enrolled in the Medicare Prescription Drug Card Program, thereby assisting these participants to receive an enhanced medical deduction in the calculation of food stamp benefits.

Text of emergency rule: A new subdivision (c) is added to Section 9600.4 of Title 9 NYCRR to read as follows:

(c) For the purpose of assisting participants to receive an appropriate amount of federal Food Stamp benefits, the Program for Elderly Pharmaceutical Insurance Coverage (EPIC) shall provide to the Office of Temporary and Disability Assistance (OTDA) information identifying EPIC participants who are also enrolled in the Medicare prescription drug discount card program authorized by Title XVIII of the Social Security Act. Information provided shall be limited to eligibility and enrollment data available to EPIC and sufficient to enable OTDA to identify those participants who are also Food Stamp recipients. OTDA's use of this information shall be limited to the purpose of identifying EPIC participants who are also Food Stamp recipients and are eligible for additional Food Stamp benefits by virtue of their enrollment in the Medicare prescription drug discount card program.

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 September 19, 2005.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the amendment of this regulation is contained sections 244(5)(a), 245(2) and 246(4) of the Elder Law.

Legislative Objectives:

Section 244(5)(a) of the Elder Law requires the Elderly Pharmaceutical Insurance Coverage (EPIC) panel, consisting of the Commissioners of the Departments of Education and Health, the Superintendent of Insurance, and the Directors of the State Office for the Aging and the Division of the Budget to promulgate regulations pursuant to Section 246(4) of the Elder Law, subject to the approval of the Director of the Budget. The Director of the Budget approved the promulgation of these regulations. Section 245(2) of the Elder Law requires the Executive Director of EPIC to appoint staff and request the assistance of any department or other agency of the State in performing such functions as may be necessary to carry out the provisions of the EPIC law and to perform such other functions as may be specifically required by the law, assigned by the EPIC panel, or necessary to ensure the efficient operation of the program. Section 246(4) of the Elder Law defines the scope of EPIC regulations as including procedures to ensure that all information obtained on persons applying for EPIC benefits remains confidential and is not disclosed to persons or agencies other than those entitled to such information because such disclosure is necessary for the proper administration of the EPIC program.

Needs and Benefits:

The EPIC program provides coverage of certain drugs for residents of the State of New York who are at least 65 years of age, who have incomes within the limitations prescribed by law, who are not in receipt of Medical Assistance and who do not have equivalent or better drug coverage from any other public or private third party payment source or insurance plan. The program provides an essential benefit for elderly New York residents who need financial assistance in order to obtain medications but who do not have other insurance benefits and are not in receipt of Medical Assistance coverage of their drug expenses. Chapter 49 of the Laws of 2004 authorizes the EPIC program to apply for transitional assistance under the Medicare prescription drug discount card program with a specific drug discount card under Title XVIII of the federal Social Security Act. EPIC automatically enrolled eligible participants in the Medicare prescription drug discount card program.

Section 1860D-31(g)(6) of the Social Security Act, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 42 USC 1395w-141(g)(6), states that the availability of negotiated prices or transitional assistance received through the Medicare prescription drug card "shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or the amount of benefits under, any other Federal program." The Secretary of the United States Department of Agriculture, through its Northeast Regional office, has interpreted this statute as requiring that the discounts and subsidy a household receives through the Medicare prescription drug discount card be treated as standard medical expenses to be used in determining the household's medical expenses deduction for Food Stamp eligibility purposes.

EPIC seeks to assist its participants who are enrolled in the Medicare prescription drug discount program who are applying for or in receipt of Food Stamp benefits to receive the appropriate amount of Food Stamp benefits. Providing information to the Office of Temporary and Disability Assistance (OTDA) about its participants who are also enrolled in the Medicare Prescription Drug card program will assist these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits. Improved health outcomes for these participants as a result of increased Food Stamp benefits and the resultant potential for decreased prescription drug needs for these participants has a direct impact on the EPIC program and justifies the sharing of this information with OTDA.

Costs:

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

There are no costs to regulated entities as a result of this proposed regulation which requires EPIC to share data with OTDA.

Costs to State and Local Governments:

There are no costs to State and local governments as a result of this proposed regulation.

Costs to the Department of Health:

The Department of Health will incur minimal costs in producing and transmitting the data required by this proposed regulation.

Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates on local governments.

Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment.

Duplication:

The proposed regulatory amendment does not duplicate any existing State or federal requirements.

Alternatives:

The alternative considered to the proposed regulatory amendment was to obtain individual consents for release of information from all EPIC participants who were enrolled in the Medicare prescription drug card program. The length of time required to obtain this consent would have meant that many elderly participants would lose the medical deduction to which they are entitled for the current year. Release of the information pursuant to regulation is a permissible release of protected health information under regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) pursuant to 45 CFR 164.512(k)(6)(i).

Federal Standards:

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

Compliance Schedule:

The EPIC program will transfer data as required by this regulation as of the effective date of the regulation's filing.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, record keeping or other compliance requirements on a business.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

Job Impact Statement

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Water Well Construction

I.D. No. HLT-33-04-00004-RXC

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

Revised action: Amendment of Subparts 5-1 and 5-2, repeal of Appendix 5-B and addition of a new Appendixes 5-B and 5-D to Title 10 NYCRR.

Statutory authority: L. 1999, ch. 395

Subject: Water well construction.

Purpose: To establish standards for water well construction.

Expiration date: November 16, 2005.

Substance of revised rule: The regulation contains the following provisions:

Appendix 5-B applies to water supply wells used for drinking, culinary, and/or food processing purposes. Appendix 5-D specifies additional requirements that need to be met for certain water supply wells that serve a public water system as defined in Chapter 1, Subpart 5-1 of the State Sanitary Code.

Appendix 5-B establishes the minimum standards for construction, renovation, development and abandonment of such water supply wells; Appendix 5-D augments these for wells serving public water systems.

Defines acceptable water supply well drilling methods which include cable-tool drilling, percussion drilling, rotary drilling, jet drilling, sonic drilling, driving water supply well casing, and boring with earth augers to obtain ground water.

Requires proper well location and protection and provides required minimum separation distances to protect water supply wells from contamination.

Establishes specific requirements for casing and grouting of water supply wells.

Requires a well yield test to provide evidence that a particular well will produce a sustained flow for a specified period of time.

Requires proper selection of pumps and appurtenances and proper installation, repair and maintenance of water supply well pumps.

Establishes standards for proper decommissioning (abandonment) of any water supply well.

Revised rule compared with proposed rule: Substantial revisions were made in Appendix 5-B.

Text of revised proposed 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

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

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

Revised Regulatory Impact Statement

A Notice of Proposed Rulemaking for Appendix 5-B was published in the August 18, 2004 issue of the *State Register*. Based on comments received on the proposed rule, changes were made to the text of the proposed regulation. These changes included accommodation of certain well construction techniques that eased the burden of new requirements on drillers using driven methods of well drilling without compromising public health protection. The changes also involved specifying conditions where some variance of the standards would be allowed and regulatory mechanisms for obtaining deviations from the standards. Additionally, requirements exclusive to wells serving public water systems were separated out from those that apply to individual water supply wells.

Statutory Authority and Legislative Objectives:

Public Health Law Section 206 Subdivision 18, as added by chapter 395 of the Laws of 1999, authorizes and directs the Commissioner of Health to promulgate rules and regulations to establish standards for water wells, including but not limited to drilling, construction, abandonment, repair, maintenance, water flow, including testing thereof, and pump standards for wells. The legislative objective is to protect the public's health and safety by requiring licensed well drillers to comply with standards for water well construction. Sections 201, 225, and 1120 of the Public Health Law also authorize DOH to regulate public health aspects of potable water supplies. Additional considerations are the protection of the state's water resources and consumer protection.

Needs and Benefits:

Approximately 7,500,000 New Yorkers depend on private or public well water for their water supply. In 1998, the Empire State Water Well Drillers Association (ESWWDA) and others urged lawmakers to provide a law and applicable regulations to ensure professionalism and consistency in the water well drilling industry, and to protect groundwater resources and public health. As a result of these concerns, Chapter 395 of the Laws of

1999, also known as the Water Well Driller Registration Law, was enacted. The Law requires that anyone conducting business in water well activities register annually with the Department of Environmental Conservation (DEC) before doing business anywhere within the State of New York. Approximately 400 well drillers are currently registered with the DEC, with a potential of 150 to 200 additional drillers expected to register in the future.

Chapter 395 of the Laws of 1999 further requires that the Department of Health (DOH) promulgate rules and regulations to establish standards for water wells, including but not limited to drilling, constructing, abandonment, repair, maintenance, water flow, including testing thereof, and pump standards for such wells. DOH proposes to replace the existing Appendix 5-B (known as "Rural Water Supply") of its rules and regulations, 10 NYCRR, with a new Appendix 5-B, "Standards for Water Wells" and to add a new Appendix 5-D, "Special Requirements for Wells Serving Public Water Systems". The proposed Appendix 5-B provides the minimum requirements for all water wells used for drinking, culinary and/or food processing purposes. Concurrent amendments will be made to other DOH regulations that reference Appendix 5-B and/or Rural Water Supply to update these references.

Costs to State Government:

There will be no additional costs to the State other than costs associated with printing and distribution of the new code. Inquiries about the new code will be responded to by existing agency staff who currently address inquiries about water wells. Information about the new code will be provided to regional agency staff during normal staff training modules and semi-annual meetings.

Costs to Local Government:

There will be no additional costs to local governments.

Costs to Regulated Parties:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information provided by ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. DOH published recommendations for well casing and grouting in a document titled Rural Water Supply in 1966. DOH subsequently (in 1978) incorporated Rural Water Supply into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in Rural Water Supply, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$600 to \$1,000 to the cost of each well depending upon a driller's current procedure for installation of casing and due to recent increases in the price of steel. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of grouting may necessitate larger size drill cutting tools than presently used. These tools cost about \$800 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs. Based on discussions with ESWWDA and regulatory agencies in nearby states, the proposed rule allows for grout methods that will minimize the impacts to many drillers. This is due in large part to advances made in grout material and placement technique in the years since Rural Water Supply was first published.

For well drillers who presently use the specifications in Rural Water Supply, the proposed rule will result in minimal additional cost because changes between the two are relatively minor.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human con-

sumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in Rural Water Supply. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household. Yield tests of four hours or more are required by the states of Connecticut and Rhode Island and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$500 and the cost of recovery observation could be an additional \$40 to \$200. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (*i.e.*, twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than four hours). Thus, well drilling equipment and personnel need not stay on site as long, which will provide a cost saving for the driller. About 50% of the water wells drilled in New York State have yields of 10 gpm or more. With regard to proficiency in determining well stabilization, ESWWDA has stated that it plans to provide training to well drillers. A growing number of local governments already require stabilized water flow determinations for new water wells.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in Rural Water Supply to between about \$1,000 to \$1,800, depending largely upon site-specific conditions, for those drillers not following Rural Water Supply. These costs will likely be passed on to the customer. Well and pump installation costs for most residential water wells presently range from \$4,500 to \$8,000, depending largely upon site-specific conditions and region of the State.

Paperwork:

One new reporting requirement is created by the proposed rule. The proposed rule directs that for all wells the results of the yield test required by the rule must be reported on the Well Completion Report form that is submitted to the DEC (DEC already requires that yield test results be shown on the Well Completion Report). The rule also requires the results to be provided to the owner and upon request to the local health department.

Local Government Mandates:

The new Appendix 5-B will provide standards for water wells and will not impose a new program duty or responsibility on any county, city, town, village, school district, fire district or special district.

Duplication:

This regulation does not duplicate any existing state or local regulation. The proposed Appendix 5-B codifies specifications contained in the document Rural Water Supply and other state policy pertaining to water wells. With respect to requirements for public water systems, the proposed rule will supplement the current 10 NYCRR Part 5 regulatory requirements. Finally, with respect to the Water Well Driller Registration Law, the proposed regulation will complement requirements for well drillers administered by the DEC.

Alternatives Considered:

One alternative is to adopt Rural Water Supply verbatim with some necessary supplements. This alternative was rejected based on comments received during outreach and initial meetings with the ESWWDA, New York State Conference of Environmental Health Directors and DEC. These comments indicated that the guidance provided in Rural Water Supply was too prescriptive in some respects, outdated in some cases, and beyond the scope of the Water Well Drillers Law on occasion. Addition-

ally, some of the information presented in Rural Water Supply was either too technical or too academic for use as a regulation.

Federal Standards:

No federal standards presently exist. States use standards developed by their own regulatory agencies or other recognized authorities (such as the American Water Works Association for public water supply wells). The proposed Appendix 5-B will provide standards for water well drilling activities; additional requirements may need to be met for certain water wells that serve a public water system as defined in Subpart 5-1 of the State Sanitary Code.

Compliance Schedule:

These regulations will be effective upon publication of a notice of adoption in the *State Register*.

Revised Regulatory Flexibility Analysis

Effects on Small Business and Local Government:

Approximately 400 well drillers are currently registered in New York State, with a potential of 150 to 200 additional drillers expected to register in the future. All of these well drillers would be classified as "small businesses," having less than 100 employees. Typical drilling companies range between one and 40 employees. Presently all of these well drillers follow, either in total or in part, guidance and recommendations provided in the New York State Department of Health (NYSDOH) publication Rural Water Supply (1966), which was incorporated into NYSDOH's rules and regulations (10 NYCRR) as Appendix 5-B in 1978. The proposed rule will replace this existing Appendix 5-B with a new Appendix 5-B, "Standards for Water Wells", promulgated pursuant to Chapter 395 of the 1999 Laws of New York State and in accordance with the State Administrative Procedures Act Rule Making process. Concurrent amendments will be made to other DOH regulations that reference Appendix 5-B and/or Rural Water Supply to update these references. The extent of impact this proposed rule will have on well drillers depends upon the extent a driller's current practice reflects the specifications provided by DOH in Rural Water Supply as these are very similar to the requirements of the new Appendix 5-B.

No adverse impacts will be created for local government under the proposed rule.

Reporting and Recordkeeping:

One new reporting requirement is created by the proposed rule. The proposed rule directs that for all wells the results of the yield test required by the rule must be reported on the Well Completion Report form that is submitted to the DEC (DEC already requires that yield test results be shown on the Well Completion Report). The rule also requires the results to be provided to the owner and upon request to the local health department.

Professional Services:

No additional requirement for professional licensing, certification, or registration is required under Appendix 5-B. The requirement for stabilized water yield testing will involve developing proficiency in this task, either through training and/or practice. The Empire State Water Well Drillers Association (ESWWDA) has stated that it plans to provide such training to well drillers. Alternatively, drillers may opt to use the services of persons skilled in well yield testing. A growing number of counties already require stabilized water flow determinations for new water wells.

Other Compliance Requirements:

The proposed rule will require compliance with standards for water well drilling and for well construction, abandonment, repair, maintenance, water flow, and pumps. The standards specify appropriate construction materials, casing/grouting procedures, and methods for testing well yield. The standards also specify methods for siting new wells in a manner that results in a water supply that is protected from contamination.

Costs:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information provided by representatives from the ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing

down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. DOH published recommendations for well casing and grouting in a document titled Rural Water Supply in 1966. DOH subsequently (in 1978) incorporated Rural Water Supply into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in Rural Water Supply, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$600 to \$1000 to the cost of each well depending upon a driller's current procedure for installation of casing and due to recent increases in the price of steel. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of grouting may necessitate larger size drill cutting tools than presently used. These tools cost about \$800 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with representatives of the ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs. Based on discussions with ESWWDA and regulatory agencies in nearby states, the proposed rule allows for grout methods that will minimize the impacts to many drillers. This is due in large part to advances made in grout material and placement technique in the years since Rural Water Supply was first published.

For well drillers who presently use the specifications in Rural Water Supply, the proposed rule will result in minimal additional cost because changes between the two are relatively minor.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human consumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in Rural Water Supply. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household. Yield tests of four hours or more are required by the states of Connecticut and Rhode Island and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$500 and the cost of recovery observation could be an additional \$40 to \$200. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (*i.e.*, twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than four hours). About 50% of the water wells drilled in New York State have yields of 10 gpm or more.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in Rural Water Supply to between about \$1,000 to \$1,800, depending largely upon site-specific conditions, for those drillers not following Rural Water Supply. These costs will likely be passed on to the customer. Well and pump installation costs for most residential water wells presently range from \$4,500 to \$8,000, depending largely upon site-specific conditions and region of the State.

Economic and Technological Feasibility:

The proposal is technologically feasible because it requires the use of existing, standard well drilling technology, methods, and appurtenances.

Minimizing Adverse Economic Impact:

The rule establishes standards for the well drilling industry to minimize risk to public health and protect ground water. If these standards have a substantial adverse impact on a particular property, the proposed rule includes mechanisms for deviations from this regulation so long as alternative measures or conditions protect public health and safety. System performance with respect to the key objectives of supplying an adequate quantity of potable water in a cost-effective and environmentally-sound manner are the primary considerations in these situations.

As noted above in the discussion of Potential New Costs to Drillers, the yield test requirements were developed in a manner that allow flexibility where possible, thereby minimizing potential cost impacts.

Small Business and Local Government Participation:

In February of 2000 NYSDOH convened a meeting with representatives from the DEC, ESWWDA (an organization that represents water well drillers), county health departments, and organizations of professionals potentially impacted by the proposed rule. Two advisory committees were then formed and on April 5 and 13, 2000 meetings were held with the Regulatory Advisory Committee and the Technical Advisory Committee, respectively. Members of these committees included organizational representatives from the ESWWDA, DEC, New York State Conference of Environmental Health Directors, Northeast Rural Community Assistance Program, New York Rural Water Association, Cornell Cooperative Extension, several county health departments (Cortland, Dutchess, Westchester, Albany, Putnam, Monroe, Rockland), American Water Works Association, New York State Council of Professional Geologists, United States Geological Survey and the New York State Society of Professional Engineers. Approximately 600 copies of the proposed rule were sent to these organizations, registered well drillers, local health departments, and other interested parties. As the regulations were developed and revised per comments received on the proposed rule, follow-up meetings with many of the above organizations and parties were held. These follow-up meetings consisted of working group sessions, telecommunications, and participation in workshops and conferences. Where appropriate, the proposed regulation was edited to address comments. In this manner, proposed specifications that would impact certain entities (*e.g.*, casing/grouting requirements and well drillers, yield test requirements and local health departments) were developed with input from the potentially affected parties. All of the organizational members of these committees recognize the need to formally promulgate uniform standards for water wells and have been generally supportive of the need for this rule.

Revised Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

Rural areas affected by the new Appendix 5-B exist in most counties in New York State. In general, wells are installed outside of urban areas and within rural areas and some suburban areas. Well drilling records submitted to the New York State Department of Environmental Conservation (DEC) for the three years from 2000 through 2002 indicate that recently installed wells are generally distributed statewide outside of New York City with relatively sparse distribution in the Adirondack region.

Reporting and Recordkeeping:

One new reporting requirement is created by the proposed rule. The proposed rule directs that for all wells the results of the yield test required by the rule must be reported on the Well Completion Report form that is submitted to the DEC (DEC already requires that yield test results be included on the Well Completion Report). The rule also requires the results to be provided to the owner and upon request to the local health department.

Professional Services:

No additional requirement for professional licensing, certification, or registration is required under Appendix 5-B. The requirement for stabilized water yield testing will involve developing proficiency in this task, either through training and/or practice. The Empire State Water Well Drillers Association (ESWWDA) has stated that it plans to provide such training to well drillers. Alternatively, drillers may opt to use the services of persons skilled in well yield testing. It should also be noted that a growing number of counties already require stabilized water flow determinations for new water wells.

Other Compliance Requirements:

The proposed rule will require compliance with standards for water well drilling and for well construction, abandonment, repair, maintenance, water flow and pumps. The standards specify appropriate construction materials, casing/grouting procedures, and methods for testing well yield. The standards also specify methods for siting new wells in a manner that results in a water supply that is protected from contamination. Most of

these standards had previously been incorporated (in 1966) by DOH in a publication titled Rural Water Supply and have become, in large part, standard industry practice. Inasmuch as many drillers have been using these technical specifications during the past twenty to thirty years, the changes necessary for compliance will be minimal.

Projected Costs of Compliance:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information provided by representatives from the ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. DOH published recommendations for well casing and grouting in a document titled Rural Water Supply in 1966. DOH subsequently (in 1978) incorporated Rural Water Supply into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in Rural Water Supply, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$600 to \$1,000 to the cost of each well depending upon a driller's current procedure for installation of casing and due to recent increases in the price of steel. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of grouting may necessitate larger size drill cutting tools than presently used. These tools cost about \$800 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with representatives of the ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs. Based on discussions with ESWWDA and regulatory agencies in nearby states, the proposed rule allows for grout methods that will minimize the impacts to many drillers. This is due in large part to advances made in grout material and placement technique in the years since Rural Water Supply was first published. For well drillers who presently use the specifications in Rural Water Supply, the proposed rule will result in minimal additional cost because changes between the two are relatively minor.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human consumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in Rural Water Supply. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household. Yield tests of four hours or more are required by the states of Connecticut and Rhode Island and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$500 and the cost of recovery observation could be an additional \$40 to \$200. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (*i.e.*, twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than four hours). About 50% of the water wells drilled in New York State have yields of 10 gpm or more.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in Rural Water Supply to between about \$1,000 to \$1,800, depending largely upon site-specific conditions, for those drillers not following Rural Water Supply. These costs will likely be passed on to the customer. Well installation costs for most residential water wells presently range from \$4,500 to \$8,000, depending largely upon site-specific conditions and region of the State.

Minimizing Adverse Economic Impact on Rural Areas:

The rule establishes standards for the well drilling industry to minimize risk to public health and protect ground water. If these standards have a substantial adverse impact on a particular property, the proposed rule includes mechanisms for deviations from the regulation so long as alternative measures or conditions protect public health and safety. System performance with respect to the key objectives of supplying an adequate quantity of potable water in a cost-effective and environmentally-sound manner are the primary considerations in these situations. As noted above in the discussion of Potential New Costs to Drillers, the yield test requirements were developed in a manner that allow flexibility where possible, thereby minimizing potential cost impacts.

Rural Area Participation:

In February of 2000 NYSDOH convened a meeting with representatives from the DEC, ESWWDA, county health departments, and organizations of professionals potentially impacted by the proposed rule. Two advisory committees were then formed and on April 5 and 13, 2000 meetings were held with the Regulatory Advisory Committee and the Technical Advisory Committee, respectively. Members of these committees included organizational representatives from the ESWWDA, DEC, New York State Conference of Environmental Health Directors, Northeast Rural Community Assistance Program, New York Rural Water Association, Cornell Cooperative Extension, several county health departments (Cortland, Dutchess, Westchester, Albany, Putnam, Monroe, Rockland), American Water Works Association, New York State Council of Professional Geologists, United States Geological Survey and the New York State Society of Professional Engineers. The ESWWDA represents private well drillers located in rural areas and several local health departments are also located in rural areas. Many of the professional associations and other government offices also represent rural constituencies. Approximately 600 copies of the proposed rule were sent to these organizations, registered well drillers, local health departments (including those with rural constituencies), and other interested parties. As the regulations were developed and revised per comments received on the proposed rule, follow-up meetings with many of the above organizations and parties were held. These follow-up meetings consisted of working group sessions, telecommunications, and participation in workshops and conferences. Where appropriate, the proposed regulation was edited to address comments. In this manner, proposed specifications that would impact certain entities (*e.g.*, casing/grouting requirements and well drillers, yield test requirements and local health departments) were developed with input from the potentially affected parties. All of the organizational members of these committees recognize the need to formally promulgate uniform standards for water wells and have been generally supportive of the need for this rule.

Job Impact Statement

The Department of Health has determined that the rule will not have substantial adverse impact on jobs or employment opportunities. The rule formally codifies long-standing guidance and recommendations that have become, to a great extent, standard industry practice. The technology and equipment for complete compliance are readily available and accessible. Depending upon how drillers choose to implement the yield test requirements of the proposed rule, there is a potential for new employment opportunities for individuals skilled in water flow testing procedures.

Assessment of Public Comment

A Notice of Proposed Rule Making for a new 10 NYCRR Appendix 5-B, titled "Standards for Water Wells", to replace the existing Appendix 5-B, titled "Rural Water Supply," was published in the August 18, 2004 issue

of the *State Register*. The State Department of Health (the Department) concurrently mailed 600 copies of the proposed rule to registered well drillers, city/county health departments, and other interested parties and 360 copies of a notice of availability of the proposed rule to potentially-interested parties. In response to these mailings, the Department received written comments from 19 parties: five from well drillers, three from geological organizations, three from geotechnical consulting firms, three from municipal water providers and associations, three from city/county health departments, one from a pump installer, and one from an agricultural organization. The following discussion summarizes comments and responses in order of the sections in the proposed rule.

Section 5-B.1 Applicability and Definitions

Comment:

Four well drillers and one county health department requested that the regulations apply to all categories of water wells.

Response:

No change. As proposed, water wells are defined as those used "for drinking, culinary and/or food processing purposes," a scope that is consistent with the Department's historic regulatory domain. Other types of wells include industrial wells, cooling wells, injection wells, geothermal wells, non-potable agricultural or livestock wells, construction dewatering wells, mineral exploration and recovery wells, groundwater monitoring and observation wells, and ground water remediation wells. Other agencies are involved with regulatory oversight and standards for these types of wells.

Comment:

Four well drillers, two local health departments, and three municipal water associations/providers requested that a variance provision or other flexibility be allowed for unusual situations where regulatory requirements cannot be achieved.

Response:

A provision has been added that recognizes the authority of local health departments to allow deviations from Appendix 5-B requirements and to use presently available mechanisms (*e.g.*, Part 75 waivers, Subpart 5-2 variances, local sanitary code provisions). The revised rule also allows installation of wells previously approved by a local health department. Provision has also been made to recognize the use of shallow wells, with additional mitigative measures to protect such water, where no suitable supply of deeper groundwater is available.

Comment:

Three municipal water associations/providers and the Suffolk County Department of Health Services requested that the rule include a separate section devoted to wells on Long Island, particularly with respect to requirements that are considered unnecessary in Long Island due to the widespread presence of well-mapped, high yield sand and gravel aquifers coupled with strong regulatory programs.

Response:

Provisions have been included that recognize the authority of local health departments to allow deviations from the minimum standards in the regulation. Important factors in considering such local deviations include sufficient hydrogeologic information, uniform conditions, abundant practical experience, and strong regulatory oversight by the local health department. These provisions thus accommodate the unique circumstances of Long Island while maintaining the option for other locations in the state if similar conditions, information, and experience exist.

Comment:

Many commenters offered helpful suggestions for improving the technical accuracy and clarity of definitions.

Response:

The Department made several changes to clarify technical language.

Section 5-B.2, Well Location and Separation Distances (Table 1)

Comment:

All commenters, except two of the geotechnical consulting firms, asked for revisions to separation distances, particularly with respect to increased distances for certain conditions. Six of the commenters suggested that flexibility be allowed to accommodate very difficult well siting situations.

Response:

Increased separation distances are specified for situations where water wells are at greater risk of contamination and therefore require greater protection. The revised rule acknowledges mechanisms for variance issuance and in some cases includes flexibility along with additional mitigative measures to protect the water supply.

Comment:

The New York State Farm Bureau requested assurance that the proposed rule would not be used to prevent manure spreading on croplands

that are near wells. The same organization asked that recent efforts to control nonpoint source pollution from agricultural facilities be reflected in the rule.

Response:

The proposed rule is applicable to the siting of water wells relative to known potential threats to a proposed water well. The rule does not regulate agricultural activities but does provide that all tillable fields should be considered subject to manure spreading and that a separation distance of 200 feet should be used. A provision has been added that allows use of a reduced separation distance (100 feet) where justified by a properly conducted agricultural environmental management evaluation or comprehensive nutrient management plan.

Section 5-B.3, Well Construction

Comment:

Five drillers commented on specific requirements for the placement of grout seals around well casing, noting that new requirements were unusually restrictive and particularly difficult for drillers using driven well methods. Comments received from the geologists and geotechnical consultants generally supported the proposed grouting requirements.

Response:

The revised rule addresses grouting for all wells and requires minimum depths of grout for certain geologic conditions. Grout specifications were modified to allow dry-driven grout placement techniques and additional pressure placement techniques.

Comment:

One local health department and the three municipal water organizations/providers asked that the requirement for constructing wells to prevent entry of contaminants be modified to allow for the use of existing contaminated ground water with treatment.

Response:

No change needed as the proposed rule recognizes and accommodates contaminated ground water provided that additional measures, including appropriate treatment and monitoring, are used as necessary to ensure the provision of an adequate water supply.

Comment:

Three drillers, the three municipal water organizations/providers, one geologist, and one local health department asked that certain construction materials and/or specifications be allowed and others not allowed.

Response:

Revisions were made to clarify that the Department allows specific items but in some cases a performance standard would be acceptable which indicates: that selected materials be sufficient to allow normal installation and operation of the well and pump system.

Appendix 5-B.4, Well Yield and Water Flow

Comment:

Two drillers commented that the yield test requirement of four hours of constant flow during stabilized drawdown is overly stringent, burdensome, and costly. Two drillers and two geologists expressed agreement with the yield test requirements noting that these are necessary for consumer protection and for gaining a better understanding of the State's ground water resources.

Response:

No changes were made to the required duration of the yield test. As noted in the Regulatory Impact Statement an adequate supply of water is necessary to ensure that domestic water needs are always met. This includes water for drinking, food preparation, bathing, cleaning, laundering, and toilets. The proposed yield testing procedure will provide a reliable determination of the sustainable flow of water that will be available from a well for a long period of time and is consistent with tests recognized by other nationally-recognized authorities.

Comment:

Three drillers, one geologic society, and one geotechnical consultant asked that the Department issue requirements for minimum well yield. Four drillers asked that household water storage and booster pump requirements for low yielding wells be included within regulation.

Response:

No changes are proposed. This Section is the minimum standard for all wells. All well drillers must follow standardized procedures for well yield testing so the results are meaningful. The acceptability of the determined yield for residential, commercial, industrial and other uses are the responsibility of the well owner, design professionals and regulatory officials. The Department is preparing informational material that provides specifications for appropriate storage that can be used to ensure an adequate water flow is available in households served by low-yielding wells.

Section 5-B.5, Pump Requirements

Comment:

Three well drillers and two local health departments asked that Appendix 5-B include a prescriptive procedure for well and pump disinfection.

Response:

No changes. The proposed rule requires disinfection of new wells and those that have been renovated without specifying the method for disinfection or requiring confirmatory sampling. Numerous disinfection procedures are available. The Department has a one-page informational sheet that details a procedure for well disinfection and is developing more detailed guidance for well and pump system disinfection.

Section 5-B.6, Well Abandonment

Comment:

Two local health departments asked that well abandonment be defined.

Response:

No changes. When a well driller is asked to assist in well abandonment and decommissioning activities (within the context of any local program or otherwise), the procedure must meet the requirements of Appendix 5-A.

General Comment:

Special Requirements for Wells Serving Public Water Systems:

Comment:

Four drillers, two geologists, and one local health department requested specific requirements for wells serving public water systems be listed/clarified.

Response:

The revised rule adds a separate listing of requirements for public water systems to be known as Appendix 5-D, "Special Requirements for Wells Serving Public Water Systems." This Appendix will include those requirements and provisions that are exclusive to public water supply wells. Requirements in Appendix 5-B will apply unless superceded by more stringent specific requirements in either Appendix 5-A (Recommended Standards for Water Works) or the proposed Appendix 5-D.

Comments on the Rule Making Documents

Comments:

Two drillers and one local health department stated that the rule making impact statements understate the potential impacts and that the costs of well installation and yield testing were underestimated.

Response:

The cost estimates have been increased in the revised rule making documents based upon updated information.

Miscellaneous Comments

Comment:

Two geologists and one local health department requested that water quality testing for individual water supplies be included in the regulation.

Response:

No changes are proposed. The Department has for many years recommended that these be tested for quality. However, the Well Drillers Registration Law did not specify water quality testing in the categories to be covered in the subject regulation. Several county health departments require bacteriologic and/or physicochemical testing for new wells and during real property transfers. The Department has a one-page guidance document for water testing and is presently expanding it as a brochure on water quality testing.

Comment:

Two county health departments asked that regulatory and guidance document references to the historic Appendix 5-B, known as Rural Water Supply, and to other water well specifications be updated to reflect the new requirements.

Response:

The Department is making such changes concurrently with promulgation of the new requirements.

**NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED**

Spousal Impoverishment Budgeting

I.D. No. HLT-03-05-00032-C

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

The notice of proposed rule making, I.D. No. HLT-03-05-00032-P was published in the *State Register* on January 19, 2005.

Subject: Spousal impoverishment budgeting.

Purpose: To clarify that a community spouse's pension fund or individual retirement account (IRA) is a countable resource for purposes of determining the institutionalized spouse's Medicaid eligibility.

Substance of rule: The purpose of the proposed regulatory amendment is to revise section 360-4.10(a)(9) of the Medicaid regulations to clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse's pension fund or IRA is a countable resource. Federal Medicaid law at 42 U.S.C. § 1396r-5(c)(5), added by the Medicare Catastrophic Coverage Act (MCCA) of 1988, defines the term "resources" to exclude only certain resources specified in federal law. Pension funds and IRAs are not among those resources specifically excluded by the MCCA, and thus are countable for purposes of determining the Medicaid eligibility of an institutionalized spouse. Therefore, when a social services district determines the income and resources of an institutionalized spouse and his or her community spouse, the assessment of the couple's resources will include pension funds and IRAs owned by the community spouse. Resources that exceed the community spouse resource allowance are considered available to the institutionalized spouse. Currently, pension funds and IRAs owned by a community spouse which exceed the community spouse resource allowance are not deemed available to the institutionalized spouse.

Changes to rule: No substantive changes.

Expiration date: January 19, 2006.

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

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

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

Treatment, Monitoring and Reporting of Radionuclides

I.D. No. HLT-28-05-00004-P

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

Proposed action: Amendment of sections 5-1.52 and 5-1.91 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225(1)

Subject: Treatment, monitoring and reporting of radionuclides.

Purpose: To revise the requirements community water systems must follow in order to comply with the federally mandated radionuclides rule and obtain primary responsibility for implementation.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The proposed code amendment incorporates the requirements of the Radionuclides Rule which was promulgated by the United States Environmental Protection Agency (EPA) on December 7, 2000. As a condition of primacy, New York State must promulgate a rule at least as stringent as the federal rule to assure that community water systems comply with the federal Radionuclides Rule. Initially the State was to establish primacy regulations by December 8, 2002. However, the New York State Department of Health (NYSDOH) received an extension from EPA to June 30, 2004 to adopt the required Code amendment. The Department entered into a Memorandum of Understanding with EPA regarding rule implementation while the Department pursues adopting the Code amendment.

The following is a summary of the proposed amendment to Subpart 5-1 of NYCRR Part 5:

Section 5-1.52 Tables

The following tables will be edited, or deleted and replaced to incorporate the requirements of the Radionuclides Rule into Subpart 5-1:

Table 7. Radiological Maximum Contaminant Level Determination: The revised Radionuclides Rule promulgates a new maximum contamination level (MCL) for uranium (30 mg/L) and retains the existing MCLs for combined radium 226 and 228 activity (5 pCi/L), gross alpha activity (15 pCi/L) and beta particle and photon radioactivity from manmade radionuclides (4 mrem/year).

Table 12. Radiological Monitoring Requirements: Monitoring requirements have been changed significantly and will now require an initial round of quarterly samples, followed by varying periodic monitoring depending on the initial sample results. Systems exceeding the MCL for gross alpha particle activity, combined radium activity or uranium concentration at any sampling point must conduct quarterly monitoring at that sampling point. For systems with multiple entry points, if a system exceeds the MCL at one entry point, the system is considered out of compliance.

For systems that do not exceed the MCL, monitoring can be reduced as follows: one sample every 9 years at each entry point when monitoring results are less than the detection limit (DL); one sample every 6 years at each entry point when monitoring results are at or above the DL but below half of the MCL; one sample every 3 years at each entry point when monitoring results are above half of the MCL but at or below the MCL. Historical monitoring data can be used in lieu of the initial monitoring requirements for gross alpha, combined radium and uranium if such data are representative of all entry points.

Community water systems only have to monitor for beta particles or photon radioactivity if they are designated as either a vulnerable system or a system utilizing waters potentially contaminated by effluents from nuclear facilities. A vulnerable system is any system with a history of gross beta particle activity above 50 pCi/L. A contaminated system is any system potentially utilizing waters contaminated by effluents from nuclear facilities. Monitoring for these contaminants can also be reduced to once every three years if the monitoring results do not exceed a specified gross beta particle activity level.

5-1.91 Variance from required use of any specified treatment technique

The Best Available Technologies (BATs) table included in 5-1.91(e) has been amended to include additional information about BATs for achieving compliance with the radionuclide MCLs. Enhanced coagulation for uranium removal has been added.

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

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

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

Regulatory Impact Statement

Statutory Authority

The statutory authority for the proposed revision can be found in Public Health Law Sections 201(l) and 225. Section 201(l) and 225(5)(p) of the Public Health Law establishes the powers of the Department of Health to supervise and regulate the sanitary aspects of water systems. Section 225(4) of the Public Health Law establishes the powers of the Public Health Council to establish, amend or repeal regulations of the State Sanitary Code to ensure the preservation and improvement of public health.

Legislative Objectives

The changes to the State Sanitary Code are being proposed pursuant to the legislative objective set forth in the Public Health Law Section 225 which authorizes the Public Health Council to amend the State Sanitary Code to insure the protection of public health. The proposed amendments are necessary in order to maintain New York State's drinking water standards within the regulatory framework established by the United States Environmental Protection Agency under federal law.

The proposed amendments modify the existing drinking water standards (Maximum Contamination Levels (MCLs)) and monitoring frequencies for radionuclides that all community water systems must satisfy. The proposed amendments promulgate a MCL for uranium and retain the existing MCLs for combined radium 226 and 228, gross alpha and beta. These amendments require all community water systems to monitor their water for gross alpha, radium-226 & 228 and uranium; however, only community water systems which are designated by the State as vulnerable to contamination or using contaminated water are required to monitor for gross beta and photons. These revisions are necessary to comply with the federal Radionuclides Rule that was promulgated on December 7, 2000. The federal rule revised the minimum requirements for all community water systems regarding treatment technologies, monitoring, and reporting for radionuclides. The regulatory action for radionuclides includes gross alpha particles, radium-224, radium-228, uranium and gross beta particles, but excludes radon.

By adopting these regulations, which are no less stringent than the federal Radionuclides Rule and which apply to only community water systems, the State can retain primary enforcement responsibility (primacy) for radionuclides in public drinking water systems. If the State does not adopt these regulations, EPA will enforce these provisions in New York State. Dual oversight by the EPA and the New York State Department of Health will result in significant confusion for water systems and likely result in conflicts between state and federal regulations. There is no cost difference imposed by the federal Radionuclides Rules and by the proposed NYS Radionuclides Rule.

Needs and Benefits

The revisions associated with the Radionuclides Rule will improve public health by increasing the level of protection from exposure to radionuclides including gross alpha particles, radium-224, radium-228, uranium and gross beta particles in drinking water. Radiation is a carcinogen and some people who drink water containing radionuclides in excess of the MCL over many years may have an increase risk of getting cancer. In addition to the increased cancer risk, uranium is known to damage the kidneys. According to the national cost-benefit estimation by EPA, the new rule promulgates separate monitoring requirements for radium-228, which is expected to reduce exposure for 42,000 people. In addition, the new standard for uranium in drinking water will result in reduced uranium exposures for 620,000 people. The EPA estimates that the monetized health benefits from regulating Ra-228 and uranium are 2 million and 3 million dollars, respectively, resulting from the avoidance of 0.4 and 0.9 cancer cases in the U.S., respectively.

Costs

Approximately 2,900 public water systems will have to comply with the requirements of the Radionuclides Rule in New York State according to the Safe Drinking Water Information System (SDWIS) database. These public water systems include community water systems using groundwater and surface waters.

EPA estimated the increase in annual compliance costs for all systems nationwide that will be affected by the Radionuclides Rule. Data obtained through EPA's National Inorganics and Radionuclides Survey (NIRS) were extrapolated to develop the following estimates. The EPA survey measured radionuclide concentrations at 990 community ground water systems between 1984 and 1986. Table 1 shows the total number of systems potentially out of compliance for gross alpha, combined radium and uranium in the U.S. based on NIRS. The number for New York State is estimated based on statewide radiological monitoring data collected during the latest monitoring cycle.

Table 1. The number of systems which could be out of compliance with the new Radionuclides Rule in the U.S. and New York State based upon the latest radiological monitoring data.

Parameters	Number of systems	
	U.S.	New York State
Noncompliance with current MCL		
Gross α	400	8
Combined radium	420	10
Total (adjusted for overlap)	670	16
Noncompliance with MCL based on revised monitoring		
Gross α	210-250	4-5
Combined radium	270-320	6-8
Total (adjusted for overlap)	310-400	7-10
Total noncompliance		
Gross α	610-650	12-13
Combined radium	690-740	16-18
Total (adjusted for overlap)	980-1070	23-26
Uranium	500	3

The additional compliance cost incurred by the Radionuclides Rule for all community water systems in New York State was estimated by using the information in Table 1, the estimated nationwide compliance cost and the number of systems in New York State. According to data provided by William Labiosa, EPA (refer to Table 2), EPA's report shows the total compliance cost increase in the U.S. was estimated at \$81 million, \$25 M for gross alpha and radium removal; \$51M for uranium removal; \$4.9M for monitoring and reporting; and \$60,000 for implementation. In developing NYS specific estimates, it was assumed that mitigation costs, radionuclide monitoring & reporting costs and new implementation costs for New York are directly proportional to the estimated national costs. In other words, costs for mitigation, radionuclide monitoring, reporting and implementation for a system in a same size class are assumed to be the same in New York as in EPA's national database. According to SDWIS (Safe Drinking Water Information System) database, the total number of systems in the U.S. and in New York State is shown below:

Total number of community water systems in the US 53,156

Total number of community water systems in New York State 2,881

Only systems which are out of compliance with the new rule will incur an increase in mitigation costs. Therefore, increases in mitigation (treatment) costs for Gross alpha and combined radium per impacted system in the U.S. can be calculated as \$23,364-25,510 per system

(\$25,000,000/(980-1070 systems)). Similarly, increases in mitigation costs for uranium per system in the U.S. can be calculated as \$102,000 per system (\$51,000,000/500 systems). Unlike mitigation costs, all community water systems will incur increases in monitoring and reporting costs, estimated to be \$92 per system (\$4,900,000/53,156 systems). Therefore, the increase in monitoring and reporting costs in New York State is \$265,052 (((\$92/system) × (2881 systems)).

Based on the national mitigation cost data explained earlier, the annual cost increase for mitigation at the projected for impacted systems in New York is estimated to be \$537,372-\$663,260 ((\$23,364-25,510/system) × (23 to 26 systems)) for gross alpha and \$306,000 (\$102,000/system × 3 systems) for uranium. The total number of systems in noncompliance with gross alpha and/or combined radium was adjusted for overlap to estimate the mitigation cost because there will be no additional mitigation cost for systems noncompliance with both gross alpha and combined radium MCLs compared to systems with only one MCL violation. The available treatment systems will effectively remove both gross alpha and radium. Based on data provided by Labiosa, EPA (refer to Table 2), the aggregate annual cost increase for implementation in New York State is estimated to be \$1,200 (\$60,000/50 states). Table 2 summarizes the increase in the Radionuclides Rule compliance costs for community water systems in the U.S and New York State.

Table 2. Calculations of Radionuclides Rule annual compliance cost increase.

		Annual Cost Increase			Total Annual Compliance Cost Increase
		Mitigation	Monitoring & Reporting	Implementation cost	
U.S. ¹	Gross α & radium Uranium	\$25M ¹	\$4.9M ¹	\$60,000 ¹	\$81M ¹
NY State ²	Gross α & radium Uranium	\$537,372-663,260 ²	\$265,052 ²	\$1,200 ²	\$1.11M-1.24M ²

¹Based on data provided by William Labiosa, EPA, OGWDW, November 22 and 24, 1999.

²The aggregate compliance costs for New York State water systems are estimated based on the national compliance cost.

Notes: Detail may not add to totals due to rounding.

There are 2,881 community water systems statewide serving 17,726,031. According to EPA and SDWIS database, none of the systems serving greater than 1,000,000 people has exceeded the MCL for radionuclides. These systems will not be expected to treat their water for radionuclide removal. In New York State, there are two systems serving more than one million people, which provide water to 7,552,718 individuals. The remaining 10,173,313 people in the State are served by 2,879 systems. The average number of consumers per system for those 2,879 potentially affected systems is 3,534 people (10,173,313 people/2,879 systems).

Based on the information outlined above, it is estimated that the average cost increase per consumer in New York State served by systems affected by the Radionuclides Rule is \$6.61-\$7.22 ((\$23,364-\$25,510/system)/(3,534 people/system)) for systems in violation of the gross alpha and/or combined radium standard, and \$28.86 ((\$102,000/system)/(3,534 people/system)) for consumers of systems that violate the new uranium standard. As explained earlier, the monitoring cost will increase \$92 per system; therefore, the average cost increase per consumer incurred by radionuclide monitoring is estimated to be 2.6 cents ((\$92/system)/(3,534 people/system)). These estimates are based on the assumption that 23—26 systems among the 2,879 possibly affected community water systems in New York State might be impacted by gross alpha and/or combined radium standard, and 3 systems in New York State might be impacted by the new uranium standard. The available treatment technology for gross alpha, radium and uranium are very similar, e.g., the reverse osmosis unit will effectively remove all radionuclides. Therefore, there will be no extra cost to systems affected by more than one MCL violation. Table 3 shows the annual compliance cost increase to consumers being served by affected systems.

Table 3. Annual increase in compliance cost incurred by the Radionuclides Rule to consumers who are being served by affected community water systems in New York State.

Number of systems that might be impacted by	
Gross α and/or combined radium	23-26
Uranium	3

Increase in mitigation costs for gross α and/or combined radium	\$537,372 - \$663,260
Per affected system	\$23,364 - \$25,510
Per person served by affected system	\$6.61 - \$7.22
Increase in mitigation costs for uranium	\$306,000
Per affected system	\$102,000
Per person served by affected system	\$28.86
Increase in monitoring costs for radionuclides	\$265,052
Per system	\$92
Per person	\$0.026

Costs to State Government

State agencies that own and operate water systems may also experience increased costs. According to the SDWIS, approximately 49 State-owned community water systems will have to comply with the Radionuclides Rule. All community water systems are categorized by ownership in order to estimate the compliance cost to responsible parties.

Total community water systems	2881
Community water systems owned by New York State	49
Community water systems owned by local governments	1,398
Privately owned community water systems	1,406
Others, including federally owned	28

Using data set out in Table 2 (the total annual compliance cost increase in NYS), the compliance cost increase per system is estimated to be \$385-\$430 ((\$1.11-\$1.24M)/2881 systems). Therefore, the increase in cost to State government for compliance with the requirements of the Radionuclides Rule is estimated to be \$18,865-\$21,070 ((\$385-\$430/system) × 49 state government-owned systems).

Costs to Local Government

The amended regulations apply to all local governments (town, village, county, authorities or area-wide improvement districts) that own or operate community water systems. Based on SDWIS, there are 1,398 community water systems owned and operated by local governments in New York State. The annual cost increase to local governments for compliance with the Radionuclides Rule is calculated using data provided in Table 2 in the same way as the estimate applicable to State Government and is estimated to be \$538,230-\$601,140 ((\$385-\$430/system) × (1,398 local government-owned systems)).

Costs to Private Regulated Parties

The requirements of the Radionuclides Rule also apply to community systems that are privately owned or operated. There are 1,406 privately owned systems in New York State. Based on Table 2, the annual cost increase due to the proposed revisions is estimated to be \$541,310-\$604,580 ((\$385-\$430/system) × (1,406 privately-owned systems)). Cost estimates to each party are summarized in Table 4.

Table 4. Annual increase in compliance cost incurred by the Radionuclides Rule to regulated parties in New York State.

State Government	\$18,865 - \$21,070
Local Government	\$538,230 - \$601,140
Private	\$541,310 - \$604,580
Federal	\$10,780 - \$12,040
Total cost for all regulated parties	\$1.11 - 1.24 M
Cost per individual system in NY	\$385 - \$430
Local Government Mandates	

The amended regulations apply to all local governments (town, village, county, authorities or area-wide improvement districts) that own and operate community water systems. Based on SDWIS, there are 1,398 community water systems owned and operated by local governments in New York State. These local governments will be responsible for complying with all aspects of the proposed rule, including mitigation, monitoring, reporting, and public notification for violations. Only systems that are out of compliance with the new rule will be required to add or modify treatment. Monitoring requirements apply to all community water systems, not just those owned and operated by local governments. The revisions incorporating the requirements of the Radionuclides Rule are federally mandated and do not impose any more stringent requirements than the federal rule.

Paperwork

In order for public water systems to comply with the Radionuclides Rule, systems must provide public notice in certain circumstances. The Radionuclides Rule requires systems to provide a Tier 2 public notice (notice within 30 days) for violation of radionuclide standards and a Tier 3 public notice (notice annually) for violations of the monitoring and testing procedure requirements. Currently systems are required to provide public notice within 14 days for MCL violations and within 3 months for the failure to comply with monitoring requirements. Therefore, this type of paperwork will be reduced.

Duplication

The state rule changes incorporate the federal standards for the Radionuclides Rule as required by 40 CFR Part 141. Any duplication with federal regulations will be temporary until NYS adopts the rule and acquires primacy from the Federal Government (U.S. EPA) to regulate public water systems under the Safe Drinking Water Act. If this rule is not adopted, then the operators of public water systems may be subject to differing state and federal requirements.

Alternatives

The revisions incorporating the requirements of the Radionuclides Rule are federally mandated. NYS DOH did not consider any significant alternatives to the rule, because to maintain "primacy" to administer and enforce the requirements of this rule, NYS DOH must amend State Sanitary Code Subpart 5-1 to adopt the federal requirements. To obtain "primacy", NYS DOH must amend the State Sanitary Code, Subpart 5-1, no later than December 8, 2004.

Federal Standards

The revisions associated with the Radionuclides Rule are as protective as, and generally conform to, the U.S. EPA's National Primary Drinking Water Regulations as specified in Subparts B, C, F, G, O, and Q of 40 CFR Part 141, and Subpart B of 40 CFR Part 142.

Compliance Schedule

This proposal requires that all community water systems (2,881 systems in New York State) comply with the Radionuclides Rule. All community water systems must begin initial monitoring under a specified monitoring plan by December 8, 2003 unless the State permits use of grandfathered data. New York allows for the use of grandfathered data collected between June 2000 and December 8, 2003. Systems without appropriate grandfathered radionuclide data must complete initial monitoring by December 31, 2007. The MCLs for gross alpha, combined radium-226 and-228, uranium and gross beta have been effective beginning December 8, 2003.

References

New York State Department of Health, Bureau of Public Water Supply Protection, 1998. State Sanitary Code, Subpart 5-1, Public Water Systems.

U.S. EPA, 2000, National Primary Drinking Water Regulations; Radionuclides; Final Rule. Federal Register, 40 CFR Parts 9, 141, and 142.

U.S. EPA, 2000, Preliminary Health Risk Reduction and Cost Analysis, Revised National Primary Drinking Water Standards for Radionuclides.

U.S. EPA, 2000, Implementation Guidance for Radionuclides.

U.S. EPA, 2000, Radionuclides Notice of Data Availability Technical Support Document.

Regulatory Flexibility Analysis

Effect of Rule

All community water systems in New York State must follow the requirements of the Radionuclides rule. There are approximately 2,555 small community water systems in New York State that are affected by this regulation. For the purpose of this analysis, a small system (business) is defined as a community water system that serves 3,300 people or less. Among these 2,555 small systems, approximately 1,319 systems are privately owned, 1,164 systems are owned by local government and the other 72 systems are owned by the state or federal government. The small private regulated systems consist primarily of mobile home parks, apartment complexes, condominiums, and realty subdivisions.

Some of these small systems that have elevated levels of radionuclides may be located near or adjacent to larger water systems. For these systems, there is a greater opportunity to connect to a larger municipal system. For this type of system, consolidation may be a less costly compliance alternative than complying with the new regulation.

Compliance Requirements

All community water systems must conduct initial monitoring, unless the State allows use of grandfathered data. New York allows for the use of grandfathered data collected between June 2000 and December 8, 2003. Systems without grandfathered data must complete initial monitoring by December 31, 2007. The MCLs for gross alpha, combined radium-226 and-228, uranium and gross beta have been effective beginning December 8, 2003.

Reporting requirements will be reduced for all systems. The Radionuclides Rule requires systems to provide a Tier 2 public notice (notice within 30 days) for violation of radionuclide standards and a Tier 3 public notice (notice annually) for violations of the monitoring and testing procedure requirements. Currently systems are required to provide public notice within 14 days for MCL violations and within 3 months for the failure to comply monitoring requirements. Recordkeeping requirements will re-

main the same — any system subject to the Subpart 5-1 must retain copies of the report for no less than five years.

Professional Services

Only community water systems must undertake actions under this rule. All community water systems will require the professional services of a certified or approved laboratory to perform water analyses of the required monitoring samples. The laboratory used must be one approved by the New York State Department of Health under its Environmental Laboratory Approval Program.

Some large systems that need to install treatment units might seek engineering consulting. However, most small systems will likely connect to an adjacent unaffected system when available or develop a new well at different locations as a first option. In this case, some new construction service will be created. When these are not an option for them, they will most likely consult the local and state health department and purchase point of use (POU) treatment units such as reverse osmosis or ion exchange that cost several hundred dollars per unit through vendors.

Compliance Costs to Small Business and Local Governments

Small businesses and local governments will incur costs in the form of water treatment costs, and monitoring and reporting costs. As discussed in the Regulatory Impact Statement, the annual cost increase for any type of water system by the proposed requirements will be approximately \$385-\$430 ((\$1.11-\$1.24M)/2881 systems in New York State) (refer to calculations on "Costs to State Government" in the Regulatory Impact Statement). The annual aggregate statewide cost increase, therefore, to small water systems owned and operated by small businesses or local governments will be approximately \$955,955-\$1,067,690 ((1,319 privately owned small systems + 1,164 small systems owned by local governments) × (\$385-\$430 per system)).

Economic and Technological Feasibility

Compliance with the Radionuclides Rule is both economically and technologically feasible. Methods currently exist for the analysis of radionuclides including gross-alpha particles, beta/photon, radium-226 and — 228 and uranium. Treatment techniques to reduce naturally existing radionuclides are fairly common, so there are technologically feasible alternatives available for treatment, e.g., ion exchange, reverse osmosis, lime softening and coagulation/filtration. The Department of Health currently has fifteen engineers in the Technical Group of Bureau of Water Supply Protection that review plant designs and provide technical assistance. This staff has the expertise and will provide technical guidance when necessary.

Minimizing Adverse Impact

The costs described above are the result of the requirements of the federal Radionuclides Rule, which will take effect regardless of state action. The New York State Department of Health plans to provide owners and operators of community water systems with training, guidance documents, and monitoring report forms to help alleviate some of the labor costs associated with the regulations.

According to the proposed amendments, community water systems with low levels of radionuclides in their water will be allowed to reduce monitoring frequency, and thereby reduce labor and laboratory costs. More than 80% of systems in NYS have radionuclides less than their detection limit, thus would need to monitor their water every nine years under the proposed regulation, which is reduced from every four years under the current regulation. The majority of the other systems have radionuclides less than half of the MCL and, therefore, will be required to collect the monitoring sample every six years, which is also reduced from every four years. Systems with radionuclides above half of, but below, the MCL are required to perform quarterly monitoring under the current Radionuclides Rule in NYS, however, these systems will be able to reduce their monitoring to every three years under the proposed rule. Monitoring requirements for systems exceeding the MCL remain unchanged. The Department of Health has been assisting systems and local health departments to determine which systems can reduce radionuclides monitoring based on levels found in samples previously collected.

Small Business and Local Government Participation

Many of the community water systems that will be affected by the proposed amendments operate as municipal water systems by towns and villages. The New York State Department of Health has been discussing the proposed amendments and seeking their input at organizational meetings where small community water systems are represented. Department of Health representatives have and will continue to explain the new requirements and provide opportunities for input and comments on the regulation at local meetings of the New York Rural Water Association, the American Water Works Association, the Conference of Environmental

Health Directors, the New York Association of Towns, and the New York Conference of Mayors, among others.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas

The proposed revisions will apply to all 2,881 community water systems in New York State including all 1,853 rural water systems located throughout all rural areas as defined by New York State (SAPA § 102[10] and Executive Law 481[7]).

Some of these rural systems that have elevated levels of radionuclides may be located near or adjacent to other water systems that are in compliance with the new Radionuclides Rule. For these systems, there is a greater opportunity to connect to a nearby water system, and consolidation may be a less costly compliance alternative than complying with the new regulations by treating their water. For some rural systems, however, this option may not exist.

Reporting, Recordkeeping, or Other Compliance Requirements

Only community water systems with a violation or failure to monitor and report are required to make notification to the State, their consumers and the public. The majority of drinking water violations result from a failure to fully follow monitoring or testing procedures. Under the proposed rule, systems will be able to reduce the number of notices issued by consolidating all notices for monitoring and testing procedure violations in an annual report (Tier 3 public notice) instead of through the issuance of a separate notice every three months. The proposed rule also allows systems to provide a Tier 2 public notice (notice within 30 days) for regulated radionuclides MCL violations, instead of the current 14 day notification requirement. Reporting and recordkeeping requirements will decrease overall for all systems including rural public water systems that are required to issue a public notice for their monitoring and/or MCL violation.

All community water systems including systems in rural areas will require the professional services of a certified or approved laboratory to perform water analyses for all radionuclides. The laboratory used must be one approved by the New York State Department of Health under its Environmental Laboratory Approval Program. It is estimated that sufficient laboratory capability and capacity are available. In some cases, a licensed professional engineer will be required to design treatment facilities to meet the radionuclides standards or to design facilities for accessing an alternate source.

Costs

The proposed amendments may incur costs to all impacted systems, including rural systems, in the form of treatment costs including professional services such as consulting and design services, initial capital, operation and maintenance costs, and monitoring and reporting costs. The annual cost increase for water system compliance with the requirements of the proposed Radionuclides Rule will be approximately \$385-\$430 per system (refer to "Costs to State Government" in the Regulatory Impact Statement. According to the Safe Drinking Water Information System, there are 1,853 community water systems in rural areas. Therefore, the total cost increase to community water systems in rural area will be approximately \$713,405-\$790,790 ((1,853 systems) × (\$385-\$430 per system)) compared to \$1.11 — 1.24 M total statewide.

Economic and Technological Feasibility

Compliance with the Radionuclides Rule is both economically and technologically feasible. Methods currently exist for the analysis of radionuclides including gross-alpha particles, beta/photon, radium-226 and — 228 and uranium. Treatment techniques to reduce naturally existing radionuclides are fairly common, so there are technologically feasible alternatives available for treatment, e.g., ion exchange, reverse osmosis, lime softening and coagulation/filtration. The Department of Health currently has fifteen engineers in the Technical Group of Bureau of Water Supply Protection that review plant designs and provide technical assistance. This staff has the expertise and will provide technical guidance when necessary.

Minimizing Adverse Impact

The costs described above are the same as those which would be imposed of the requirements of the federal Radionuclides Rule which will take effect regardless of state action. The New York State Department of Health plans to provide owners and operators of community water systems with training, guidance documents, and monitoring report forms to help alleviate some of the labor costs associated with these regulations. Existing regulations allow the State, at its discretion, to provide laboratory analyses for regulated contaminants to meet the requirements imposed upon the systems. If State resources are available, this would reduce costs for small water systems regardless of the owner type.

According to the proposed amendments, community water systems with low levels of radionuclides in their water will be allowed to reduce

monitoring frequency, and thereby reduce labor and laboratory costs. More than 80% of systems in NYS have radionuclides less than their detection limit, thus would need to monitor their water every nine years under the proposed regulation, which is reduced from every four years under the current regulation. The majority of the other systems has radionuclides less than half of the MCL and will be required to collect the monitoring sample every six years which is also reduced from every four years. Systems with radionuclides above half of, but below, the MCL are required to perform quarterly monitoring under the current Radionuclides Rule in NYS. These systems will be able to reduce their monitoring to every three years under the proposed rule. The monitoring requirements for systems exceeding the MCL remain unchanged. The Department of Health has been assisting systems and local health departments to determine which systems can reduce radionuclides monitoring based on levels found in samples previously collected.

Rural Area Participation

Many of the community water systems that will be affected by the proposed amendments are towns and villages operating municipal water supplies. The New York State Department of Health has been discussing the proposed amendments and seeking their input at organizational meetings where small community water systems are represented. Department of Health representatives have and will continue to explain the new requirements and provide opportunities for input and comments on the regulation at local meetings of the New York Rural Water Association, the American Water Works Association, the Conference of Environmental Health Directors, the New York Association of Towns, and the New York Conference of Mayors, among others.

Job Impact Statement

Nature of Impact

The Department of Health has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities. It requires additional monitoring of water quality and the installation of water treatment equipment at isolated community water systems to reduce radionuclides. However, the majority of community systems in New York State will reduce the monitoring, therefore, the net increase of laboratory service is not expected.

Its impact on employment, if any, is expected to be positive for the construction/water treatment industry during the first years of implementation. As discussed earlier most systems affected by the MCL requirements will likely choose to connect to an adjacent system. If this is not an option then they will probably develop other wells. Assuming 2/3 of all impacted systems for gross alpha, combined radium and uranium (26 — 29 systems, refer to Table 3, Regulatory Impact Statement) choose these options, approximately 20 — 22 systems will require construction work. Typically this type of work does not require more than 3 or 4 people for more than a couple of months. Both of these options will generate approximately 15 year-round equivalent construction jobs initially. The remaining impacted systems (6 — 7 systems) will install point-of-use treatment units through vendors. Assuming one contracted technician can provide the required service for two systems, this option will create approximately 3 or 4 new permanent jobs for the maintenance. Longer term, the increased employment is estimated to be these 3 or 4 jobs statewide for the maintenance of point-of-use treatment units.

Categories and Numbers Affected

The proposed amendments will not decrease the number of jobs in New York State. There may be a small increase in employment due to the increased monitoring and treatment requirements of the proposed amendments at different systems.

Regions of Adverse Impact

The proposed amendments apply to all community water systems in NY, and any impact, both positive and negative, will be broadly and evenly dispersed statewide. The proposed rule will not focus adverse impacts on any specific region in New York State.

Minimizing Adverse Impact

In a few cases a licensed professional engineer will be required to design treatment facilities to meet the radionuclides standards or to design facilities for accessing an alternate source. The connection to an adjacent system and new well development may create some construction jobs. However, the overall impact on jobs in NYS is anticipated to be minimal. Any impact, although minimal, is the result of the requirements of the federal Radionuclides Rule, which will take effect regardless of state action.

Alternatives

The revisions incorporating the requirements of the Radionuclides Rule are federally mandated. NYS DOH did not consider any significant

alternatives to the rule, because to maintain "primacy" to administer and enforce the requirements of this rule, NYS DOH must amend State Sanitary Code Subpart 5-1 to adopt the federal requirements.

Self-employment Opportunities

Since the overall impact on jobs in NYS is anticipated to be minimal, any self-employment opportunities are expected to be insignificant.

Insurance Department

EMERGENCY RULE MAKING

Rules for Key Person Corporate-Owned Life Insurance

I.D. No. INS-28-05-00005-E

Filing No. 705

Filing date: June 22, 2005

Effective date: June 22, 2005

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

Action taken: Addition of Part 48 (Regulation 180) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3205

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

Specific reasons underlying the finding of necessity: Corporate-owned life insurance covering rank-and-file employees, also called "janitors insurance" or "dead peasant insurance," has been the focus of numerous negative press articles and public commentaries over the last several years. In many cases, the covered employees were not notified and did not consent to such insurance. In addition, the Internal Revenue Service has pursued litigation against some companies using corporate-owned life insurance as a means of evading taxes.

Most recently in response to criticism concerning COLI, the United States Senate has drafted legislation that provides for the taxation of death proceeds of corporate-owned life insurance under certain circumstances. The Senate's proposal addresses the abuses of "janitor insurance" and recognizes the legitimate business need for COLI to serve as a funding vehicle for employee benefit plans. As a result, the Senate's legislative proposal provides that death benefits under corporate-owned life insurance policies will not be taxable if the employee is a key employee as defined in the proposed legislation.

The potential for abuse in the corporate-owned life insurance market has long been a concern of the New York Legislature. Chapter 491 of the Laws of 1996 added a new subsection (d) to Section 3205 to provide notice, consent and termination rights to employees, including rank-and-file employees, whose lives were insured under corporate-owned life insurance programs designed to fund employee benefit plans. Such notice, consent and termination rights were designed to reduce the potential for abuse in the COLI market.

Since the notice, consent and termination rights only apply in the case of Section 3205(d) COLI and not key person COLI under Section 3205(a)(1)(B), it is imperative that insurers only insure key employees under Section 3205(a)(1)(B). This will also ensure that rank and file employees and other non-key employees receive the notice, consent and termination rights prescribed by Section 3205(d) and to curb some of the reported abuses associated with COLI on rank-and-file employees. This will serve to ensure that employees insured pursuant to the insurable interest provisions of Section 3205(a)(1)(B) are key employees.

The establishment of a key employee standard based on the proposed federal legislation will aid in curbing abuse in the corporate-owned life insurance market. Therefore, for the reasons stated above, this rule must be promulgated on an emergency basis for the preservation of the general welfare.

Subject: Rules for key person corporate-owned life insurance.

Purpose: To provide guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) and (d) of the Insurance Law.

Text of emergency rule: I, Howard Mills, Superintendent of Insurance of the State of New York, pursuant to the authority granted by Sections 201,

301, and 3205 of the Insurance Law of the State of New York, hereby promulgate a new Part 48 of Chapter IX of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 180), to take effect upon filing with the Secretary of State, to read as follows:

§ 48.0 Preamble and Purpose.

(a) Section 3205(b)(2) of the Insurance Law provides in part that "No person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable . . . to a person having, at the time when such contract is made, an insurable interest in the person insured."

(b) Section 3205(a)(1)(B) of the Insurance Law defines the term "insurable interest", for the purposes of life and accident and health insurance, to include "...a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured."

(c) Under Section 3205(a)(1)(B), an employer has an insurable interest in the lives of certain employees and other persons, commonly referred to as "key employees" or "key persons", whose services and qualifications are of such nature that their death or disability would cause the employer to incur a substantial pecuniary loss.

(d) The purpose of this Part is to establish standards for life insurers and fraternal benefit societies issuing key person company-owned life insurance to ensure that the employees or other persons on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key persons.

§ 48.1 Underwriting Guidelines.

An insurer using key person company-owned life insurance shall establish and apply appropriate underwriting guidelines to ensure that the employees or other persons on whose lives policies are written pursuant to Section 3205(a)(1)(B) are actually key persons.

§ 48.2 Standards.

For purposes of this Part and for establishing whether there exists an insurable interest under Section 3205(a)(1)(B) at the time the policy is issued, the term key person shall include the following persons:

(a) An employee who is one of the five highest paid officers of the employer;

(b) An employee who is a five-percent owner of the employer. A "five-percent owner" shall mean:

(1) If the employer is a corporation, any person who owns or controls more than five percent of the outstanding stock of the corporation or stock possessing more than five percent of the total combined voting power of all stock of the corporation; or

(2) If the employer is not a corporation, any person who owns more than five percent of the capital or profits interest in the employer;

(c) An employee who had compensation from the employer in excess of \$90,000 in the preceding year;

(d) An employee who is among the highest paid 35 percent of all employees; or

(e) An employee or other person who makes a significant economic contribution to the company, including but not limited to, an employee who is responsible for management decisions, has a significant impact on sales or a special rapport with customers and creditors, possesses special skills, or would be difficult to replace. Criteria for the employer's determination shall be included in the insurer's underwriting guidelines.

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 September 19, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: mbarry@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation 180 (11 NYCRR 48) is derived from Sections 201, 301, and 3205 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him (under the provisions of the Insurance Law) to prescribe forms or otherwise to make regulations.

Section 3205 of the Insurance Law defines the term “insurable interest” and sets forth insurable interest requirements for any policy of life insurance and accident and health insurance.

2. Legislative objectives:

The insurable interest requirements contained in Section 3205 reflect the state’s public policy against contracts wagering on human life. Section 3205(b)(2) prohibits the issuance of any policy upon the life of another person unless the beneficiary is the insured, personal representative of the insured, or a person having an insurable interest in the insured at the time the policy is issued.

Section 3205(a)(1)(B), applicable when policies are purchased by persons not closely related to the insured by blood or by law, defines “insurable interest” to include a lawful and substantial economic interest in the continued, life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured. Employers and insurers have historically relied upon Section 3205(a)(1)(B) to satisfy the insurable interest requirement for the purchase of insurance on the lives of “key persons” or “key employees.”

In 1996, the Legislature added new subsections (d) and (e) to Section 3205 of the Insurance Law (L. 1996 c. 491) to specifically grant employers an insurable interest in any employee or retiree who is eligible to participate in an employee benefit plan. The Legislature enacted Section 3205(d) in order to assist employers with the financing of employee benefit plans through the use of corporate-owned life insurance (“COLI”) purchased on the lives of employees.

The purpose of the proposed regulation is to establish standards for life insurers issuing key employee COLI, pursuant to Section 3205(a) rather than Section 3205(d) COLI, to ensure that the employees on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key employees.

3. Needs and benefits:

As noted in the Federal Standard section below, the definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate’s proposal is intended to eliminate well-publicized abuses of COLI. The proposal also recognizes the legitimate business need for employers to use corporate owned policies as a funding vehicle for employee benefits, and specifically provides that COLI death benefits would not be taxable if the covered employee meets the definition of a key employee.

The potential for abuse in the COLI market has historically been a concern of the New York legislature as evidenced by the enactment of notice, consent and termination rights in Section 3205(d) and (e) of the Insurance Law in 1996, establishing an insurable interest for the purchase of life insurance used to fund employee benefit plans. Since the employee notice, consent and termination rights are not required when company-owned life insurance is purchased under Section 3205(a)(1)(B), it is imperative that insurers be provided with standards for key employees to ensure that such employees are key employees and to avoid the potential for any further abuses in the market. The establishment of a key employee standard would provide such guidance.

In addition, a key employee standard would enhance the Department’s market conduct exams by providing field examiners with a reference point. Field examiners currently lack statutory or regulatory standards for determining the proper application of Section 3205(a) and, specifically, whether COLI insurance issued pursuant to Section 3205(a) is on key employees.

The key employee standard is particularly important in the bank-owned life insurance market, in which employees do not receive Section 3205(d) protections. Currently, banks do not purchase coverage under Section 3205(d) because the employee’s ability to terminate coverage makes the policy an unreliable mechanism for funding plan liabilities and results in adverse tax consequences to the bank. When bank-owned life insurance is issued as key employee coverage under Section 3205(a)(1)(B), the key employee standard created by this proposed regulation will help ensure that the covered employees will in fact be key employees.

4. Costs:

Life insurers licensed in New York that sell key employee COLI are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key employee COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the proposed regulation. Any insurers in the key employee

COLI market that lack established key person underwriting guidelines would incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the proposed regulation.

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

5. Local government mandates:

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

6. Paperwork:

The proposed regulation imposes no new reporting requirements.

7. Duplication:

The proposed regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered but rejected the prospect of issuing a Circular Letter to establish the standard for key person. The Department was concerned that the Circular Letter proposal would not have the same force and effect of a regulation, and would therefore be an inadequate mechanism to apply and enforce the insurable interest requirements of Section 3205.

9. Federal standards:

The definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft COLI bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate bill, which was approved by the Senate Finance Committee in February, 2004, provides that a key employee may be either a “highly compensated employee” under Section 414(q) of the Internal Revenue Code or a “highly compensated individual” under Section 105(h)(5) of the Internal Revenue Code (except that ‘35 percent’ shall be substituted for ‘25 percent’ in subparagraph (C) thereof). The purpose of the definition of key employee in the Senate bill is to create an exemption from tax for death proceeds paid to employers in connection with COLI, and does not relate to state insurable interest laws. There is no federal standard that defines key employee in the context of insurable interest for life insurance.

10. Compliance schedule:

The proposed regulation establishes a standard for all key employee life insurance policies issued before and after the effective date of the Regulation.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business in New York State, none of which fall within the definition of “small business” as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of “small business”, because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

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

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

The regulation provides guidance to insurers in defining the term key person.

3. Costs:

Life insurers that sell key person COLI to fund broad-based employee benefit plans are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key person COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the Regulation. Any insurers in the key person COLI market that lack established key person underwriting guidelines will incur

costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the Regulation.

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

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with the Life Insurance Council of New York, a trade organization representing life insurers in New York.

Job Impact Statement

Nature of impact: The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation provides guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) of the Insurance Law.

Categories and number affected: No categories of jobs or number of jobs will be affected.

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

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

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

Division of the Lottery

EMERGENCY RULE MAKING

Mega Million Multi-State Lottery Game

I.D. No. LTR-28-05-00001-E

Filing No. 702

Filing date: June 22, 2005

Effective date: June 22, 2005

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

Action taken: Amendment of Part 2806 of Title 21 NYCRR.

Statutory authority: Tax Law, section 1617

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

Specific reasons underlying the finding of necessity: The New York Lottery and other participating Mega Million states have added California to the Mega Millions game, and have amended the game rules, including the prize structure by which the game is governed. The first drawing under the new rules is scheduled to take place on June 22, 2005, and thus the amended regulations need to be in place before that date.

Subject: Mega Million multi-state lottery game.

Purpose: To add a new state in the Mega Millions game and clarify regulations.

Text of emergency rule: 21 NYCRR Section 2806.1 subdivision (a)-(c) is hereby repealed and replaced by new 21 NYCRR Section 2806.1 subdivision (a)-(c).

§ 2806.1 Propose

(a) The purpose of MEGA MILLIONS is the generation of revenue for education in New York through the operation of specially-designed multi-state lottery game(s) that will award prizes to ticket holders consistent with the game rules established for a particular game. Such game(s) may include instant tickets ("instants") and/or matching specified combinations of numbers randomly selected in regularly scheduled drawings ("on-line").

(b) During each MEGA MILLIONS on-line drawing, six (6) MEGA MILLIONS Winning Numbers will be selected from two (2) fields of numbers in the following manner: five (5) winning numbers from a field of one

(1) through fifty-six (56) numbers, and one (1) winning number from a field of one (1) through forty-six (46) numbers.

(c) The objective of MEGA MILLIONS on-line drawings shall be to select at random, with the aid of drawing equipment, MEGA MILLIONS Winning Numbers, pursuant to the controls and methods established for the game.

21 NYCRR Section 2806.2 paragraph (1) (4) (5) (7) through (13) (16) of subdivision (a) is hereby repealed and replaced by new 21 NYCRR Section 2806.2 paragraphs (1)(4)(5)(7) through (13) (16) of subdivision (a).

(1) Agent - The person who has been licensed and authorized by the New York Lottery to sell lottery tickets pursuant to Part 2801 of these regulations.

(4) Cash Option - The manner in which the on-line MEGA MILLIONS Jackpot Prize may be paid in a single payment.

(5) Claimant - Any person or entity submitting a claim form within the required time period to collect a prize for any MEGA MILLIONS Ticket. A Claimant may be the person or entity named on a signed MEGA MILLIONS Ticket, or the bearer of an unsigned MEGA MILLIONS Ticket. No Claimant may assert rights different from the rights acquired by the original Purchaser at the time of purchase.

(7) Jackpot Prize For the on-line MEGA MILLIONS game, the prize awarded for selecting all the numbers drawn from both fields. If more than one player from all participating lottery states has selected all the numbers drawn, the jackpot prize shall be divided among those players. Jackpot prize may also be referred to from time to time as "Grand Prize". For any other game, the Jackpot Prize will be identified in game rules issued for such game.

(8) MEGA MILLIONS Play Area For the on-line MEGA MILLIONS game, the areas on a MEGA MILLIONS play slip identified by an alpha character, A through E, containing two separate fields - one field of 56 and a second field of 46 both containing one or two digit numbers each. This is the area where the player, or computer if the player is using the Quick Pick option, will select five (5) one or two-digit numbers from the first field, and will select one (1) one or two-digit numbers from the second field.

(9) MEGA MILLIONS Play Slip - For the on-line MEGA MILLIONS game, a computer-readable form, printed and issued by the New York Lottery, used in purchasing a MEGA MILLIONS Ticket, having up to five (5) separate play areas. The Play Slip additionally includes boxes for selection of Cash Option or Annuity Option. The play slip also provides for multiple drawing wagering up to 26 draws.

(10) MEGA MILLIONS Ticket - A game ticket, produced on official paper stock, by an agent in an authorized manner, bearing player or computer selected numbers from the play area on the play slip, game name, drawing dates, amount of wager, jackpot prize payment option, and validation data.

(11) MEGA MILLIONS Winning Numbers - For the on-line MEGA MILLIONS game, five (5) one or two digit numbers, from one (1) through fifty-six (56) and one (1) one or two-digit number from one (1) through forty-six (46), randomly selected at each MEGA MILLIONS drawing, which shall be used to determine winning MEGA MILLIONS plays contained on MEGA MILLIONS Tickets.

(12) Pari-Mutuel - For the on-line MEGA MILLIONS game total amount of prize money allocated to pay prize Claimants, at the designated prize level, divided among the number of winning MEGA MILLIONS Tickets.

(13) Party Lottery or Party Lotteries - One or more of the state lotteries established and operated pursuant to the laws of any state lottery which becomes a signatory to the Mega Millions Game agreement.

(16) Quick-Pick - For the on-line MEGA MILLIONS game, a player option in which MEGA MILLIONS number selections are determined at random by the lottery terminal.

21 NYCRR Section 2806.3 subdivision (a) is hereby repealed and replaced by new 21 NYCRR Section 2806.3 subdivision (a)

§ 2806.3 Ticket Sales.

(a) The sale of MEGA MILLIONS Tickets within New York State may be conducted only by an agent.

21 NYCRR Section 2806.4 subdivision (a) is hereby repealed and replaced by new 21 NYCRR Section 2806.4 subdivision (a)

§ 2806.4 Ticket Price.

(a) For the on-line MEGA MILLIONS game: MEGA MILLIONS Tickets may be purchased for \$1.00 per play at the discretion of the Purchaser, in accordance with the number of game panels and inclusive drawings. The Purchaser receives one play for each \$1.00 wagered in MEGA MIL-

LIONS. Instants will be at the price stated on any such ticket. Tickets may contain multiple plays.

21 NYCRR Section 2806.5 subdivision (f) is hereby repealed and replaced by new 21 NYCRR Section 2806.5 subdivision (f)

§ 2806.5 Play Characteristics and restrictions.

(f) For the on-line MEGA MILLIONS game, purchasers may submit a manually completed MEGA MILLIONS Play Slip to an Agent to have issued a MEGA MILLIONS Ticket. MEGA MILLIONS Play Slips shall be available at no cost to the Purchaser and shall have no pecuniary or prize value, or constitute evidence of purchase or number selections. The use of mechanical, electronic, computer generated or any other non-manual method of marking Play Slips is prohibited.

21 NYCRR Section 2806.6 is hereby repealed and replaced by new 21 NYCRR Section 2806.6

§ 2806.6 Time, Place and Manner of Conducting Drawings

For the on-line MEGA MILLIONS game: MEGA MILLIONS drawings will be conducted twice weekly approximately 11:00 p.m. Eastern Time in one of the party lottery states. The day, time, frequency and location of the MEGA MILLIONS drawings may be changed following public announcement.

21 NYCRR Section 2806.7 subdivision (a) is hereby repealed and replaced by new 21 NYCRR Section 2806.7 subdivision (a)

§ 2806.7 Prize Structure

(a) For the on-line MEGA MILLIONS game - Matrix of 5/56 and 1/46 with 50 Percent Anticipated Prize Fund

Match Field 1	Match Field 2	Odds	Prize Category	Percentage of Prize Fund
5	1	1:175,711,536.00	Grand	63.60 percent
5	0	1:3,904,700.80	Second	12.80 percent
4	1	1:689,064.85	Third	2.90 percent
4	0	1:15,312.55	Fourth	1.96 percent
3	1	1:13,781.30	Fifth	2.18 percent
2	1	1:843.75	Sixth	2.38 percent
3	0	1:306.25	Seventh	4.58 percent
1	1	1:140.63	Eighth	4.26 percent
0	1	1:74.80	Ninth	5.34 percent
Reserve				0 percent
Totals		1:39.89		100 percent

21 NYCRR Section 2806.7 paragraph (1) of subdivision (b) is hereby repealed and replaced by new 21 NYCRR Part 2806.7 paragraph (1) of subdivision (b)

(b) Jackpot Prize Payments.

For the on-line MEGA MILLIONS game:

(1) The prize money allocated from the winning pool for the Jackpot Prize, plus any money brought forward from a previous drawing plus any money added from the prize reserve fund or any other available source pursuant to a guaranteed first prize amount announcement will be divided equally among all Jackpot Prize winners in all participating lottery states. Prior to each drawing, the annuitized MEGA MILLIONS Jackpot Prize amount will be advertised. The advertised Jackpot Prize amount shall be the basis for determining the amount to be awarded for each MEGA MILLIONS Panel matching all five (5) of the five (5) MEGA MILLIONS Winning Numbers drawn for Field 1 and the one (1) MEGA MILLIONS Winning Number drawn for Field 2.

21 NYCRR Section 2806.7 paragraph (1) of subdivision (c), paragraph (2) of subdivision (c), paragraph (6) of subdivision (c) is hereby repealed and replaced by new 21 NYCRR Section 2806.7 paragraph (1) of subdivision (c), paragraph (2) of subdivision (c), paragraph (6) of subdivision (c)

(c) Second through Ninth Level Prizes

For the on-line MEGA MILLIONS game:

(1) MEGA MILLIONS Panels matching five (5) of the five (5) MEGA MILLIONS Winning Numbers drawn for Field 1, but not matching the MEGA MILLIONS Winning Number drawn for Field 2 shall be entitled to receive a Second Prize of \$250,000*.

(2) MEGA MILLIONS Panels matching four (4) of the five (5) MEGA MILLIONS Winning Numbers drawn for Field 1 and the MEGA MILLIONS Winning Number drawn for Field 2 shall be entitled to receive a Third Prize of \$10,000*.

(6) MEGA MILLIONS Panels matching three (3) of the five (5) MEGA MILLIONS Winning Numbers drawn for Field 1 but not matching the MEGA MILLIONS Winning Number drawn for Field 2 shall be entitled to receive a Seventh Prize of \$7.

21 NYCRR Section 2806.7 subdivision (d) is hereby repealed and replaced by new 21 NYCRR Section 2806.7 subdivision (d)

(d) In a single on-line drawing, a Claimant may win in only one prize category per single MEGA MILLIONS Panel in connection with MEGA MILLIONS Winning Numbers, and shall be entitled only to the highest prize.

Footnote identified by asterisk is hereby repealed and replaced by new footnote identified by asterisk

* Should total prize liability, exclusive of Grand/Jackpot Prize rollover from previous drawings and California Lottery sales and prizes for prize levels 2 through 9, exceed 300% of draw sales or 50% of draw sales plus \$50,000,000, whichever is less, (both hereinafter referred to as the "Liability Cap"), the Second through Fifth prizes shall be paid on a pari-mutuel rather than fixed prize basis, provided, however, that in no event shall the pari-mutuel prize be greater than the fixed prize. The amount to be used for the allocation of such pari-mutuel prizes shall be the Liability Cap less the amount paid for the Grand/Jackpot Prize and prize levels Six through Nine.

21 NYCRR Section 2806.9 paragraph (10) of subdivision (a), paragraph (14) of subdivision (a), paragraph (15) of subdivision (a) is hereby repealed and replaced by new 21 NYCRR Part 2806.9 paragraph (10) of subdivision (a), paragraph (14) of subdivision (a), paragraph (15) of subdivision (a)

(10) The ticket must not be misregistered, defectively printed, or produced in error to an extent that it cannot be processed by the New York Lottery;

(14) The ticket must be submitted to the New York Lottery and to no other lottery participating in any MEGA MILLIONS lottery game.

(15) No MEGA MILLIONS ticket purchased outside the State of New York may be presented to either the New York Lottery or an agent for payment within New York.

21 NYCRR Section 2806.9 paragraph (1) of subdivision (b) is hereby repealed and replaced by new 21 NYCRR Part 2806.9 paragraph (1) of subdivision (b)

(b) (1) The Director may, at his/her option, replace an invalid ticket with a MEGA MILLIONS Ticket of equivalent sales price;

21 NYCRR Section 2806.12 subdivision (a) is hereby repealed and replaced by new 21 NYCRR Section 2806.12 subdivision (a)

§ 2806.12 Governing Law

(a) In purchasing a ticket issued for MEGA MILLIONS within New York State, the Purchaser agrees to comply with and be bound by all applicable statutes, administrative rules and regulations, and procedures of New York State, and by directives and determinations of the Director of the New York Lottery. The Purchaser agrees, as its sole and exclusive remedy, that claims arising out of a ticket purchased in New York State from an agent can be pursued only against the New York Lottery and no other lottery. Litigation, if any, arising from the purchase of a MEGA MILLIONS ticket in New York State from an agent shall only be maintained against the New York Lottery within the State of New York.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 19, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Dwight T. Flynn, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail:dflynn@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Lottery was authorized by Chapter 383 of the Laws of 2001 to commence a multi-state lottery game. The rule amends Lottery regulations pertaining to the operation of such game pursuant to the Lottery's authority under Tax Law Section 1604 to promulgate rules and regulations governing the operation of Lottery games.

2. Legislative objectives:

The purpose of operating Lottery games is to generate revenue for the support of education in the State. Amendment of these regulations forwards the mission of the New York State Division of the Lottery to generate revenue for education.

3. Needs and benefits:

The New York Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. New Yorkers routinely travel outside the state to participate in those games. Entry into a multi-state game has allowed the Lottery to offer large jackpot prizes and permits its retailers around the state to compete with sales of lottery products in bordering states, providing them an immediate competitive advantage at the point of purchase. On average the revenue to education from Mega Millions has been roughly \$158 Million per fiscal year in New York State.

The addition of California to Mega Millions is expected to generate roughly another \$30 Million annually for education.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this new game.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery Division's experience in operating State Lottery games for more than 30 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. New play cards and game brochures are required for this game, and the Lottery Division is providing new play cards and game brochures for public convenience at retailer locations free of charge.

7. Duplication: None.

8. Alternatives: None.

9. Federal standards: None.

10. Compliance schedule: None.

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

The proposal does not require a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement. There will be no adverse impact on jobs, rural areas, small business or local governments.

EMERGENCY RULE MAKING

Video Lottery Gaming

I.D. No. LTR-28-05-00006-E

Filing No. 706

Filing date: June 23, 2005

Effective date: June 23, 2005

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

Action taken: Addition of Part 2836 to Title 21 NYCRR.

Statutory authority: Tax Law, section 1617-a

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

Specific reasons underlying the finding of necessity: The specific reasons underlying the finding of necessity are as follows (State Administrative Procedure Law Section 202(6)(d)(iv)):

(1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. The current financial situation in New York State is such that funds are urgently needed to meet revenue shortfalls, particularly after the September 11th disaster and the general economic downturn that followed. It is projected that the operation of video lottery gaming in New York State may generate over \$1 Billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to 4 Million weekly in aid to education.

Since passage of the legislation in October 2001 authorizing the Division to license the operation of video lottery gaming at racetracks around New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. With commencement of gaming anticipated sometime around the end of this year, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been drafted, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1).

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rulemaking is that the Division will begin to generate needed aid to education through the operation of video lottery gaming. In July 2003, the first draft of these regulations was published. The Division received a number of comments during the public comment

period. Revisions to the proposed regulations based on comments received from the public and arising from internal product development are included in these emergency regulations. The Division intends to file shortly a Notice of Revised Rulemaking pursuant the State Administrative Procedure Act Section 202(4-a) to continue the normal rulemaking procedures relative to these regulations.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation of the game and deprive the state of needed revenue to education. The approximately \$1 to 4 Million in weekly aid to education lost this fiscal year by this delay would need to be taken from other revenue sources.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment because any game delay would result in a loss of approximately \$1 to 4 Million weekly this fiscal year in aid to education. As mentioned above, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been finalized, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the commencement of gaming for the time needed to utilize the normal rulemaking process would mean a loss in aid to education of approximately \$1 to 4 Million per week which would have to be made up from other state revenues.

Subject: Video lottery gaming.

Purpose: To allow for the licensed operation of video lottery gaming.

Substance of emergency rule: Chapter 383 of the Laws of 2001 as amended by Chapter 85 of the Laws of 2002, as amended by Chapter 62 of the Laws of 2003, codified as § 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks around New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principles and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

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 September 20, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Robert J. McLaughlin, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: rmclaughlin@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the laws of 2002, as amended by Chapters 62 and 63 of the Laws of 2003, codified as 1617-a and 1612 of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. That legislation directs the Division to promulgate

regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, and certain requirements for the physical layout of the gaming facilities. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While the Division considers video lottery gaming to be very similar to other lottery games that the Division has successfully conducted for over twenty-five years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming will require the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key employees, and employees.

In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled after those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

A Notice of Proposed Rulemaking was published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Because of this, and based on comments received during the public comment period, it was necessary to revise the proposed regulations. These emergency regulations include the revisions. By way of example, sections were added authorizing the issuance of badges for temporary employees, expressly setting forth a procedure to request exemption from the regulations, and authorizing the video lottery gaming agents to use Division logos and other copyrighted material to advertise and promote video lottery gaming at the licensed facilities.

In response to comments received from prospective licensees, the video lottery gaming agents were given increased latitude in managing their business operations. For example, rather than adhering to internal controls procedures prescribed by the Division, each agent will design their own in compliance with guidelines established by the Division. License applications with minor deficiencies can be resubmitted without the need to wait a lengthy resubmission time. If temporary employees are needed intermittently, they may utilize a badging system instead of undergoing a lengthy licensing process. Gaming agents will be able to utilize a Division logo in their advertising program, and will be able to sell all lottery products. Grammatical and formatting changes were made for clarity and ease of use.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$450 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million dollars. The

regulations require video lottery gaming agents housing over 2500 terminals to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. The gaming facilities throughout the state are expected to employ upwards of a total estimated 4,000 people. Individual gaming agents will be employing approximately 200 to 1,200 people. The average number of employees at each facility is estimated to be over 500. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$3.0 million to over \$15 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Total costs for the State, the tracks and vendors for start up and a full year of operations are estimated to be approximately \$500 million, with total revenue for the project for that time period estimated to be over \$1.2 billion.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. However, if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

(a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$100,000.00 in any twelve (12) month period;

(b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$150,000.00 in any twelve (12) month period;

(c) the non-gaming vendor has contract(s) for a portion of a video lottery gaming facility construction project that exceeds \$500,000.00 in any twelve (12) month period;

(d) the non-gaming vendor has combined contracts for a portion of more than one video lottery gaming facility construction project exceeding \$1,000,000.00 within any twelve (12) month period.

Agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures,

marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled on those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

Prior to publication of the first proposed regulations, members of the regulated community were contacted and comments to the proposed draft regulations solicited. In response, the Division received hundreds of comments that were carefully and thoroughly examined. These comments fell broadly into the following general categories:

- (a) That the requirements to become licensed and operate video lottery gaming appeared oftentimes unclear or vague;
- (b) That many of the requirements established in the proposed draft regulations were overly burdensome;
- (c) That the licensing authority of the Division was questionable;
- (d) That the regulations imposed excessive costs to satisfy unnecessary regulatory requirements; and
- (e) That the regulations contained definitions that were inconsistent, inaccurate or ambiguous.

As a result of this outreach effort, a number of revisions were made and included in the first proposed regulations published in July 2003. The public comment period which followed elicited a number of comments primarily from prospective licensees. Many of those comments proved valuable in drafting these emergency regulations which both meet the needs of the regulated community while maintaining the high standards established by the Division to operate and regulate its games. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to rmclaughlin@lottery.state.ny.us

While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. For example, when asked to make changes which would reduce the costs of developing or operating their businesses, the Division generally accommodated those requests when possible. Conversely, though comments were received that the stringent licensing application process was overly burdensome, the Division did not lessen these requirements.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

Regulatory Flexibility Analysis

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

(a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act Section 102;

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain leaders. It is anticipated that once video lottery gaming has commenced, these companies will recoup any costs associated with licensing and start-up;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process. However, if their contract exceeds a certain value, they will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, will conform to the costs of licensing discussed in paragraph (c) below. However, non-gaming vendors who must undergo a licensing process will not be required to pay a licensing fee other than the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. To the extent that any small business becomes a non-gaming vendor to a video lottery agent, a contract value threshold of \$100,000 applies before licensing is necessary. Completion of the licensing application will be required. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates provided by the racetracks themselves, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$240 million if all eligible venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$100 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ upwards of a total estimated 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Lottery guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks. Small businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$25,000 annually will be exempt from any registration or licensing requirements, and businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$100,000 will only need to complete a registration process.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. After publication of the Notice of Proposed Rulemaking on July 16, 2003, the Lottery received numerous comments mostly from prospective licensees, during the public comment period. These emergency regulations include revisions made to the regulations as a result of that comment period.

Rural Area Flexibility Analysis

Many of the racetracks eligible for video lottery gaming licenses are located within rural areas as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

Job Impact Statement

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ upwards of 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs. Undoubtedly, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

Office of Mental Health

NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

Pre-Admission Certification for Residential Treatment Facilities for Children and Youth

I.D. No. OMH-04-05-00004-C

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

The notice of proposed rule making, I.D. No. OMH-04-05-00004-P was published in the *State Register* on January 26, 2005.

Subject: Pre-admission certification committees for residential treatment facilities for children and youth.

Purpose: To revise the pre-admission certification process.

Substance of rule: This rule would amend Part 583 of Title 14 NYCRR which relates to the pre-admission certification process for residential treatment facilities for children and youth (RTF). It would amend the existing regulation to extend the period of time after which the pre-admission certification committee must reconfirm its determination of eligibility of a child awaiting admission from 45 days to 60 days. It would require that this reconfirmation include a request for an update of the child's status, including the child's clinical status, current placement and willingness and ability to be admitted if offered a placement. It would require that the committee base its reconfirmation of eligibility on a review of the documentation provided, be made in writing, and include the physician's signature.

This proposed rulemaking would also amend the existing regulation to require that if a child, who had been found eligible for RTF placement, became unavailable for such admission for a period of less than 30 days, then such child's eligibility shall be considered temporarily suspended. Such child may be restored to eligibility status on the date such temporary suspension ends.

The proposed rulemaking also amends the existing regulation to set forth the circumstances under which the pre-admission certification committee must decertify a child, previously certified as eligible for placement, from that eligibility status and related notice requirements regarding this decision.

Changes to rule: No substantive changes.

Expiration date: January 26, 2006.

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

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

Public Service Commission

NOTICE OF ADOPTION

Petitions for Rehearing and Clarification by Niagara Mohawk Power Corporation, et al.

I.D. No. PSC-10-05-00014-A

Filing date: June 22, 2005

Effective date: June 22, 2005

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

Action taken: The commission, on June 15, 2005, adopted an order in Case 03-M-0117 denying petitions for rehearing by Niagara Mohawk Power Corporation, KeySpan Energy Delivery New York and Long Island, Consolidated Edison Company of New York, Inc., National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation (collectively utilities), Belkin,

Burden, Wenig & Goldman, LLP, National Energy Marketers Association, and the Small Customer Marketer Coalition (SCMC), and granted clarification of certain provisions of its Dec. 5, 2003 order.

Statutory authority: Public Service Law, sections 2, 4, 5, 22, 30-53, 65 and 66

Subject: Petitions for rehearing and clarification.

Purpose: To grant clarification of the commission's Dec. 5, 2003 order.

Substance of final rule: The Commission adopted an order denying petitions for rehearing filed by Niagara Mohawk Power Corporation, KeySpan Energy Delivery New York and Long Island, Consolidated Edison Company of New York, Inc., National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation (collectively utilities), Belkin, Burden, Wenig & Goldman, LLP, National Energy Marketers Association, and the Small Customer Marketer Coalition (SCMC). The Commission granted clarification of certain provisions of its December 5, 2003 Order on Petitions for Rehearing and Clarification, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(03-M-0117SA6)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Verizon New York Inc. and MCImetro Access Transmission Services LLC

I.D. No. PSC-28-05-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and MCImetro Access Transmission Services LLC to revise the interconnection agreement effective on Oct. 10, 1997.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and MCImetro Access Transmission Services LLC in October 1997. The companies subsequently have jointly filed amendments to clarify the provisions regarding rates applicable to embedded base. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, 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.

(96-C-0787SA7)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Verizon New York Inc. and Intermedia Communications, Inc.

I.D. No. PSC-28-05-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Intermedia Communications, Inc. to revise the interconnection agreement effective on Feb. 8, 1997.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and Intermedia Communications, Inc. in February 1997. The companies subsequently have jointly filed amendments to clarify the provisions regarding rates applicable to embedded base. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, 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.

(97-C-0111SA5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Verizon New York Inc. and Brooks Fiber Communications of New York, Inc.

I.D. No. PSC-28-05-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Brooks Fiber Communications of New York, Inc. to revise the interconnection agreement effective on Sept. 14, 1999.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and Brooks Fiber Communications of New York, Inc. in September 1999. The companies subsequently have jointly filed amendments to clarify the provisions regarding rates applicable to embedded base. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, 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-C-1568SA5)

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

Interconnection Agreement between Verizon New York Inc. and MCI WORLDCOM Communications

I.D. No. PSC-28-05-00013-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 modification filed by Verizon New York Inc. and MCI WORLDCOM Communications to revise the interconnection agreement effective on Feb. 9, 2000.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and MCI WORLDCOM Communications in February 2000. The companies subsequently have jointly filed amendments to clarify the provisions regarding rates applicable to embedded base. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(99-C-1569SA4)

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

Interconnection Agreement between Verizon New York Inc. and Enhanced Communications Network, Inc. d/b/a Asian American Association

I.D. No. PSC-28-05-00014-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Enhanced Communications Network, Inc. d/b/a Asian American Association to revise the interconnection agreement effective on Sept. 30, 2002.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and Enhanced Communications Network, Inc. d/b/a Asian American Association in September 2002. The companies subsequently have jointly filed amendments to clarify the provisions regarding unbundled network elements. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our

website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(02-C-1250SA2)

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

Interconnection Agreement between Verizon New York Inc. and MCI WORLDCOM Communications

I.D. No. PSC-28-05-00015-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and MCI WORLDCOM Communications, Inc. (as Successor to Rhythms Links, Inc.) to revise the interconnection agreement effective on Jan. 23, 2004.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and MCI WORLDCOM Communications, Inc. (as Successor to Rhythms Links Inc.) in January 2004. The companies subsequently have jointly filed amendments to clarify the provisions regarding rates applicable to embedded base. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-C-0066SA2)

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

Interconnection Agreement between Verizon New York Inc. and Neutral Tandem-New York, LLC

I.D. No. PSC-28-05-00016-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Neutral Tandem-New York, LLC to revise the interconnection agreement effective on May 3, 2004.

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

Subject: Intercarrier agreements for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and Neutral Tandem-New York, LLC in May 2004. The companies subsequently have jointly filed amendments to clarify the provisions regarding two-way traffic exchange trunks. The Commission is considering these changes.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(i) of the State Administrative Procedure Act. (04-C-0697SA2)

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

Interconnection Agreement between Verizon New York Inc. and NationsLine North, Inc.

I.D. No. PSC-28-05-00017-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and NationsLine North, Inc. for approval of an interconnection agreement executed on May 3, 2005.

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

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

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

Substance of proposed rule: Verizon New York Inc. and NationsLine North, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and NationsLine North, 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 May 2, 2007, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-C-0690SA1)

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

Interconnection Agreement between Verizon New York Inc. and My Tel Co, Inc.

I.D. No. PSC-28-05-0018-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 Verizon New York Inc. and My Tel Co, Inc. for approval of an interconnection agreement executed on April 4, 2005.

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

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

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

Substance of proposed rule: Verizon New York Inc. and My Tel Co, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and My Tel Co, 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 April 3, 2007, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-C-0691SA1)

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

Interconnection Agreement between Verizon New York Inc. and MasterCall Communications, Inc.

I.D. No. PSC-28-05-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Master Call Communications, Inc. for approval of an interconnection agreement executed on April 28, 2005.

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

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

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

Substance of proposed rule: Verizon New York Inc. and Master Call Communications, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Master Call Communications, 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 April 27, 2007, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(05-C-0692SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Warwick Valley Telephone Company and Sprint Communications Company L.P.

I.D. No. PSC-28-05-00020-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Warwick Valley Telephone Company and Sprint Communications Company L.P. for approval of a mutual traffic exchange agreement executed on June 15, 2005.

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

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

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

Substance of proposed rule: Warwick Valley Telephone Company and Sprint Communications Company L.P. have reached a negotiated agreement whereby Warwick Valley Telephone Company and Sprint Communications Company L.P. will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(05-C-0721SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Methodology to Calculate the Value Added Charge

I.D. No. PSC-28-05-00021-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal developed by Department of Public Service staff regarding the methodology used to calculate the value added charge which is applicable to non-core transportation service provided to electric generators by gas distribution utilities. The value added charge is intended to provide a standard offer for generators while providing some benefit to gas utilities and their ratepayers and reflects increases or decreases in the wholesale market price of electricity relative to the changes in the cost of gas for electric generation.

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

Subject: Methodology to calculate the value added charge which is applicable to non-core transportation service for electric generators.

Purpose: To calculate the value added charge.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a proposal developed by Department of Public Service staff regarding the methodology used to calculate the value added charge which is applicable to non-core transportation service provided to electric generators by gas distribution utilities. The value added charge is intended to provide a standard offer for generators while providing some benefit to gas utilities and their ratepayers and reflects increases or decreases in the wholesale market price of electricity relative to the changes in the cost of gas for electric generation.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(98-G-0122SA3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interruptible Sales and Transportation Services by Orange and Rockland Utilities, Inc.

I.D. No. PSC-28-05-00022-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service —P.S.C. No. 4.

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

Subject: Interruptible sales and transportation services.

Purpose: To establish higher charges for unauthorized use of gas during periods of interruption and remove customers from the interruptible rate for failing to interrupt two times during the winter period.

Substance of proposed rule: The Commission is considering Orange and Rockland Utilities, Inc.'s proposal to revise its interruptible sales and interruptible transportation services to establish higher charges for unauthorized use of gas during periods of interruption and the removal of customers from the interruptible rate for failing to interrupt two times during the winter period.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(05-G-0776SA1)

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Technical Amendments

I.D. No. TDA-16-05-00016-A

Filing No. 707

Filing date: June 22, 2005

Effective date: July 13, 2005

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

Action taken: Amendment of section 352.8(b)(5), (6), (c)(1)(ii) and (f) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 355(3)

Subject: Technical amendments.

Purpose: To make technical changes to refer to current terminology.

Text or summary was published in the notice of proposed rule making, I.D. No. TDA-16-05-00016-P, Issue of April 20, 2005.

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

Text of rule and any required statements and analyses may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 473-7793

Assessment of Public Comment

The agency received no comment.