

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; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Cuisine Trail

I.D. No. AAM-50-06-00006-A
Filing No. 270
Filing date: March 9, 2007
Effective date: March 28, 2007

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

Action taken: Addition of Part 206 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, section 284-a

Subject: Cuisine Trail.

Purpose: To designate and describe the Cooperstown Cuisine Trail, a New York State Cuisine Trail.

Text or summary was published in the notice of proposed rule making, I.D. No. AAM-50-06-00006-P, Issue of December 13, 2006.

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

Text of rule and any required statements and analyses may be obtained from: William Kimball, Director, Agricultural Protection and Development Services, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-7076, e-mail: bill.kimball@agmkt.state.ny.us

Assessment of Public Comment

The Department received comments from the New York Farm Bureau expressing support for the proposed regulation. The Department agrees with these comments.

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Domestic Violence Shelter

I.D. No. CFS-13-07-00018-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 452 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 383-c, 384, 409-e and 459-g; and L. 2002, ch. 178

Subject: Location or address of a domestic violence shelter.

Purpose: To bring regulations into compliance with statutory mandates for confidentiality of the location and address of a domestic violence shelter.

Text of proposed rule: Subdivision (c) of section 452.10 of Title 18 NYCRR is renumbered as subdivision (c)(1).

New subdivisions (c)(2) and (c)(3) are added to read as follows:

(c)(2) *All information related to the general location or specific street address of a structure anticipated to house or housing a residential program for victims of domestic violence contained in any application or other document submitted to a state or local agency or any instrumentality thereof shall be kept confidential and not subject to release or disclosure in whole or in part. A state or local agency or any instrumentality thereof shall deny any request for such information made pursuant to Article 6 of the Public Officers Law in accordance with Section 87(2)(f) of such law.*

(3) *A state or local agency or any instrumentality thereof and its employees may disclose the general location or specific street address of a structure anticipated to house or housing a residential program for victims of domestic violence only where authorized by a Court of competent jurisdiction or otherwise expressly permitted by statute or regulation.*

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793, e-mail: info@ocfs.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (OCFS) to establish rules, regulations and policies to carry out OCFS' powers and duties under the SSL.

Section 34(3)(f) of the SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State.

Section 459-a of the SSL defines “residential program for victims of domestic violence” and authorizes OCFS, as the successor agency to the former New York State Department of Social Services, to certify such residential programs for victims of domestic violence and to establish regulations to govern the operation of such programs.

Section 459-g(2) of the SSL authorizes OCFS to establish rules and regulations as to the confidentiality of the street address of any residential program for victims of domestic violence and to whom the address may be disclosed. More specifically, Section 459-g of the SSL requires that the address of such residential program “. . . contained in any application submitted to a state or local agency or instrumentality thereof prior to the filing of an application for funding pursuant to this article shall be kept confidential by those entities and their employees and may be disclosed only to persons designated by the rules and regulations of [OCFS].”

2. Legislative Objectives

The proposed regulation carries out the intent of the aforementioned statutory provisions by establishing rules that specify the limited circumstances under which information about the address of a residential program for victims of domestic violence may be disclosed by a state or local agency or any instrumentality thereof.

3. Needs and Benefits

The site location of residential programs for victims of domestic violence must be maintained in a confidential manner for the safety of victims of domestic violence temporarily residing in such residences. Strict limits on the release of this information will decrease the chances that a batterer will be able to obtain the site address and possibly harm victims of domestic violence temporarily residing at the site. These regulations expand the entities that must maintain site information they receive concerning residential programs for victims of domestic violence in a confidential manner to include state and local governmental agencies and instrumentalities thereof, including fire and safety inspectors, zoning boards and others. Such entities may not be aware of the sensitive nature of the information and may unintentionally make the information available.

4. Costs

The proposed amendment is necessary to conform with Section 459-g of the Social Services Law in relation to financial aid to local social services districts for domestic violence programs. The proposed amendment will not impose any costs on municipalities beyond those imposed by Federal and State statutes.

There is no adverse fiscal impact to the Office of Children and Family Services related to these proposed regulatory amendments. The proposed changes are technical in nature and essentially redefine and clarify existing requirements related to the confidentiality of residential programs for domestic violence victims. In addition, where current regulations have been slightly revised, these requirements represent an effort to codify and slightly expand the current policy to some non-OCFS stakeholders to include applications or other documents submitted to a state or local agency and clarify when and to whom that information can be disclosed neither of which should add any significant fiscal impact. Also, the residential domestic violence programs are currently practicing confidentiality by maintaining a separate and distinct business mailing address and by nondisclosure of the street address and description of these programs.

5. Local Government Mandates

Local agencies and instrumentalities that have information related to the address of residential programs for victims of domestic violence must maintain that information in a confidential manner and not disclose the information except as authorized by these regulations. This is likely to affect only a small percentage of local agencies and instrumentalities because most local entities would not, based on their function, learn of the site of residential programs for victims of domestic violence. Additionally, of those local agencies and instrumentalities affected by these regulations, many are probably already maintaining the information in accordance with these regulations and are strictly limiting release and disclosure of the site information.

6. Paperwork

No new paperwork is required by these regulations. Local or state agencies or entities in possession of information concerning the address of residential programs for victims of domestic violence will need to maintain established paper or electronic records in accordance with these regulations.

7. Duplication

These regulations do not duplicate other state or federal requirements.

8. Alternatives

Section 459-g(2) of the SSL authorizes promulgation of these regulations. Failing to adopt these regulations would leave state and local agencies and instrumentalities uncertain as to whether and under what circumstances site addresses of residential facilities for victims of domestic violence could be released, potentially resulting in conflicting policies and inadvertent disclosures. An early draft of the regulation would have authorized release of the information to law enforcement, fire departments and other emergency services. However, those entities do not need to know that a site houses a residential facility for victims of domestic violence to provide emergency services to the site. Accordingly, after careful consideration, the regulation limits access and release to a Court of competent jurisdiction or where expressly authorized by statute or regulation.

9. Federal Standards

These regulations meet but do not exceed any applicable federal standards.

10. Compliance Schedule

The confidentiality provisions required by these regulations would become effective upon the effective date of the regulations.

Regulatory Flexibility Analysis

1. Effect of Rule

These regulations will not have an impact upon small businesses. Local governmental agencies and instrumentalities that, as a function of their mission, become aware of the site location of residential programs for victims of domestic violence will need to maintain the information in a strictly confidential manner and not disclose the information except as authorized by these regulations.

2. Compliance Requirements

Those local governmental agencies and instrumentalities that come into the possession of information about the site address of residential programs for victims of domestic violence must store the information confidentially and not disclose the information to any person or entity except as authorized by these regulations.

3. Professional Services

These regulations do not create the need for additional professional services.

4. Compliance Costs

The State is required to comply with the amended Social Services Law as it relates to the confidential location of residential programs for victims of domestic violence. There are no additional mandates imposed by these regulations. The proposed amendment will not impose any significant costs on municipalities beyond those imposed by State and Federal statutes.

There is no adverse fiscal impact to the Office of Children and Family Services related to these proposed regulatory amendments. The proposed changes are technical in nature and essentially redefine and clarify existing requirements related to the confidentiality of residential programs for victims of domestic violence. In addition, where current regulations have been slightly revised, these requirements represent an effort to codify and slightly expand the current policy to some non-OCFS stakeholders to include applications or other documents submitted to a state or local agency and clarify when and to who that information can be disclosed neither of which should add any significant fiscal impact. Also, the residential domestic violence programs are currently practicing confidentiality by maintaining a separate and distinct business mailing address and by nondisclosure of address and description of these programs.

5. Economic and Technological Feasibility

It is anticipated that local governmental agencies and instrumentalities have the economic and technological feasibility to confidentially maintain information that comes into their possession about the site addresses of residential programs for victims of domestic violence. Depending upon whether the information is maintained in an electronic database, it may be necessary to reprogram the database to prevent disclosing the address to unauthorized persons or entities.

6. Minimizing Adverse Impact

It is not anticipated that these regulations will result in an adverse impact on small businesses or local government agencies or instrumentalities. OCFS is prepared to provide or arrange for technical assistance to local governmental agencies or instrumentalities where compliance questions are raised by such entities.

7. Small Business and Local Government Participation

As noted above, these regulations will not affect small businesses. OCFS participated in a meeting with the New York City Department of Buildings and several residential programs for victims of domestic violence to discuss implementing the confidentiality provisions contained

within Section 459-g(2) of the Social Services Law, which is the statutory provision that authorized OCFS to develop these regulations. Several options for compliance were discussed at the meeting. In addition, comment was solicited through the NYS Building Officials Conference, and received from building inspectors and other local government staff in the towns of Colonie, Poughkeepsie, Victor and Dryden.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

The proposed regulations may affect certain local governmental agencies and instrumentalities in the 44 counties that contain rural areas.

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

The proposed regulations will not create any new reporting or other compliance requirements, nor will it create a need for additional professional services. However, any locality in a rural area that has any existing records pertaining to the site address of a residential program for victims of domestic violence, they must be maintained in a strictly confidential manner and not released or disclosed except as authorized by these regulations.

3. Costs:

The proposed amendment is necessary to conform with Section 459-g of the Social Services Law in relation to financial aid to local Social Services Districts for domestic violence programs. The proposed amendment will not impose any costs on municipalities beyond those imposed by Federal and State statutes.

There is no adverse fiscal impact to the Office of Children and Family Services related to these proposed regulatory amendments. The proposed changes are technical in nature and essentially redefine and clarify existing requirements related to the confidentiality of domestic violence victims. In addition, where current regulations have been slightly revised, these requirements represent an effort to codify and slightly expand the current policy to some non-OCFS stakeholders to include applications or other documents submitted to a state or local agencies and clarify when and to who that information can be disclosed neither of which should add any significant fiscal impact. Also, the residential domestic violence programs are currently practicing confidentiality by maintaining a separate and distinct business mailing address and by nondisclosure of address and description of these programs.

4. Minimizing adverse impact:

It is not anticipated that these regulations will result in an adverse impact upon small businesses or local governmental agencies or upon instrumentalities in rural areas. OCFS is prepared to provide or arrange for technical assistance to local governmental agencies or instrumentalities where compliance questions are raised by such entities.

5. Rural area participation:

At the suggestion of the NYS Department of State, OCFS reached out to the New York State Building Officials Conference Technical Subcommittee, and invited that group to submit comments on a draft proposal. Comments were received from the towns of Colonie, Poughkeepsie, Victor and Dryden.

Job Impact Statement

A full job impact statement has not been prepared for the proposed regulation. The proposed regulation would not result in the loss of any jobs. It is apparent from the nature and purpose of the rule (confidentiality of site location of residential facilities for victims of domestic violence) that it will not have a substantially adverse impact on jobs and employment opportunities.

Department of Economic Development

NOTICE OF ADOPTION

Empire State Film Production Tax Credit Program

I.D. No. EDV-04-07-00001-A

Filing No. 271

Filing date: March 12, 2007

Effective date: March 28, 2007

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

Action taken: Addition of Part 170 to Title 5 NYCRR.

Statutory authority: L. 2004, ch. 60

Subject: Empire State Film Production Tax Credit Program.

Purpose: To promulgate regulations for the program, establish procedures for the allocation of tax credits and describe the application process, the due dates for applications, the standards used to evaluate the application and any other provisions deemed necessary and appropriate.

Text or summary was published in the notice of proposed rule making, I.D. No. EDV-04-07-00001-P, Issue of January 24, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Thomas P. Regan, Department of Economic Development, 30 S. Pearl St., Albany, NY 12245, (518) 292-5123, tregan@empire.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF EMERGENCY ADOPTION

AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Bait Fish Regulations and Fish Health Inspection Reports

I.D. No. ENV-49-06-00014-ERP

Filing No. 267

Filing date: March 9, 2007

Effective date: March 9, 2007

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

Emergency action taken: Amendment of Parts 10, 35, and 188 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, and 11-0325

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

Specific reasons underlying the finding of necessity: Viral hemorrhagic septicemia virus (VHS) is a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the United States and Canada. This disease causes the hemorrhaging of the fish's tissues, including internal organs, and affects all sizes of fish. Not all infected fish develop the disease, but they can continue to carry it and spread it to others. There is no known cure for VHS.

VHS was first confirmed in New York waters in May 2006 when it was linked to the death of round gobies and muskellunge in Lake Ontario and the St. Lawrence River. Most recently, VHS caused the death of walleye in Conesus Lake. The virus has now been confirmed in round goby, burbot,

smallmouth bass, muskellunge, pumpkinseed, rock bass, bluntnose minnow, emerald shiner and walleye in infected waters in New York State.

Due to the potential adverse effects of the disease on fish populations and the desire to prevent or delay its spread to other states, a Federal Order was issued (October 24, 2006) by the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) that prohibits the importation of certain species of live fish from Ontario and Quebec and the interstate movement of the same fish species from eight states bordering the Great Lakes.

The Federal Order does not, however, address the movement of fish within New York State. In-state movement of fish could potentially lead to the spread of VHS in New York and significant adverse impacts to the state's fish resources. Moreover, the spread of VHS in New York could result in negative impacts to the state economy. More than a million New Yorkers hold state fishing licenses. Freshwater sportfishing contributes an estimated \$1.4 billion annually to the state's economy, supporting over 17,000 jobs.

Therefore, the Department is adopting regulations which address the commercial collection of bait fish, personal possession and use of bait fish, and requirements for fish health inspection reports. The promulgation of this regulation on an emergency basis is necessary in order to prevent the spread of VHS in New York and to protect New York's fish resources. It is also necessary to prevent negative impacts to the state's economy that would be associated with the spread of VHS in New York.

Subject: Possession and personal use of bait fish, taking bait fish for commercial purposes, and fish health inspection requirements.

Purpose: To prevent the spread of viral hemorrhagic septicemia virus (VHS) in New York, protect New York's fish resources and prevent negative impacts to the State's economy that would be associated with the spread of VHS in New York.

Text of emergency/revised rule: A new subdivision 10.1(f) is added to 6 NYCRR Part 10 to read as follows:

(f) *Special regulations for bait fish (personal use).*

(1) *Bait fish taken for personal use from any water body shall only be possessed or used in the same water body from which such bait fish were taken, and shall not be possessed or used in any other water body, except as provided in paragraph 2 of this subdivision.*

(2) *Bait fish taken for personal use in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, shall only be possessed or used in waters of the marine and coastal district and the Hudson River as defined in 10.1(f)(x), and shall not be possessed or used in a water body outside the marine and coastal district, except the Hudson River as defined in 10.1(f)(x).*

(3) *Bait fish taken for personal use from any water body shall not be transported overland, except:*

(i) *bait fish taken pursuant to Section 10.5 of this Part may be transported overland. Such fish, which are transported overland, shall not be used as bait; or*

(ii) *bait fish taken for personal use in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, may be transported overland only for use in waters of the marine and coastal district.*

(4) *Environmental conservation officers may seize any bait fish possessed in violation of this subdivision. No action for damages shall lie for such seizure, and disposition of seized bait fish shall be at the discretion of the Department.*

(5) *For purposes of this subdivision, "transported overland" shall mean transport by motorized vehicle other than on the water body where the fish were taken.*

(6) *For purposes of this subdivision, "water body" shall mean any lake, river, pond, stream or any other distinct mass of water existing in the State of New York, whether publicly or privately owned, including the banks and shores thereof. A water body shall also include all tributaries upstream to the first impassable barrier including the banks and shores thereof. For the purposes of this subdivision, locks and dams shall be considered impassable barriers.*

(7) *Notwithstanding the definition of water body in paragraph 6 or this subdivision, each of the following combined water bodies, including all tributaries up to the first barrier impassable by fish, shall be considered the same water body for purposes of this subdivision only:*

(i) *Lake Ontario in combination with the Lower Niagara River and the St. Lawrence River;*

(ii) *Lake Erie in combination with the Upper Niagara River, Black Rock Canal, and waters of the Erie Barge Canal from the Upper Niagara River to Lock E-35 in Lockport;*

(iii) *Oswego River from Lock 7 to junction with Oneida River & Seneca River at Three Rivers;*

(iv) *Oneida River downstream of Caughdenoy dam and Erie Barge Canal from Lock E23 to the junction with Oswego and Seneca Rivers;*

(v) *Oneida Lake and Erie Barge Canal downstream to Lock E23 and upstream to Lock E22, and the Oneida River downstream to Caughdenoy Dam;*

(vi) *Mohawk River from Barge Canal in Rome upstream to Delta Dam;*

(vii) *Erie Barge Canal from Lock E22 east to Lock E6;*

(viii) *Hudson River from the Federal Dam at Troy to Bakers Falls in the City of Hudson Falls, and the Champlain Canal up to but not above Lock 7 in Fort Edward, and the Erie Barge Canal up to but not above Lock E6 in Waterford;*

(ix) *Lake Champlain including the Champlain Canal up to, but not above Lock 12;*

(x) *Hudson River downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island.*

(xi) *Susquehanna River downstream of dam in Oakland, Pennsylvania and Chenango River.*

Part 35 of Title 6 of NYCRR is amended as follows:

Paragraph 35.2(d)(16) is amended to read as follows:

(16) *Franklin County. [Big Salmon River, Town of Fort Covington;] Floodwood Pond; Lake Clear Outlet; Middle Pond, Town of Santa Clara; Lake Colby; Lake Flower; Little Colby Pond; [Little Salmon River, from mouth at Fort Covington to dam at South Bombay;] Lower, Middle, Upper Saranac Lakes; Middle Pond; Town of Santa Clara; Lyon Brook and tributaries; [Pike Creek, Towns of Bombay and Fort Covington;] Raquette River, Town of Tupper Lake; Saranac River, from Middle Saranac Lake to dam at Union Falls; Simon Pond, Town of [Altamont] Tupper Lake; Tupper Lake; Weller Pond, Town of Santa Clara.*

Paragraph 35.2(d)(23) is amended to read as follows:

(23) *Livingston County. [Conesus Lake] Hemlock Lake.*

New Sections 35.3 and 35.4 are added to read as follows:

35.3 *Possession, Sale and Use of bait fish taken for commercial purposes*

(a) *Definitions. For purposes of this section, the following definitions shall apply.*

(1) *"Water body" shall mean any lake, river, pond, stream or any other distinct mass of water existing in the State of New York, whether publicly or privately owned, including the banks and shores thereof. A water body shall also include all tributaries upstream to the first impassable barrier including the banks and shores thereof. For the purposes of this section, locks and dams shall be considered impassable barriers.*

Notwithstanding the definition of water body in this paragraph, each of the following combined water bodies, including all tributaries up to the first barrier impassable by fish, shall be considered the same water body for purposes of this section only:

(i) *Lake Ontario in combination with the Lower Niagara River and the St. Lawrence River;*

(ii) *Lake Erie in combination with the Upper Niagara River, Black Rock Canal, and waters of the Erie Barge Canal from the Upper Niagara River to Lock E-35 in Lockport;*

(iii) *Oswego River from Lock 7 to junction with Oneida River & Seneca River at Three Rivers;*

(iv) *Oneida River downstream of Caughdenoy dam and Erie Barge Canal from Lock E23 to the junction with Oswego and Seneca Rivers;*

(v) *Oneida Lake and Erie Barge Canal downstream to Lock E23 and upstream to Lock E22, and the Oneida River downstream to Caughdenoy Dam;*

(vi) *Mohawk River from Barge Canal in Rome upstream to Delta Dam;*

(vii) *Erie Barge Canal from Lock E22 east to Lock E6;*

(viii) *Hudson River from the Federal Dam at Troy to Bakers Falls in the City of Hudson Falls, and the Champlain Canal up to but not above Lock 7 in Fort Edward, and the Erie Barge Canal up to but not above Lock E6 in Waterford;*

(ix) *Lake Champlain including the Champlain Canal up to, but not above Lock 12;*

(x) *Hudson River downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island.*

(xi) *Susquehanna River downstream of dam in Oakland, Pennsylvania and Chenango River.*

(2) "Transported overland" shall mean transport by motorized vehicle other than on the water body where the fish were taken.

(3) "Bait fish" shall mean those listed under subdivision 35.2 (a) of this Part, and shall include both live and dead bait fish except dead bait fish packaged for commercial purposes and preserved by any method other than freezing only.

(4) "Retail sale" shall mean the sale of bait fish to any person in the state for any purpose other than for resale.

(b) General prohibition. Bait fish taken for commercial purposes from the waters of the State shall not be possessed, sold, offered for sale, bartered, transferred or used except as authorized by this section.

(c) Bait fish taken from any water body pursuant to section 35.2 of this Part shall only be possessed, sold, offered for sale, bartered, transferred or used in the same water body from which such bait fish were taken, and shall not be possessed, sold, offered for sale, bartered, transferred or used in any other water body, except:

(1) as provided in subdivision d of this section;

(2) pursuant to permit issued by the Department in its discretion; or

(3) bait fish may be possessed, sold, offered for sale, bartered or transferred for use as bait in any water body if: (i) the use of bait fish is allowed in such water body pursuant to section 10.3 of this Title, and (ii) all applicable requirements of subdivisions (f), (g) and (h) of this section have been satisfied.

(d) Bait fish taken for commercial purposes in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, shall only be possessed or used in waters of the marine and coastal district and the Hudson River as defined in 35.2(a)(1)(x), and shall not be possessed or used in any water body outside the marine and coastal district, except the Hudson River as defined in 35.2(a)(1)(x).

(e) Bait fish taken for commercial purposes from any water body shall not be transported overland, except:

(1) bait fish taken in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, may be transported overland only for use in waters of the marine and coastal district;

(2) pursuant to permit issued by the Department in its discretion; or

(3) bait fish may be transported overland if all applicable requirements of subdivisions (g) and (h) of this section have been satisfied.

(f) Bait fish may not be possessed, sold, offered for sale, bartered or transferred for use as bait pursuant to paragraph (c)(3) of this section if the person selling or transferring such bait fish does not possess a fish health certification report for all bait fish owned or kept at the place of sale or transfer. For purposes of this section, the place of sale or transfer shall include, but not be limited to, all buildings, structures, tanks, containers, ponds or vehicles located at or contiguous to the place of sale or transfer.

(g) Retail sale of bait fish; receipt required. When engaging in the retail sale of bait fish, the seller shall issue a receipt to the purchaser. Such receipt shall indicate whether or not the fish are certified pursuant to Part 188, and shall contain the name of the seller, the date of the retail sale transaction, the species of fish sold, and the quantity of each species of fish sold. Such receipt shall be retained by the purchaser while in possession of the bait fish, and shall be valid for 7 days from date of the retail sale. For purposes of this section, such receipt shall expire and become invalid after 7 days from the date of the retail sale.

(h) Sale or transfer of bait fish other than retail sale; report and receipt required. When engaging in a sale or transfer of bait fish other than a retail sale, except as provided for in Part 35.3 (c), the seller shall provide the purchaser with:

(1) a copy of the fish health certification report as defined in 188.2 for the bait fish sold to the purchaser; and

(2) a receipt, containing the name of the seller, the date of the retail sale transaction, the species of fish sold, and the quantity of each species of fish sold. A copy of both the fish health certification report and the receipt shall be retained by the purchaser or transferee for 30 days or until the fish are sold or transferred, whichever is greater.

(i) Dead bait fish packaged for commercial purposes, and preserved by any method other than freezing only, shall be allowed to be possessed, sold, offered for sale, bartered, and transported overland for use as bait in any water body where the use of bait fish is allowed pursuant to section 10.3 of this Title.

(j) Environmental conservation officers may seize any bait fish possessed in violation of this section. No action for damages shall lie for such seizure, and disposition of seized bait fish shall be at the discretion of the Department.

(k) No person shall fail to exhibit a fish health certification report or bait fish receipt upon the demand of any police officer or representative of the Department.

35.4 Sale of bait fish from waters outside the State of New York

(a) For the purposes of this section, "bait fish" shall mean those listed under subdivision 35.2 (a) of this Part, and shall include both live and dead bait fish except dead bait fish packaged for commercial purposes and preserved by any method other than freezing only.

(b) General prohibition. Bait fish taken for commercial purposes from the waters outside the State shall not be possessed, sold, offered for sale, bartered, transferred or used except as authorized by this section.

(c) Subject to the provisions of subdivision (d) of this section, bait fish, accompanied by a fish health certification report in accordance with section 188.2, may be possessed, sold, offered for sale, bartered, imported and transported overland for use as bait in any water body where the use of bait fish is allowed pursuant to section 10.3 of this Title.

(d) Bait fish may not be possessed, sold, offered for sale, bartered or transferred for use as bait pursuant to subdivision (c) of this section if the person selling or transferring such bait fish does not possess a fish health certification report for all bait fish owned or kept at the place of sale or transfer. For purposes of this section, the place of sale or transfer shall include, but not be limited to, all buildings, structures, tanks, containers, ponds or vehicles located at or contiguous to the place of sale or transfer.

(e) Retail sale of bait fish; receipt required. When engaging in the retail sale of bait fish, the seller shall issue a receipt to the purchaser. Such receipt shall indicate whether or not the fish are certified pursuant to Part 188, and shall contain the name of the seller, the date of the retail sale transaction, the species of fish sold, and the quantity of each species of fish sold. Such receipt shall be retained by the purchaser while in possession of the bait fish, and shall be valid for 7 days from date of the retail sale. For purposes of this section, such receipt shall expire and become invalid after 7 days from the date of the retail sale.

(f) Sale or transfer of bait fish other than retail sale; report and receipt required. When engaging in a sale or transfer of bait fish other than a retail sale, except as provided for in Part 35.3 (c), the seller shall provide the purchaser with:

(1) a copy of the fish health certification report as defined in 188.2 for the bait fish sold to the purchaser; and

(2) a receipt, containing the name of the seller, the date of the retail sale transaction, the species of fish sold, and the quantity of each species of fish sold. A copy of both the fish health certification report and the receipt shall be retained by the purchaser or transferee for 30 days or until the fish are sold or transferred, whichever is greater.

(g) Dead bait fish packaged for commercial purposes, and preserved by any method other than freezing only, shall be allowed to be possessed, sold, offered for sale, bartered, and transported overland for use as bait in any water body where the use of bait fish is allowed pursuant to section 10.3 of this Title.

(h) Environmental conservation officers may seize any bait fish possessed in violation of this section. No action for damages shall lie for such seizure, and disposition of seized bait fish shall be at the discretion of the Department.

(i) No person shall fail to exhibit a fish health certification report or bait fish receipt upon the demand of any police officer or representative of the Department.

Part 188 of Title 6 of NYCRR, entitled "Fish Health Inspection Requirements" is amended as follows:

Section 188.1 is repealed, and new sections 188.1 and 188.2 are added to read as follows:

Section 188.1 Prohibitions; Fish Health Certification Report.

(a) No person shall place live fish into the water bodies of the State, or possess, sell, offer for sale, barter, import or transport fish for purposes of placing them into water bodies of the State, unless such fish are accompanied by a fish health certification report issued within the previous twelve (12) months, except:

(1) in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103; or

(2) pursuant to permit issued by the Department in its discretion.

(b) This section shall not prohibit the personal use of bait fish in accordance with paragraph 10.1(f) of Part 10 of this Chapter or shall not prohibit the use of legally obtained bait fish in accordance with Sections 35.2, 35.3 and 35.4. All fish health certification reports required by this section shall comply with section 188.2 of this Part.

(c) Environmental conservation officers may seize any fish possessed in violation of this Part. No action for damages shall lie for such seizure,

and disposition of seized bait fish shall be at the discretion of the Department.

(d) No person shall fail to exhibit a fish health certification report upon the demand of any police officer or representative of the Department.

Section 188.2 Fish Health Inspections

(a) All fish species.

(1) A fish health certification report shall certify that the fish being placed into the waters of the State are free of:

- (i) Viral Hemorrhagic Septicemia (VHS);
- (ii) Spring Viremia of Carp Virus (Infectious carp dropsy);

(2) Until January 1, 2009, a fish health certification report shall also certify the presence or absence of the following pathogens:

- (i) *Aeromonas salmonicida* (Furunculosis);
- (ii) *Yersinia ruckeri* (Enteric Red Mouth);
- (iii) Infectious Pancreatic Necrosis Virus (IPN);

(3) Effective January 1, 2009, a fish health inspection report shall certify that the fish are free of the pathogens listed in paragraph 2 of this subdivision.

(b) Additional fish health inspection requirements for Salmonidae.

(1) In addition to the requirements of subdivision (a) of this section, a fish health certification report for Salmonidae shall certify that the fish are free of:

- (i) *Myxobolus cerebralis* (whirling disease);
- (ii) Infectious Hematopoietic Necrosis Virus (IHN).

(2) Until January 1, 2009, a fish health certification report for Salmonidae shall also certify the presence or absence of *Renibacterium salmoninarum* (bacterial kidney disease).

(3) Effective January 1, 2009, a fish health certification report shall certify that the Salmonidae fish are free of *Renibacterium salmoninarum* (bacterial kidney disease).

(c) Effective January 1, 2009, no fish shall be placed into the waters of the State unless a fish health certification report certifies that such fish are free of all pathogens identified in this Section.

(d) Sample collection shall be made and fish health certification reports shall be issued by one of the following independent qualified inspectors:

- (1) American Fisheries Society certified fish pathologists;
- (2) American Fisheries Society certified fish health inspectors;
- (3) licensed veterinarians with demonstrated capability to perform sample collection and fish health inspections;
- (4) government employees with demonstrated capability to perform sample collection and fish health inspections;
- (5) university or college personnel with demonstrated capability to perform sample collection and fish health inspections; or
- (6) private laboratory personnel with demonstrated capability to perform sample collection and fish health inspections.

(e) Fish health certification reports required by this section shall be based upon and conform with testing methods and procedures recognized by the American Fisheries Society or the World Organization of Animal Health.

(f) Fish health certification reports required by this Part shall be completed on a form provided by the Department. A copy of the completed form shall be submitted by the inspector to the Department within 7 days of the date of fish health inspection.

(g) The addition of fish that are not accompanied by a fish health certification report to a facility will invalidate any existing fish health certification report.

(h) A fish health certification report shall not be required for fish placed into an aquarium or possessed for purposes of placing such fish into an aquarium.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on December 6, 2006, I.D. No. ENV-49-06-00014-EP. The emergency rule will expire June 6, 2007.

Emergency rule compared with proposed rule: Substantial revisions were made in Parts 10, 35 and 188.

Text of rule and any required statements and analyses may be obtained from: Shaun Keeler, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8920, e-mail: sxkeeler@gw.dec.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.

Additional matter required by statute: A programmatic impact statement is on file with the Department of Environmental Conservation.

Revised Regulatory Impact Statement

Statutory authority:

The Commissioner of Environmental Conservation, pursuant to Environmental Conservation Law (ECL) Sections 3-0301, 11-0303, and 11-0305, has authority to protect the fish and wildlife resources of New York State.

Environmental Conservation Law Section 11-0325 provides the Department of Environmental Conservation (Department) with authority to take action necessary to protect fish and wildlife from dangerous diseases. If the Department determines that an epizootic disease which endangers the health and welfare of native fish populations exists in any area of the state, or is in imminent danger of developing or being introduced into the state, the Department is authorized to adopt measures or regulations necessary to prevent the development, spread or introduction of such disease.

Legislative objectives:

The legislative objective of ECL Sections 3-0301, 11-0303, and 11-0305 is to grant the Commissioner the powers necessary for the Department to protect New York's natural resources, including fish resources, in accordance with the environmental policy of the state.

The legislative objective of ECL Section 11-0325 is to provide the Department with broad authority to respond to the presence or threat of a disease that endangers the health or welfare of fish or wildlife populations.

Needs and benefits:

Viral hemorrhagic septicemia virus (VHS) is a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the United States and Canada. This disease causes the hemorrhaging of the fish's tissues, including internal organs, and affects all sizes of fish. Not all infected fish develop the disease, but they can continue to carry it and spread it to others. There is no known cure for VHS.

VHS was first confirmed in New York waters in May 2006 when it was linked to the death of round gobies and muskellunge in Lake Ontario and the St. Lawrence River. In the summer of 2006, VHS caused the death of walleye in Conesus Lake. The virus has now been confirmed in round goby, burbot, smallmouth bass, muskellunge, pumpkinseed, rock bass, bluntnose minnow, emerald shiner and walleye in infected waters in New York State.

Due to the potential adverse effects of Viral Hemorrhagic Septicemia (VHS) on fish populations and the desire to prevent or delay its spread to other states, the USDA Animal and Plant Health Inspection Service (APHIS) issued a federal Order on October 24, 2006, as well as an amended order on November 14, 2006. The Amended Order prohibits the importation of certain species of live fish from Ontario and Quebec and restricts the interstate movement of the 37 fish species identified in the order from eight states bordering the Great Lakes: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Movement of fish from these eight states is limited to certified VHS free fish or fish destined for a fish processing facility that meets specified standards.

The Federal Order does not, however, address the movement of fish within New York State. The in-state movement of fish could potentially lead to the spread of VHS as well as other fish pathogens, in New York. In addition to VHS, Spring Viremia of Carp Virus (Infectious carp dropsy) and Infectious Hematopoietic Necrosis Virus (IHN) are internationally reportable diseases to the World Organization of Animal Health. Because they are a threat to fish hatcheries in New York and possibly to the freshwater fish populations of New York, *Aeromonas salmonicida* (Furunculosis), *Yersinia ruckeri* (Enteric Red Mouth) and Infectious Pancreatic Necrosis Virus (IPN) have been included in the proposed regulations. All pathogens identified in the regulations are considered pathogens of concern by the Great Lakes Fishery Commission Fish Health Committee and by the New England Fish Health Committee.

The spread of VHS in New York, as well as other fish pathogens, could lead to significant adverse impacts to the state's fish resources. Moreover, the spread of these diseases in New York could result in negative impacts to the state economy. More than one million New Yorkers hold state fishing licenses. Freshwater sportfishing contributes an estimated \$1.4 billion annually to the state's economy, supporting over 17,000 jobs.

Therefore, the Department is adopting regulations which address the commercial collection of bait fish, personal possession and use of bait fish, and requirements for fish health inspection reports. The promulgation of this regulation on an emergency basis is necessary in order to prevent the spread of VHS in New York and to protect New York's fish resources. It is also necessary to prevent negative impacts to the state's economy that would be associated with the spread of VHS in New York.

Costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

The estimated cost for testing a "lot" of fish (i.e. 60 fish) for the pathogens that are required to be tested ranges from approximately \$500 to \$1,000.

Local government mandates:

Testing for a group of pathogens will be required for local governments that raise fish to be released to the water of the State. Since the testing will need to be conducted by qualified testers, the local government facilities will not need to establish any new technology at their facilities. The costs of the testing is described above.

Paperwork:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will be required to maintain documentation associated with fish health inspections. Bait fish dealers will be required to provide receipts of their sales.

Duplication:

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

Alternatives:

No Action: The Department has considered and rejected the option of taking no action to address VHS. Failing to act to address VHS would allow the disease to spread unchecked to other waters of the state. The spread of VHS could compromise the health of New York's freshwater fish populations and could have significant economic impacts on commercial and recreational activities associated with the state's freshwater fish populations.

Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) issued a federal order (October 24, 2006), followed by an Amended Order on November 14, 2006, that prohibits the importation of certain species of live fish from Ontario and Quebec, and restricts interstate movement of the same fish species from eight states bordering the Great Lakes to certified VHS free fish or fish destined to a fish processing facility that meets specified standards.

Compliance Schedule:

Immediate compliance will be required.

Revised Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rule is intended to prevent the spread of viral hemorrhagic septicemia virus (VHS), a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the United States and Canada.

Due to the potential adverse effects of the disease on fish populations and the desire to prevent or delay its spread to other states, a federal Order was issued by the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) on November 14, 2006. The Order prohibits the importation of certain species of live fish from Ontario and Quebec and restricts the interstate movement of the 37 fish species identified in the order from eight states bordering the Great Lakes: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Movement of fish from these eight states is limited to certified VHS free fish or fish destined for a fish processing facility that meets specified standards.

For licensed commercial bait fish dealers (approximately 400), this rulemaking will limit the collection and sale of wild bait fish from New York waters for use on the same water unless permitted by the Department, and require that any other fish to be released in the waters of New York be certified as disease free.

In addition to commercial bait fish operators, private hatchery operations will also be affected by this rule. This year, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass (in-state). These operations will now be required to certify that fish in their possession are disease free, prior to release to the waters of New York.

2. Compliance requirements:

Fish being sold for release to state waters, largely by commercial bait fish dealers and hatcheries, must be accompanied by fish health inspection reports, from a qualified tester, certifying that the fish have been tested for the required pathogens and are disease free. Bait fish dealers will be required to provide receipts of their sales.

3. Professional services:

A fish health inspection report, issued by an independent, qualified inspector, certifying that the fish are disease free, will be required before

such fish may be released into the waters of New York by any of the regulated parties. An independent qualified inspector will also be required for obtaining the fish samples to be tested.

4. Compliance costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

The estimated cost for testing a "lot" of fish (i.e. 60 fish) for the pathogens that are required to be tested ranges from approximately \$500 to \$1,000.

5. Economic and technological feasibility:

Testing for a group of pathogens will be required for the small businesses that sell fish to be released to the waters of New York and for local governments that raise fish to be released to the water of the State. Since the testing will need to be conducted by qualified testers, the small businesses and local government facilities will not need to establish any new technology at their facilities. The costs of the testing is described above.

6. Minimizing adverse impact:

The rulemaking does not prohibit the collection of bait fish from waters in New York. Collection and sale of bait fish are still allowed provided the fish remain on the same water body (no overland transport). In addition, the regulations authorize the Department in its discretion to issue a permit allowing for overland transport, possession and sale of bait fish. The rulemaking also allows the commercial hatcheries to sell freshwater fish for release into the waters of New York once they have been determined to be disease free. The Department is assisting hatcheries in New York by offering to temporarily test their fish for at least one year, thus saving hatcheries the cost of having to hire independent testing contractors.

7. Small business and local government participation:

The Department's outreach efforts on this rulemaking included the issuance of a statewide news release (10/31/06) informing the public of this crisis and indicating that the Department was contemplating measures that could be taken to address VHS. On December 18, 2006, the Department issued a statewide news release announcing 11 informational meetings, subsequently held at nine locations across the State in January, 2007. In addition, DEC forwarded copies of a VHS New York information sheet, the APHIS Industry Alert, and the APHIS federal Order to the holders of Fishing Preserve Licenses in New York, licensed Private Hatchery Operators, holders of Great Lakes commercial fishing licenses, and those licensed by the Department to collect and/or sell bait fish.

Revised Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The proposed rule will affect all rural areas in New York. Most commercial bait fish dealers and licensed fish hatcheries and most of their customers that are seeking to stock private waters pursuant to a Department permit are located in rural areas. The number of commercial bait fish licenses (allowing for the collection and/or selling of bait) that have been issued, statewide, by DEC is approximately 400. In addition to commercial bait fish operators, private hatchery operations will also be affected by this rule. This year, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass (in-state). Some rural counties own and operate trout hatcheries. Examples include Essex County and Warren County.

2. Reporting, Recordkeeping, and Other Compliance Requirements; and Professional Services:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will be required to maintain documentation associated with fish health inspections. Bait fish dealers will be required to provide receipts of their sales.

3. Costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

The estimated cost for testing a "lot" of fish (i.e. 60 fish) for the pathogens that are required to be tested ranges from approximately \$500 to \$1,000.

4. Minimizing Adverse Impact:

The rulemaking does not prohibit the collection of bait fish from waters in New York. Collection and sale of bait fish are still allowed provided the fish remain on the same water body (no overland transport). In addition, the regulations authorize the Department in its discretion to issue a permit allowing for overland transport, possession and sale of bait fish. The rulemaking also allows the commercial hatcheries to sell freshwater fish

for release into the waters of New York once they have been determined to be disease free. The Department is assisting hatcheries in New York by offering to temporarily test their fish for at least one year, thus saving hatcheries the cost of having to hire independent testing contractors.

5. Rural Area Participation:

The Department's outreach efforts on this rulemaking included the issuance of a statewide news release (10/31/06) informing the public of this crisis and indicating that the Department was contemplating measures that could be taken to address VHS. On December 18, 2006, the Department issued a statewide news release announcing 11 informational meetings, subsequently held at nine locations across the State in January, 2007. In addition, DEC forwarded copies of a VHS New York information sheet, the APHIS Industry Alert, and the APHIS federal Order to the holders of Fishing Preserve Licenses in New York, licensed Private Hatchery Operators, holders of Great Lakes commercial fishing licenses, and those licensed by the Department to collect and/or sell bait fish.

Revised Job Impact Statement

The Department has determined that this emergency rulemaking will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the freshwater fish species resource), the proposed rule will protect jobs and employment opportunities. Therefore, the Department has determined that a job impact statement is not required.

Due to the potential adverse effects of Viral Hemorrhagic Septicemia (VHS) on fish populations and the desire to prevent or delay its spread to other states, the USDA Animal and Plant Health Inspection Service (APHIS) issued a federal Order on October 24, 2006, as well as an amended order on November 14, 2006. The Amended Order restricts the importation of certain species of live fish from Ontario and Quebec and interstate movement of the same species from eight states bordering the Great Lakes, including New York, requiring that the fish be VHS free or be destined for a fish processing facility that meets specified standards.

This rulemaking is necessary to protect New York's freshwater fish species and their populations from VHS and other determined fish pathogens, by preventing the spread of these fish pathogens to additional waters, thereby safeguarding the health of the freshwater fisheries of New York State. In addition to VHS, Spring Viremia of Carp Virus (Infectious carp dropsy) and Infectious Hematopoietic Necrosis Virus (IHN) are internationally reportable diseases to the World Organization of Animal Health. Because they are a threat to fish hatcheries in New York and possibly to the freshwater fish populations of New York, *Aeromonas salmonicida* (Furunculosis), *Yersinia ruckeri* (Enteric Red Mouth) and Infectious Pancreatic Necrosis Virus (IPN) have been included in the proposed regulations. All pathogens identified in the regulations are considered pathogens of concern by the Great Lakes Fishery Commission Fish Health Committee and by the New England Fish Health Committee.

Preventing the spread of these fish pathogens is intended to safeguard New York's freshwater sportfishing industry which currently contributes an estimated \$1.4 billion annually to the state's economy and supports over 17,000 jobs. Some additional jobs are likely to be generated, in order to accommodate the required fish collection, sampling and testing.

Commercial bait fish dealers and private hatchery operators are the two employment areas that will most likely be affected by this rulemaking.

For licensed commercial bait fish dealers (approximately 400), this rulemaking will limit the collection and sale of wild bait fish from NY waters for use on the same water unless permitted by the Department, and require that any other release of fish in the waters of New York be certified as disease free. However, it is unlikely that these restrictions will result in a substantial adverse impact on jobs due to several qualifying factors. First, not all licensed dealers engage in the restricted activities. For example, some licensees may operate retail establishments that do not collect fish from the waters of New York or release fish to the wild. Second, a portion of the licensed commercial baitfish dealers sell bait as just one component of their business (e.g. in conjunction with selling fishing tackle, fishing clothing, operating a marina), and would therefore remain viable even without the sale of bait. Third, allowance is made for sale of bait fish on the same water body as collected, but no overland transport of their fish. Fourth, by permit, the Department has the discretion to allow for overland transport, possession and sale in special situations with low risk. Fifth, many bait fish operators purchase fish from a disease free source (e.g. fish farms) and therefore will not need to test the fish for disease.

Private hatchery operators will also be affected by the restrictions on fish movement noted above. In 2006, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass in New York. The regulations will require that these operations certify their fish as disease

free if the fish are to be sold for bait or for use in the waters of the State of New York. The estimated cost for testing a "lot" of fish (i.e. 60 fish) for the pathogens that are required to be tested ranges from approximately \$ 500 to \$ 1,000. While this is not an insignificant sum, the presence of VHS in New York will likely dictate a market in which buyers require certification from sellers that the fish are disease free. Therefore, the testing requirements in the proposed regulations will likely contribute to the marketability of the hatchery operator's product.

In addition, the Department is assisting the private hatcheries in New York by temporarily offering to conduct the required disease testing, for up to one year. For this reason, it does not appear that the Department's regulations on disease testing will result in a loss of fish hatchery jobs.

The Department has determined that this emergency rulemaking will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the freshwater fish species resource), the proposed rule will in fact protect jobs and employment opportunities dependent on New York's fishery resources. While it is difficult to determine exactly how many jobs may be affected by this rulemaking, based on the above, the Department does not believe it will result in the decrease of more than one hundred jobs (or the equivalent). Therefore, the Department has determined that a job impact statement is not required.

Assessment of Public Comment

The following comments were received by the Department during the public comment period associated with this proposed rulemaking. Some comments have been grouped together because they are related or for convenience in providing an efficient response. The Department's response is provided for each comment or group of comments.

Comment: The Department should increase the allowable available number of bait fish for personal use.

Response: The Department has revised its original proposal to remove the limit on the number of bait fish for personal use. Given the other restrictions contained in the revised rulemaking, this change should not pose any increased risk of VHS movement to new water bodies.

Comment: The Department should allow collection and use of bait fish in waters which are directly connected.

Response: The Department has revised its original proposal to specify that tributaries of a water body are considered part of the water body for purposes of this proposal. In addition, the revised rulemaking lists certain connected waters that have been grouped together for purposes of this rulemaking, thus allowing bait fish to be moved between such waters. Since these waters are already connected, these revisions to the proposal should pose no increased risk of spreading VHS to new waters.

Comment: The Department should develop zones, regions, or use watersheds to allow for broader use of bait fish.

Comment: The Department should implement these requirements only in VHS (Viral Hemorrhagic Septicemia) positive regions of the states.

Response: The Department has revised its original proposal to specify that tributaries of a water body are considered part of the water body for purposes of this proposal. In addition, the revised rulemaking lists certain connected waters that have been grouped together for purposes of this rulemaking, thus allowing bait fish to be moved between such waters. Any further allowance for the movement of bait fish between waters is not acceptable to the Department because it would increase the risk of spreading the VHS virus.

Comment: The Department should ban personal bait fish collection and use in known VHS positive waters.

Comment: Commercial collection of bait fish on VHS positive waters should be allowed for, and sale for use in the same waters.

Comment: The allowance for the personal collection on VHS positive waters and non allowance for the commercial collection of bait fish on VHS positive waters is unfair.

Response: The revised rulemaking reestablishes Great Lake's waters for the commercial collection and use of bait fish provided that the bait fish collected are sold on the same water body from which they were collected. Because the fish remain within the same water body, this change should not increase the risk of spreading the VHS virus.

Comment: Dead bait fish do not harbor active virus so the Department should not restrict the collection and use of dead bait fish.

Comment: Dead bait fish can harbor active virus, so the Department should tighten restrictions on commercially sold dead bait fish.

Comment: The Department should allow for the collection, possession, sale and use of salted minnows. The commercial industry of providing salted minnows, including those collected from VHS positive waters, should be allowed.

Response: Current science indicates that the virus can survive in dead fish, particularly in freshly killed and/or frozen fish. Such science further suggests that the virus does not survive when fish are processed by methods such as salting. The revised rulemaking allows for dead bait fish that are packaged for commercial purposes, and preserved by methods other than freezing only, to be possessed, sold, offered for sale, bartered, and transported overland for purposes of being used as bait in any water of the state, where the use of bait fish is allowed, without being certified disease free of the pathogens required by this rulemaking.

In the revised rulemaking, the collection, sale and use of bait fish is restricted to use on the same water body from which they were taken, unless permitted by the Department. In cases where the activities pose little or no risk of spreading the VHS virus, the Department retains the discretion to consider issuing a permit.

Comment: The elimination of commercial harvest of bait fish from VHS positive waters will result in overpopulation of bait fish and a subsequent risk of disease.

Response: The commercial harvest of bait fish in New York State is limited to a group of select waters (as listed in Title 6 NYCRR Section 35.2). The Department has not observed substantial die offs of bait fish in waters where the commercial harvest of bait fish is not allowed.

Comment: Commercial operators should provide documentation of bait fish source to retailers/customers.

Response: The revised rulemaking requires that bait fish seller provide a receipt to the purchaser. The required contents of this receipt will enable the purchaser to track the bait fish back to their source.

Comment: The supply of bait fish will be limited by these regulations.

Comment: Commercially sold bait fish will become to expensive, partially due to supply problems.

Response: Information collected to date, including direct contact with those in the industry and affected parties, suggests that there has not been an interruption in the bait fish supply since the filing of the Emergency Rulemaking in November, 2006.

Comment: The restriction on not moving fish between water bodies is problematic to organized tournaments.

Comment: The Department should allow fish to be moved freely throughout connected waters without an inspection requirement.

Comment: The restriction on fish crossing state lines is problematic to tournaments on some waters (e.g. Lake Champlain).

Response: The Department has revised its original proposal to specify that tributaries of a water body are considered part of the water body for purposes of this proposal. In addition, the revised rulemaking lists certain connected waters that have been grouped together for purposes of this rulemaking, thus allowing bait fish to be moved between such waters. These revisions should alleviate much of the concerns voiced about the initial rulemaking, including those related to fishing tournament activity. However, further allowance for the movement of bait fish between waters within New York State would not be acceptable to the Department because of the associated risk of spreading the VHS virus. Inter-State movement of fish is governed by federal order issued by USDA APHIS.

Comment: The proposed regulations will result in economic hardships to bait fish operations, chartered fishing businesses, private hatcheries, and fishing preserves.

Comment: Regulations will cause region wide economic hardship, including as a result to impacts to angling practices such as tournaments.

Response: Where possible, without interfering with measures that are necessary to preventing the spread of the VHS virus, the Department has made adjustments in the revised rulemaking to address economic and business related concerns. The commercial collection of bait fish on waters where fish have been tested positive for VHS is now permissible, provided that the fish collected are used on the same water and are not transported overland. The definition of "water body" in the revised rulemaking will alleviate some of the previous restraints on the Chartered fishing businesses, in that it will allow for movement of fish (on the water) between certain connected waters. In addition, in cases where the activities pose little or no risk of spreading the VHS virus, the Department retains the discretion to consider issuing a permit.

The Department will offer to assist hatcheries in New York by temporarily conducting disease testing for their fish for at least one year, thus saving hatcheries the cost of having to hire independent testing contractors.

The revised rulemaking now requires that fish be tested for five pathogens (with three additional pathogens for salmonids). One of the pathogens required for testing in the original proposed rulemaking is no longer required (i.e. heterosporis). Under the terms of the revised regulations, fish

that test positive for four of the original nine pathogens are not precluded from being released into the waters of the State until January 1, 2009. This will lessen the economic hardship to private hatcheries because they may sell some bait fish that would have been prohibited under the terms of the original proposal.

With regard to regional economic impacts, the Department has revised its original proposal to specify that tributaries of a water body are considered part of the water body for purposes of this proposal. In addition, certain connected waters that have been grouped together for purposes of this rulemaking, thus allowing bait fish to be moved between such waters. These revisions should alleviate much of the concerns voiced about impacts to fishing tournament activity. In certain cases, a permit might also be available under the revised rulemaking, thereby lessening potential for negative economic impacts.

Comment: The Department should tighten inspection requirements for fish being imported into New York State. Fish en route can be exposed to different environmental stresses, such as changes in water and water temperature, making them susceptible to disease while being transported.

Response: The Department requires that fish health inspections be conducted in accordance with the testing methods and procedures recognized by the American Fisheries Society or the World Organization of Animal Health. The adherence to these procedures, including not adding fish to a "lot" of fish, and not moving the fish to another water body, while in transport, should adequately prevent disease problems from occurring.

Comment: The Department should allow for the movement of fish among private bodies of water within property boundaries.

Response: The revised regulations propose restrictions on movement of fish between bodies of water because such movement is a recognized and principal pathway for transmitting the disease. The revised rulemaking does allow for some movement of fish, by permit, in the discretion of the Department.

Comment: The Department should make procedural changes to pre-analytical situations (e.g. allow facility inspections, require third party inspection).

Response: Regarding testing methods and procedures, the Department will continue to call for requirements that conform with the testing methods and procedures recognized by the American Fisheries Society and the World Organization of Animal Health. The revised rulemaking requires that fish sample collection be made by an independent qualified inspector. Facility inspections are provided for in the procedures of the World Organization of Animal Health.

Comment: The Department should adjust the requirements for health certificates. There may be misuse of these (e.g. as one that is issued may be used as a cover document for other fish that are uncertified).

Response: Where a copy of the fish health inspection report is required to transfer fish under the revised regulations, a receipt is also required. The receipt shall contain the name of the selling vendor, the date sold, species of fish sold and quantity of fish sold. The receipts for sale and transfer are also only valid for a limited period of time. These requirements will minimize the potential for misuse of health certificates.

Comment: The regulation should only put requirements in place for the VHS virus and not all the other pathogens.

Comment: The Department should make changes to laboratory protocols and testing requirements (specifically, there is no AFS or OIE protocol for heterosporis).

Response: The requirement for testing for heterosporis is not included in the revised rulemaking. All pathogens identified in the regulations are considered pathogens of concern by the Great Lakes Fishery Commission Fish Health Committee and by the New England Fish Health Committee. Efforts to reduce the incidence and distribution of these pathogens are dependent upon the information provided by fish health inspections.

The Department will continue to call for requirements that conform with the testing methods and procedures recognized by the American Fisheries Society and the World Organization of Animal Health.

Comment: The testing requirements will decrease the availability of fish for stocking purposes.

Response: The Department has tested all lots of fish that it plans to stock and none of the pathogens identified in the regulations was detected. Therefore, there will be no impact to the number of fish available for stocking from DEC hatcheries. Testing results from licensed, private and public New York hatcheries, though incomplete to date, indicate nearly all are free of the pathogens identified in the regulations. Thus, these fish will be available for stocking.

Office of General Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Records

I.D. No. GNS-13-07-00017-P

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

Proposed action: This is a consensus rule making to amend sections 330-1.2 and 330-1.9 of Title 9 NYCRR.

Statutory authority: Executive Law, section 200; Public Officers Law, section 87; and L. 2006, ch. 182, section 1

Subject: Public access to records.

Purpose: To implement the provisions of L. 2006, ch. 182.

Text of proposed rule: Paragraphs (2), (3), (4), (5), and (6) of subdivision 330-1.2(b) are re-numbered paragraphs (3), (4), (5), (6), and (7) respectively and a new paragraph (2) is added to read as follows:

(2) *maintain forms on the internet for requesting records and responding to requests for records;*

A new paragraph (3) is added to subdivision 330-1.9(b) to read as follows:

(3) *Other records. For any other record not specified herein, the fee to be charged shall be the actual cost of reproducing the record, except when a different fee is otherwise prescribed by statute or regulation.*

Text of proposed rule and any required statements and analyses may be obtained from: Paula B. Hanlon, Esq., Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: paula.hanlon@ogs.state.ny.us

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

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

Consensus Rule Making Determination

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102(11)(b) and (c), it merely implements Chapter 182 of the Laws of 2006 and is non-controversial.

Chapter 182 of the Laws of 2006 provides that all State agencies having a reasonable means available, are required to accept requests for records submitted in the form of electronic mail and to respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the forms developed by the Committee on Open Government, provided that the written requests do not seek a response in some other form. The proposed rulemaking simply provides for such new requirements. No one is likely to object to these amendments.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposed amendments to Part 330 will not have an adverse impact on existing or future jobs and employment opportunities. The proposed regulations would amend the current regulations to be consistent with Chapter 182 of the Laws of 2006 regarding agency obligations to accept and respond to FOIL requests by email if the agency has reasonable means to do so. Additionally, the proposed regulations obligate State agencies to make forms available on the internet for requesting and responding to requests for records. This proposal does not impose any regulatory mandate on the regulatory 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.

Department of Health

EMERGENCY RULE MAKING

Recreational Aquatic Spray Grounds

I.D. No. HLT-52-06-00004-E

Filing No. 266

Filing date: March 9, 2007

Effective date: March 9, 2007

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

Action taken: Addition of Subpart 6-3 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

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

Specific reasons underlying the finding of necessity: During the summer of 2005, approximately 4,000 patrons of the Seneca Lake State Park spray ground became ill with cryptosporidiosis as a result of exposure to the spray ground water.

This type of aquatic facility poses a significant risk of illness to the patrons due to the design which involves the collection and recirculation of the sprayed water. To prevent a similar illness outbreak involving this type of recreational aquatic activity, spray ground design and operation regulations are necessary.

Emergency adoption of the new regulations is necessary to provide the operators of existing facilities with adequate time to evaluate facilities, complete an engineering report and make modifications, as needed, prior to use. Proposed facilities will be able to utilize the design standards to ensure new facilities are in compliance.

Subject: Recreational aquatic spray grounds.

Purpose: To establish standards for the safe and sanitary operation of recreational aquatic spray grounds that re-circulate water.

Substance of emergency rule: The proposed Subpart contains the following provisions:

Recreational aquatic spray grounds (spray ground) are defined and spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the spray ground is located.

Design standards for new and existing spray grounds are established. The standards including requirements for disinfection (chemical and ultraviolet) and filtration equipment, as well as, requirements for spray pad, spray pad treatment tank, decking and spray pad enclosure construction and design.

Existing spray ground operators must provide a report to the LHD which evaluates compliance with the design criteria contained in the regulation and needed improvements. The report must be prepared by a New York State licensed professional engineer and submitted to the LHD at least 90 days prior to operation.

LHDs must follow the recommendations of the State Health Department prior to accepting or denying alternative designs for new and existing spray grounds.

Operation and maintenance standards are established including daily start-up procedures, minimum disinfection levels, filtration rates, water quality standards and general safety provisions. The spray ground operator must maintain daily operation records.

On-site water supplies, toilet facilities, and sanitary wastewater treatment systems must comply with sanitary and operation standards.

Spray grounds must be supervised when open for use and must be maintained by a qualified swimming pool water treatment operator.

Spray ground operators must develop, update and implement a written safety plan consisting of procedures for patron supervision, injury prevention, reacting to emergencies, injuries and other incidents providing first aid and assistance.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-52-06-00004-P, Issue of December 27, 2006. The emergency rule will expire May 7, 2007.

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: regsna@health.state.ny.us

Summary of Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(a) and 201(1)(m) authorize SSC regulation of the sanitary aspects of businesses and activities affecting public health.

Needs and Benefits:

During the summer of 2005, approximately 3,000 patrons of the Seneca Lake State Park spray ground became ill with cryptosporidiosis as a result of exposure to the spray ground water. This type of aquatic facility poses a significant risk of illness to the patrons due to the design, which involves the collection and recirculation of sprayed water. To prevent future illness outbreaks involving this type of aquatic activity, spray ground design and operation regulations are necessary including design criteria for new and existing spray grounds for water recirculation, filtration and disinfection (chemical and ultraviolet), electrical safety and spray pad enclosure.

Additionally, the regulation contains requirements for obtaining an annual permit to operate from the state or local health department (LHD) having jurisdiction, as well as, other bathhouse, personnel, potable water supply, wastewater disposal and general safety requirements.

Regulated Parties:

Statewide in 2005, there were thirty-two seasonally operated spray grounds that use re-circulated water. Four additional spray grounds are under construction. Until the emergency regulations became effective on January 18, 2006, spray ground operations were not regulated by the SSC. Of the 36 existing and proposed spray grounds, 14 have submitted the required engineering report and plans for installation of ultraviolet disinfection systems and other necessary modifications, and 5 indicated they will not meet the spray ground definition because they plan to discharge feature water to waste, therefore regulatory compliance is not necessary. The proposed regulation clarifies of certain requirements but is consistent with the emergency regulation effective April 18, 2006.

Costs to Regulated Parties:

There may be significant cost to spray grounds operators for water recirculation, filtration and disinfection (chemical and ultraviolet) improvements and additions. Additionally there will be expenses associated with an engineering report, which addresses the design criteria, and other miscellaneous improvements.

Government:

The printing and distribution the new Code and the corresponding revised inspection report will be a minimal State Health Department expense. There may be additional costs to some city and county health departments that enforce the proposed rule, because the proposed rule will increase the number of facilities regulated by some of these agencies. LHD's are expected to use existing staff to for the workload because of the low number of spray grounds in a jurisdiction.

The costs to municipally operated spray grounds are described above in Costs to Regulated Parties.

This regulation does not duplicate any existing federal, state or local regulations.

Alternatives Considered:

Several treatment options were considered for control of cryptosporidium including the use of ozone, membrane filtration, dilution and patron control. UV disinfection was selected as the code standard because of its effectiveness and appropriateness for the high flow rates of spray grounds. Other treatment options that can be documented to effectively remove cryptosporidium are acceptable in the proposed regulation.

Compliance Schedule:

The proposed regulation will be effective upon publication of a notice of adoption in the *State Register*.

Regulatory Flexibility Analysis

Effect on small business and local government:

There are thirty-two (32) recreational aquatic spray grounds (spray grounds) in New York State and four that are under construction. Eighteen (18) of the thirty-six (36) are or will be operated by local governments.

Compliance requirements:

Reporting and Recordkeeping:

A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather

usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Other affirmative acts:

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds are established to assure safe and sanitary spray ground operation.

1. Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

2. Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

3. Electrical standards protect patrons from electrocution.

4. Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, spray grounds existing prior to January 18, 2006 effective date of initial emergency regulation) are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

Spray feature water treatment systems must be maintained by a qualified swimming pool water treatment operator to assure continuous and proper operation of water treatment equipment.

Safety:

Signs, which contain seven rules and warning statements, must be posted at the spray pad or enclosure/entrance and bathhouse/toilet facilities. The statements inform the patrons that the water is recirculated (not potable) and highlights the practices to reduce the potential for the contamination of the spray ground water.

First aid equipment must be provided at the spray ground unless otherwise specified in the safety plan.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot shower will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

Professional services:

Operators of existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

Compliance costs:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

Spray grounds that require modifications to the existing equipment and plumbing incur additional cost. The estimated cost for engineering services related to design modification(s) range from 6% to 15% of the project cost.

The estimated cost for other modifications are as follows:

Spray Ground Feature Water Treatment:

Ultraviolet (UV) disinfection equipment cost will vary based on the spray ground feature flow rate. Costs are based on estimates provided by two leading UV reactor manufacturers.

Flow rate (gpm)	UV reactor cost	Installation ¹	Lamp replacement ²
50	\$6,585 - \$12,000	\$1,930 - \$4,000	\$240 - \$500
100	\$9,000 - \$17,500	\$2,050 - \$4,000	\$480 - \$500
140 - 150	\$13,800 - \$19,000	\$2,290 - \$4,500	\$600 - \$720
250	\$20,965 - \$23,000	\$2,650 - \$5,000	\$600 - \$840
500	\$29,355 - \$31,000	\$3,068 - \$5,500	\$700 - \$1,680
1,000 - 1,300	\$34,000 - \$42,225	\$3,712 - \$6,000	\$700 - \$2,320
2,000 - 2,300	\$40,000 - \$50,000	\$4,100 - \$7,000	\$800 - \$3,480

¹ UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

² Lamp replacement is anticipated to be once every 4-5 years for seasonally operated facilities.

The cost to operate UV reactors ranges from \$30 to \$875 per season for electric and \$350 to \$450 for cleaning and other maintenance.

Spray grounds that do not have adequate treatment tank filtration will require an additional pump and filtration. The pump and filter costs are based on the volume of water to be filtered. Costs range between \$350 and \$620 for pumps and \$350 and \$850 for filters. The number of required filters varies for each facility and cannot be estimated.

The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

Bathroom/foot shower:

Some spray grounds may need to replace or add bathroom facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to

performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

Economic and technological feasibility:

The proposal is technologically feasible because it requires the use of existing technology. The overall economic feasibility cannot be predicted at this time because the economic feasibility for each regulated spray ground is dependent upon the financial condition of that spray ground and the extent to which that spray ground must undertake additional actions to comply with the requirements of this regulation.

Minimizing adverse economic impact:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

Small business participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion and had numerous telephone conversations to develop a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

Rural Area Flexibility Analysis

Types and estimated number of rural areas:

There are thirty-six (36) recreational aquatic spray grounds (spray grounds) in New York State grounds including four that are under construction. Approximately half are located in rural areas.

Reporting, recordkeeping and other compliance requirements:

A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds is established to assure safe and sanitary spray ground operation.

(1) Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) or other acceptable equivalent, and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

(2) Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

(3) Electrical standards protect patrons from electrocution.

(4) Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, existing spray grounds are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

Spray feature water treatment systems must be maintained by a qualified swimming pool water treatment operator to assure continuous and proper operation of water treatment equipment.

Safety:

Signs, which contain seven rules and warning statements, must be posted at the spray pad or enclosure/entrance and bathhouse/toilet facilities. The statements inform the patrons that the water is recirculated (not potable) and highlights the practices to reduce the potential for the contamination of the spray ground water.

First aid equipment must be provided at the spray ground unless otherwise specified in the safety plan.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot showers will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

Professional services:

Operators of spray grounds existing prior to January 18, 2006 (effective date of the initial emergency regulation) must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

Costs:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

Spray grounds that require modifications to the existing equipment and plumbing incur additional cost. The estimated cost for engineering ser-

vices related to design modification(s) range from 6% to 15% of the project cost.

The estimated cost for other modifications are as follows:

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¹ UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

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The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

Bathhouse/foot shower:

Some spray grounds may need to replace or add bathhouse facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

Minimizing adverse economic impact on rural areas:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so

long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

Rural area participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion and had numerous telephone conversations to develop a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

Assessment of Public Comment

In response to the December 27, 2006 notice in the *State Register*, a total of 2 written comments were received during the public comment period. Written comments were received from the Chief of the Bureau of Public Health Protection of the Suffolk County Department of Health (SCDH) and the Vice President of Properties for the YMCA of Greater Rochester.

The following reflects the concerns expressed by those who commented and the Department's response:

Spray Ground Capacity:

The SCDH representative indicated that "health and safety" would be enhanced by requiring a spray ground operator to establish and post patron capacity. He noted: "Overcrowding makes supervision difficult and adds to pollution entering the treatment system. While design standards are based on water flow, the level of contamination within the returned water for a given period is increased with a corresponding increase in users. Limiting the number of users at any one time to the design capacity appears appropriate. The required posting of a sign would enhance supervision and provide a monitoring point during inspection."

Response:

No change is proposed. The Department considered establishing a maximum capacity for the number of patrons allowed on a spray pad to address potential safety concerns but rejected the idea as there was no identifiable basis for such a limit. The Department believed that operators of spray grounds can restrict the number of patrons, if needed, to address individual facility operating conditions/concerns.

Patron introduced contaminants and turbidity levels were taken into consideration when developing the water treatment (filtration and disinfection) requirements.

Documentation of Injuries:

The YMCA representative addressed the Regulatory Flexibility Analysis and questioned if clarification is needed regarding the types of injuries and illness required to be reported. Specifically, the need to record minor injuries such as bumps, scrapes and cuts, or if such documentation should primarily focus on ailments directly related to water quality.

Response:

No change is proposed. The injuries or illnesses that must be documented and reported are further clarified and specified in section 6-3.7 of the regulation. These include all incidents that: result in death, require resuscitation, require referral to a hospital or other facility for medical attention, or is an illness alleged to be associated with the spray ground water quality.

Equipment Cost Estimates:

One commenter stated that the Regulatory Impact Statement's cost estimates may be "a little low" compared to their own estimates but acknowledged it is possible that cost can vary.

Response:

No change is proposed. The Department's cost estimates for regulatory compliance were obtained from equipment manufacturers, service providers and engineering firms.

NOTICE OF ADOPTION

SPARCS Definition of Ambulatory Surgical Procedures

I.D. No. HLT-47-06-00005-A

Filing No. 264

Filing date: Marcy 9, 2007

Effective date: March 28, 2007

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

Action taken: Amendment of section 400.18 of Title 10 NYCRR.

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

Subject: SPARCS definition of ambulatory surgical procedures.

Purpose: To improve reporting to SPARCS of surgical procedures performed in freestanding and hospital based ambulatory surgery centers.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-47-06-00005-P, Issue of November 22, 2006.

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

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

Assessment of Public Comment

The Department received one letter in comment on the proposed rule, from the Healthcare Association of New York State (HANYNS). The HANYNS letter, in part, used the occasion of the publication of the proposed rule to urge that prescribed timeframes for the reporting to SPARCS of data on ambulatory surgery be made the same as those for the reporting of data on inpatient services. The provisions governing these timeframes are found elsewhere in Part 400 and are not the subject of the proposed change. In its letter, HANYNS' only comment on the consensus rule itself was in support of the proposed change in the definition of ambulatory surgery, confirming that HANYNS was consulted in advance about the proposal and that the organization did not wish to raise any concerns regarding the new language of the proposed rule.

As stated in SAPA section 202, the principal basis for the publication of a consensus rule is the determination that no person is likely to object to the proposed rule as written. The HANYNS letter did not object to the proposed rule, and indeed supported it fully.

NOTICE OF ADOPTION

Recreational Aquatic Spray Grounds

I.D. No. HLT-52-06-00004-A

Filing No. 265

Filing date: March 9, 2007

Effective date: March 28, 2007

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

Action taken: Addition of Subpart 6-3 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Recreational aquatic spray grounds.

Purpose: To establish standards for the safe and sanitary operation of recreational aquatic spraygrounds that re-circulate water.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-52-06-00004-P, Issue of December 27, 2006.

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

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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Assisted Living Residence

I.D. No. HLT-13-07-00002-P

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

Proposed action: Addition of Part 1001 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 4662

Subject: Assisted living residence.

Purpose: To further the goals of the Assisted Living Reform Act by creating the regulatory framework necessary for implementation of the provisions therein.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The Assisted Living Reform Act creates several new licensure and certification categories: Assisted Living Residence (ALR), Enhanced ALR and Special Needs ALR. The Act defines "assisted living" and "assisted living residence" as "an entity" which provides or arranges for housing, on-site monitoring and personal care services and/or home care services (either directly or indirectly) in a home-like setting to five or more adult residents unrelated to the assisted living provider. An ALR must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an individualized service plan for each resident. In order to operate as an ALR, an operator must also be certified as an adult home or enriched housing program.

The ALR licensure category is viewed as a basic level of assisted living, but one that differs from the level of care provided by adult homes or enriched housing programs in several significant ways. An additional requirement for ALRs is an individualized service plan (ISP) for each resident. The ISP describes what services will be provided and the identified provider or staff responsible. The ISP must be reviewed and updated every six months as well as whenever a resident has a significant change in needs. In addition, prospective residents, resident and their representatives are entitled to significant residency agreement and disclosure information. Case management and other services and related staff qualification and training requirements will differ as well.

Certification as an Enhanced ALR will allow residents to age in place. This is a major new feature of the Assisted Living Reform Act. Assisted living residences with Enhanced ALR certification may admit and retain residents who exceed the retention standards of adult homes, enriched housing programs or assisted living residences. Enhanced ALRs cannot admit residents in need of 24-hour skilled nursing care or medical care. A written evaluation from the resident's physician that the resident does not require 24-hour skilled nursing care or medical care is required prior to admission. However, Enhanced ALRs may retain residents in need of 24-hour skilled nursing care or medical care if certain conditions are met as described in this section.

The second certification category for which ALRs may apply is the Special Needs ALR. The Special Needs ALR certification requires that ALRs that advertise or market themselves as serving individuals with special needs, including but not limited to dementia or cognitive impairments, must apply to the New York State Department of Health (the Department) for Special Needs ALR certification. All facilities currently licensed under Article 7 of the Social Services Law that operate dedicated dementia facilities and/or units will be required to apply for this designation. The Department has revised its current policy and procedures for such dementia units.

No adult home, enriched housing program or ALR may advertise or market itself as providing specialized services to individuals with special needs unless and until the residence has been licensed as an ALR and issued a Special Needs assisted living certificate. This approval will be based in part on the submission of a special needs plan which sets forth how the special needs of such residents will be safely and appropriately met at the residence. The plan must include, but need not be limited to, a written description of specialized services, staffing levels, staff education and training, work experience, professional affiliations or special considerations relevant to serving persons with special needs, as well as any environmental modifications that have been made or will be made to protect the health, safety, and welfare of such persons in residence. The approval of any special needs program will also be based on adherence to any standards developed by the Department to ensure adequate staffing and training necessary to safely meet the needs of the specialized population proposed to be served.

The Department proposes the following rule making for the purpose of providing a regulatory framework for implementation of the Assisted Living Reform Act of 2004.

Section 1001.1 sets out the types of residences to which this regulation applies, as well as what other regulations will apply to assisted living residences.

Section 1001.2 lists the applicable definitions.

Section 1001.3 provides the requirements pertaining to certificates of incorporation and/or articles of organization. Specifically, this section sets forth the requirements for a not-for-profit corporation or business corporation to file or amend certificates of incorporation or for a limited liability company to file or amend articles of organization for the purpose of establishing and operating or fundraising on behalf of any ALR, Enhanced ALR or Special Needs ALR.

Section 1001.4 describes who may be issued operating certificates to operate an ALR, Enhanced ALR or a Special Needs ALR. In addition, this section discusses what must be contained in the respective operating certificates. This section also prohibits the operator from taking certain actions with respect to the operating certificate. Also detailed is what actions must be taken by the operator in the event that the residence ceases operations. Finally, this section provides what authority the operator and the fact that such authority is limited to the operator.

Section 1001.5 enumerates the procedure for and what information must be included in an application for licensure as an ALR and for certification as an Enhanced ALR or a Special Needs ALR. This section also describes the process that will be followed by the Department when considering applications.

Section 1001.6 provides the general provisions to which all assisted living residences must adhere.

Section 1001.7 discusses the admission and retention standards applicable to assisted living residences. Specifically, this section provides the standards that need to be met at the differing levels of care. This section also lists the differing levels of resident infirmity that would preclude a residence (depending on the type of certificate that the facility is operating under) from admitting and/or retaining such a resident.

Section 1001.8 provides the consumer and resident protections. These specific protections require each residence to provide the residents with a living environment that promotes dignity, autonomy, independence and privacy in the least restrictive and most home like setting. This section provides individual residents' right as well as providing for the support of resident and family organizations. Also enumerated in this section are standards that must be followed when creating and implementing residency agreements.

Section 1001.9 sets forth the requirements of how residents' funds and valuables are to be maintained and protected.

Section 1001.10 lists the services that must be provided by assisted living residences. These services include, but are not limited to the following: monitoring, daily food service, case management service, personal care, health care, medication management. Depending on the operating certificate of the individual residence, the residence may expand the scope of the basic services provided and/or provide additional services.

Section 1001.11 discusses personnel requirements. This section delineates staff training requirements, appropriate tasks for each specific training level and the staffing levels and classifications that must be present at the residence at any given time.

Section 1001.12 proscribes what records and reports must be generated and maintained by the operator.

Section 1001.13 lists the structural and environmental standards that must be met by both existing and newly constructed residences.

Section 1001.14 set forth the requirement that each residence must have disaster and emergency preparedness plans. This section also provides what should be included in such plans and how often such plans should be updated.

Section 1001.15 provides for the inspection and enforcement procedures to which each assisted living residence will be subject, and enumerates the schedule of penalties.

Section 1001.16 details the requirements and procedures to be followed should an operator of a residence contract with a separate entity for the provision of any of the residence's management or operations.

In addition to the sections set forth above, the residence will also be required to comply with any applicable adult care facility regulations found in Title 18 of the New York Code of Rules and Regulations Parts 485, 486, 487 and 488 and any other statutes and regulations required for maintaining a valid operating certificate issued pursuant to Title Two of Article Seven of the Social Services Law, unless superceded by a conflicting provision of the Assisted Living Reform Act, and shall obtain and maintain all other licenses, permits, registrations or other government approvals required in addition to the requirements under Article Seven.

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: regsqna@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 authority for the promulgation of these regulations is contained in Section 4662 of the Public Health Law (PHL), through Chapter 2 of the Laws of 2004 (known as the "Assisted Living Reform Act" or ALRA, PHL Article 46-B). PHL Section 4662 authorizes the Commissioner of Health to promulgate, in consultation with the Director of the State Office for the Aging, such rules and regulations as are necessary to implement the provisions of this article. Section 4662 further authorizes the Commissioner to receive and investigate complaints regarding the condition, operation and quality of care of any entities holding themselves out as "assisted living" or advertising themselves by a similar term, and to exercise all other powers and functions as are necessary to implement the provisions of Article 46-B.

In order to be licensed as an assisted living residence (ALR), Article 46-B requires all residences to be certified as an adult home or enriched housing program in accordance with Article 7 of the Social Services Law (SSL). Residences that are currently unlicensed desiring to be licensed as an ALR must simultaneously submit an application for licensure as an ALR and an SSL Article 7 application to seek approval as an adult home or enriched housing program. The residence must also be in compliance with all rules and regulations applicable to such facilities (18 NYCRR Parts 485, 486, and 487 (adult homes) or 488 (enriched housing programs)) unless a provision of the ALRA supercedes the Article 7 statutory or regulatory provision. Section 122(c) of Chapter 436 of the Laws of 1997 provides that effective April 1, 1997, the functions, powers, duties and obligations of the former Department of Social Services concerning adult homes, enriched housing programs, residences for adults and assisted living programs (i.e., "adult care facilities") are transferred to the New York State Department of Health.

Legislative Objectives:

In enacting Chapter 2 of the Laws of 2004, the Legislature found and declared that congregate residential housing with supportive services in a home-like setting, commonly known as "assisted living", is an integral part of the continuum of long term care. Further, the philosophy of assisted living emphasizes aging-in-place, personal dignity, autonomy, independence, privacy and freedom of choice. The legislative objective of PHL Article 46-B is to create a clear and flexible statutory structure for assisted living that provides a definition of "assisted living residence"; that requires licensure of the residence; that requires a written residency agreement that contains consumer protections; that enunciates and protects resident rights; and that provides adequate and accurate information for consumers, which is essential to the continued development of a viable market for assisted living.

"Assisted living" and "assisted living residence" means an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider. An applicant for licensure as assisted living that has been approved in accordance with the provisions of this article must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an Individualized Service Plan for each resident. An operator of assisted living shall provide each resident with considerate and respectful care and promote the resident's dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status.

Needs and Benefits:

For many years, it has been very difficult for consumers to compare one assisted living residence to another because, in New York State, there had been no standard definition. This opinion was echoed in a 1999 report by the federal General Accounting Office (GAO), which outlined the results of a two-year study of assisted living in four states. A major finding of the report was that consumers need clear and complete information regarding facility services, costs and policies in order to make an informed decision and that, in the states studied, seniors were not routinely provided with sufficient information to allow them to select the most appropriate setting.

To help seniors make such informed decisions before agreeing to live in an assisted living residence, the ALRA requires every residence to provide clear and complete information to prospective residents before

they sign a contract. Under this new law, ALRs must use a standard "plain language" contract – with no small print – that fully discloses what services are provided, by whom, and the cost. The law also requires ALRs to disclose to seniors the conditions under which an operator can terminate a residency agreement and what the resident can expect to happen if they can no longer pay the fees.

The ALRA also fills the gaps in adult residential services law that in some instances allowed facilities to operate without any licensure or State surveillance. For instance, it requires certain adult residences that had operated without license (known as "look alike" facilities) to become certified as adult care facilities and therefore subject to State regulation and oversight. Any residence that then wishes to market itself as assisted living must seek an additional licensure as an Assisted Living Residence.

In other instances, facilities had long been prevented from appropriately expanding the range of services provided to their residents as their needs changed over time. The ALRA provides a mechanism to allow those operators who wish to provide a broader range of services, known as "aging in place", to do so by becoming licensed as an Assisted Living Residence and obtaining additional certification as Enhanced Assisted Living from the Department. Those operators seeking to provide specialized services to special needs residents, such as those with Alzheimer's or dementia, will likewise have to be licensed as an Assisted Living Residence and also obtain a Special Needs Assisted Living certificate.

To obtain either the Enhanced Assisted Living or Special Needs Assisted Living certifications, operators must submit a plan to the Department demonstrating how they will safely and appropriately meet all of their residents' needs, and have policies in place to continually meet those needs as they change over time. The plan must include, but not be limited to, a written description services, staffing levels, staff education and training, work experience, and any environmental modifications that have been or will be made to protect the health, safety and welfare of such residents.

The ALRA provides several important opportunities for consumers and providers: greater clarity as to the definition of "assisted living"; greater assurance that the combinations of housing and services referred to as assisted living will be subject to State oversight; significant protection of consumer/resident rights; the opportunity to age in place with dignity and choice in a more home-like setting; as well as the opportunity for persons with special needs to obtain specialized care by persons with appropriate qualifications and experience. These regulations further the goals of PHL Article 46-B by creating the regulatory framework necessary for implementation of the provisions therein, including but not limited to criteria by which applications for licensure and certification can be reviewed, defining "independent senior housing", establishing standards for the hiring of direct care staff by residences, and generally clarifying and carrying out the intent of the law.

Costs:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee.

The biennial fee for Enhanced Assisted Living certification is \$2,000. The biennial fee for Special Needs Assisted Living is also \$2,000. Facilities applying for Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Cost to State and Local Government:

None.

Cost to the Department of Health:

Passage of the ALRA has necessitated the Department hiring of staff to implement its licensure and certification provisions, specifically the review of initial applications submitted to the Department. Under this Act, through creation of a new State Finance Law Section 99-1, a special fund is created in the joint custody of the State Comptroller and the Commissioner of Health – the "Assisted Living Residence Quality Oversight Fund".

This fund shall consist of all money collected by the Department pursuant to PHL Article 46-B, including licensure fees, certification fees and civil penalties collected. Any interest earned on investment of monies by such fund becomes part of the fund. The fund shall be available to the Department for the purpose of implementation of PHL Article 46-B.

Through passage of the SFY 2006-07 Budget, the Department has been authorized up to \$2 million from this special revenue account for the implementation and oversight activities related to this Act. In addition, the Act provides that \$500,000 is to be available from this fund to the State Office for Aging's Long-Term Care Ombudsman Program for the purposes of carrying out the provisions of Article 46-B.

Local Government Mandates:

None.

Paperwork:

In many regards, the application process for ALRs is very similar to the process that operators currently utilize to obtain certification for an adult home or enriched housing program. Likewise, with regards to obtaining an Enhanced Assisted Living or Special Needs Assisted Living Certificate, operators will have to submit an application to the Department providing a plan which sets forth how the additional needs of such residents will be safely and appropriately met, including but not limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications.

In addition to these application processes to obtain licensure as an ALR and/or certification for Enhanced and/or Special Needs Assisted Living, the Assisted Living Reform Act contains numerous provisions to ensure resident rights are protected and adequate and accurate information is available for consumers. For instance, the Act requires a written residency agreement that contains consumer protections, and enunciates and protects resident rights.

A key provision of the Act is development of an Individualized Service Plan (ISP). A written ISP must be developed for each resident upon admission. The ISP is to be developed with the resident, resident's representative and resident's legal representative, if any; the operator; and, if necessary, a home care services agency. The initial ISP will be developed in consultation with the resident's physician. If the physician determines that the resident is not in need of home care services, a home care services agency need not participate in the development of the ISP.

The ISP will take into account the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident. The ISP will include the services to be provided, and how and by whom services will be provided and accessed. The ISP is to be reviewed and revised as frequently as necessary to reflect the changing care needs of the resident, but no less frequently than every six months. To the extent necessary, such review and revision will be undertaken in consultation with the resident's physician.

The ALRA requires that certain important information be disclosed to prospective residents and their representatives, pursuant to PHL Section 4658(3). Among the items to be disclosed are: a consumer guide to inform and assist the consumer in the selection of an ALR (prepared by DOH in consultation with the State Office for the Aging, consumers, operators of ALRs, and home care services providers); a statement listing the residence's licensure status and whether it has an Enhanced Assisted Living or Special Needs Assisted Living certificate; a statement that the resident shall have the right to receive services from service providers with whom the operator does not have an arrangement; a statement that the resident shall have the right to choose their health care providers, notwithstanding any agreements to the contrary; and a statement regarding the availability of Long-Term Care Ombudsman Services and the telephone number of the local and State ombudsman.

Duplication:

This regulation does not duplicate any other state or federal law or regulation. PHL Section 4656(1) requires that, in order to operate as an assisted living residence, an operator shall be certified as an adult home or enriched housing program pursuant to Title 2 of Article 7 of the Social Services Law. PHL Section 4656(2) goes on to require the assisted living operator to comply with all applicable statutes, rules and regulations required for maintaining a valid operating certificate for an adult home/enriched housing program.

In PHL Section 4656(7), this lack of duplication is emphasized, stating that the requirements of PHL Article 46-B "shall be in addition to those required of an adult care facility. In the event of a conflict between any provision of this article and a provision of Article 7 of the Social Services Law or a regulation adopted thereunder, the applicable provision of [PHL Article 46-B] or the applicable regulation shall supersede Article 7 of the Social Services Law or the applicable regulation thereunder to the extent of such conflict." In addition, the application process provides for a streamlined procedure for review of character and competence for those existing operators of adult homes and enriched housing programs who are in "good standing" with the Department in terms of compliance. Operators are being requested to submit only those application materials that are updated

information or that is different from what they may have submitted to the Department in previous applications.

Alternatives:

Pursuant to Public Health Law Article 46-B, the Assisted Living Reform Act, added by Chapter 2 of the Laws of 2004, the Department has developed these regulations in close consultation with the Office for the Aging and the Taskforce on Adult Care Facilities and Assisted Living Residences (the Taskforce). The Taskforce members include representatives of consumer organizations, proprietary and non-profit operators of adult homes and enriched housing programs, an operator of currently unlicensed facilities, providers of care for persons with dementia, as well as representatives of the Department, the Office for the Aging, the Commission on Quality of Care and Advocacy for Persons with Disabilities and the Office of Mental Health. Since April of 2005, the Department has met on numerous occasions with Taskforce members to discuss nearly every aspect of the implementation of the program, and has provided many opportunities for comment, by Taskforce members and members of the public attending Taskforce meetings, on implementation issues and proposed guidance material intended to be incorporated into the regulations. The Department has considered these comments and recommendations, and has incorporated many such comments and recommendations into the proposed regulations.

Federal Standards:

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

Compliance Schedule:

As Section 7 of the Laws of Chapter 2 of the Laws of 2004 prohibits the Department from issuing emergency regulations in regard to PHL Article 46-B, this regulation will take effect upon publication of a notice of adoption in the New York State Register.

In terms of compliance schedule, the "Assisted Living Reform Act" became effective 120 days after being signed into law. Since the Governor signed the bill on October 26, 2004, the Act was effective as of February 23, 2005.

The Act states that any entity which qualifies as an ALR pursuant to PHL Article 46-B and operating as an ALR on or before the effective date shall, within 60 days of such effective date (that is, by April 25, 2005) apply to be licensed or certified with the Commissioner of Health in accordance with the provisions of Article 46-B upon approval of all licenses and certification for which the entity has applied.

Given the very short timeframe for implementation provided under the Act, the ALR application was not available to applicants until June 3, 2005. Therefore, the Department extended the deadline for submission of the application to August 3, 2005. This regulation will enable the Department to act upon those applications, and perform the oversight functions necessary for implementing the provisions of the Act.

Regulatory Flexibility Analysis

Effect of Rule:

There are 500 existing adult homes and enriched housing programs in New York State. Of those, 371 have been identified as being certified for 100 or fewer beds and considered a small business (74%).

To date, 226 existing adult homes and enriched housing programs have applied for licensure as Assisted Living Residences (ALRs). An additional 46 applications have been received by the Department by facilities proposing to be certified as an adult home/enriched housing program and subsequently licensed as an ALR.

The Department has advised prospective applicants that, in order to be licensed as an ALR, the facility's entire capacity will have to be subject to such licensure. Currently with regards to adult care facilities, for example, a 100-bed facility could be comprised of 80 adult home beds and 20 enriched housing program beds. If this same facility desired licensure as an ALR, all 100 beds would have to be licensed as such. It is expected that majority of facilities applying for ALR licensure will be for 100 or fewer beds and, thereby, considered a small business.

Local governments are not affected by this rule, unless they intend to apply to the Department to operate an ALR.

Compliance Requirements:

In order to comply with these requirements, any entity wishing to establish, operate, provide, conduct, or offer "assisted living" in New York state, or hold itself out as an entity which otherwise meets the definition of "assisted living" or by a similar term, must apply and obtain approval of the Department to operate as an adult care facility (either an adult home or an enriched housing program) and as an assisted living residence. This shall not apply to Assisted Living Programs (ALPs) approved by the Department pursuant to SSL Section 461-1.

Professional Services:

All facilities required to obtain licensure as an ALR must have staff trained and qualified to provide the care and services the residence has been approved by the Department to provide.

Compliance Costs:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee.

The biennial fee for Enhanced Assisted Living certification is \$2,000. The biennial fee for Special Needs Assisted Living is also \$2,000. Facilities applying for Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Economic and Technological Feasibility:

As the majority of such existing facilities are small businesses, it should be economically and technologically feasible for small businesses to comply with the regulations.

Minimizing Adverse Impact:

The "Assisted Living Reform Act" created a Task Force on Adult Care Facilities and Assisted Living Residences, to update and revise the requirements and regulations applicable to [ACFs and ALRs] to better promote resident choice, autonomy and independence. The Task Force consists of ten appointed members (six appointed by the Governor, two by the Senate, and two by the Assembly), as well as four ex-officio members (the Commissioner of Health, the Director of the State Office for the Aging, the Commissioner of the Office of Mental Health, and the Chair for the Commission on Quality of Care and Advocacy for Persons with Disabilities). Beginning with their first meeting in April 2005, the Task Force also makes recommendations with respect to "minimizing duplicative or unnecessary regulatory oversight." In order to minimize adverse impact, the Department has consulted with the Task Force on the principles contained within this regulatory package.

Small Business and Local Government Participation:

As stated above, the Task Force on Adult Care Facilities and Assisted Living Residences first convened in April 2005, and has met a total of eleven times through April 2006. In addition to ex-officio members of four State agencies, the Task Force includes representatives of the ACF and assisted living industry, home care representatives, and consumer advocates.

Rural Area Flexibility Analysis

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

The proposed rule will not impose an adverse economic impact on rural adult care facilities or assisted living residences.

Job Impact Statement

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

Higher Education Services Corporation

NOTICE OF ADOPTION

New York State Flight 587 Memorial Scholarship

I.D. No. ESC-04-07-00005-A

Filing No. 275

Filing date: March 13, 2007

Effective date: March 28, 2007

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

Action taken: Addition of section 2201.7 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 668-f

Subject: New York State Flight 587 Memorial Scholarship.

Purpose: To implement the New York State Flight 587 Memorial Scholarship.

Text or summary was published in the notice of proposed rule making, I.D. No. ESC-04-07-00005-P, Issue of January 24, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, Associate Attorney, Higher Education Services Corporation, 99 Washington Ave., Rm. 1350, Albany, NY 12255, (518) 473-1581, e-mail: CFisher@HESC.com

Assessment of Public Comment

The agency received no public comment.

Office of Homeland Security

NOTICE OF ADOPTION

Security Guard Training Tax Credit

I.D. No. HLS-04-07-00002-A

Filing No. 274

Filing date: March 13, 2007

Effective date: March 28, 2007

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

Action taken: Addition of Part 1000 to Title 9 NYCRR.

Statutory authority: Executive Law, section 709(2)(n); and Tax Law, section 26(e)

Subject: New York State Office of Homeland Security—security guard training tax credit.

Purpose: To provide for a process by which applicants can apply for the tax credit.

Text of final rule: Pursuant to the authority contained in subdivision (e) of Section 26 of the New York State Tax Law and subdivision (n) of subsection (2) of Section 709 of the Executive Law, the Director of the Office of Homeland Security hereby proposes to make and adopt the following amendments, as published in Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by adding the following:

§ 1000.1 Purpose and general description.

These rules and regulations set forth the application process for the New York State Office of Homeland Security 'Security Officer Training Tax Credit Program' as set forth in subsection (e) of Tax Law Section 26 as added by Chapter 537 of the Laws of 2005. A taxpayer, which is subject to tax under article 9, 9-A, 22, 32 or 33 of the Tax Law and is a qualified building owner, shall be allowed a tax credit in the amount of \$3,000 for each full-time qualified security officer who has been trained according to the Office of Homeland Security Certified Training Program. The Director of the Office of Homeland Security has the authority to promulgate regula-

tions to establish procedures for the application and allocation of such credits and any other provisions necessary and appropriate to implement this program per Tax Law subdivision (e) of Section 26 and paragraph (n) of subdivision (2) of Section 709 of the Executive Law.

§ 1000.2 Definitions.

As used in this regulation, the following terms shall have the following meanings:

(a) "Qualified Building Owner" means a building owner whose building entrances, exits and common areas are protected by security officers, registered under article 7-A of the General Business Law, whether or not such security officers are employed directly by the building owner or indirectly through a contractor.

(b) "Building" means any commercial building under ownership of a qualified building owner that contains at least 500,000 square feet whose entrances, exits and common areas are protected by security officers licensed under article 7-A of the General Business Law.

(c) "Security Officer" means a security guard registered and subject to Article 7-A of the General Business Law.

(d) "Qualified Security Officers" means security officers who: (i) are employed in positions which are under a legally binding written agreement, including a service contract between qualified building owners and security contractors, enforceable by employees, that provides for a minimum hourly wage rate of at least nine dollars fifty cents for the calendar year two thousand five; nine dollars eighty-five cents for the calendar year two thousand six; and ten dollars eighty-five cents for the calendar year two thousand seven and thereafter; and (ii) have completed the Office of Homeland Security certified security training program as set forth in this section.

(e) "Qualified Security Training Program" means a program certified by the New York State Office of Homeland Security for residential and commercial building security officers, which is designed to: improve observation, detection and reporting skills; improve coordination with local police, fire and emergency services; provide and improve skills and working knowledge of advanced security technology including surveillance systems and access control procedures; require at least 40 hours of training, including 3 hours of training devoted to terrorism awareness.

(f) "Application" means a document issued by the Office of Homeland Security and submitted by a qualified building owner that contains information concerning the Homeland Security, Security Officer Training Tax Credit. Such application shall include, but is not limited to, the following information: the New York State Department of State issued unique identification number of each qualified security officer applied for which the tax credit is being sought and the employment status; the specific work locations; the address and square footage of each eligible building secured by the same qualified security officers; a certification that the employment records remain on file and readily available upon request by the Office of Homeland Security; and any other information necessary to properly evaluate the application.

(g) "Complete Application" means a properly completed and executed application where all questions on the application itself were fully answered by the qualified building owner and that all supporting documents or information required in the application were fully furnished to the Office of Homeland Security to review and approve the application.

(h) "Method of Transmittal" means that all applications containing original forms and supporting documentation must be mailed to the New York State Office of Homeland Security located at 1220 Washington Avenue, Building 7A, 7th Floor, Albany New York 12242, via a mail carrier service that provides proof of date of mailing.

(i) "Filing Period" means the date specified by the Office of Homeland Security on the tax credit application for credit in the calendar year for which the tax credit is being sought.

(j) "Application Filing Date" means date which the application was postmarked by the mail carrier used by applicant regardless of the date the application is received by the Office of Homeland Security, provided that the date is within the filing period specified above.

(k) "Untimely Application" means an application that has been postmarked either before or after the filing period specified.

(l) "Certificate of Tax Credit" means a certificate issued by the Office of Homeland Security that states the amount of the Security Officer Tax Credit that the building owner has qualified for, based on the office's receipt of the complete application and subject to the process set forth in these rules and regulations. The certificate shall include, but not be limited to the following information and any information necessary: name and address of qualified building owner; certificate serial number; amount of tax credit approved; and the calendar year in which such credit was

awarded; and any other information as deemed necessary by the Office of Homeland Security.

§ 1000.3 Application Process.

In the event that subtraction of the credit allocations of all the eligible applications received on a given day would result in a zero or negative balance of the legislative cap, the tax credits shall be allocated among such qualified building owners for that day on a pro rata basis. Each qualified building owner's request shall be allowed at a reduced rate equivalent to the percentage created by dividing the unallocated tax credits by the aggregate tax credits requested on such date. Untimely applications will not be considered for the tax credit.

(a) Application. A qualified building owner shall file a complete application according to the specified method of transmittal to the Office of Homeland Security within the filing period. The qualified building owner shall file with application such information, deemed necessary for the application process, as requested by the Director of the Office of Homeland Security, which includes, but is not limited to, affirmation by the qualified building owner that the certified training has been provided to each security officer; dates and places of training; hours worked by each qualified security officer for which the taxpayer is applying; and verification that all information has been provided to the best of the qualified building owner's knowledge. The Office of Homeland Security may request additional supporting documentation, as necessary.

All applications postmarked on the first day of the filing period by the required method of transmittal shall be treated as having been filed on the first day of the application period and shall be given priority with all other applications filed on the same day in the awarding of tax credits over all applications postmarked on subsequent days. Applications postmarked on subsequent days shall be given priority based on the date of the postmark.

(b) Criteria for Review of Application. A committee appointed by the Director shall evaluate all applications received by the Office of Homeland Security in accordance with paragraph (a) above. The Office of Homeland Security shall use the following criteria to determine the eligibility of a qualified building owner to receive a certificate of tax credit:

(1) the application is a complete application;

(2) the application is submitted within the filing period and is not untimely;

(3) the applicant is a qualified building owner; and

(4) the qualified building owner certifies and offers proof that the qualified security officers have, in fact, been trained according to an OHS Qualified Security Officer Training Program.

The Director of the Office of Homeland Security shall approve or disapprove the applications based upon criteria set forth by the Office of Homeland Security in order of priority based upon the application filing date of a complete application for allocation of Security Officer Training Tax Credit.

(c) Notification of Determination. If the Office of Homeland Security determines that a qualified building owner is eligible for the Security Officer Training Tax Credit, the Director of the Office of Homeland Security shall issue a certificate of tax credit to the qualified building owner after verification of the information submitted by the qualified building owner. If the application is disapproved, the Office of Homeland Security shall provide the qualified building owner with a notice of disapproval. Any security officer determined not to be a qualified security officer, shall be rejected for the purpose of calculating the qualified building owner's tax credits and any such reduction in tax credit shall be reallocated in conformity with the process specified in these regulations.

Upon a successful verification of eligible and timely applications, the Office of Homeland Security shall, within 45 days of the end of the filing period, issue certificates of tax credit and/or letters of disapproval, as appropriate.

(d) Eligibility in Subsequent Years. Any qualified building owner who is allocated a credit in the first calendar year and who applies for credit in the second calendar year shall, upon successful application, have priority of their percentage amount awarded in the previous year over all other taxpayers who file a complete application in the succeeding calendar year.

(e) Unallocated Tax Credits. If at the end of the calendar year, the aggregate amount of Security Officer Training Tax Credits applied for is less than the calendar year's allocation, then the amount permitted with respect to subsequent taxable years shall be augmented by the amount of such excess.

(f) Audit of Information. The qualified building owners who receive Security Officer Training Tax Credits in any given year shall, upon request by the Director of the Office of Homeland Security, immediately provide or make available any information necessary, including copies of supporting

documentation to verify the information submitted in applications for such credit, including verification of training of security guards, the existence of a required contract, the payment of the mandatory wage provision as set forth in paragraph (4) of subdivision (b) of Section 26 of the Tax Law, and any other information deemed necessary by the Director of the Office of Homeland Security.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 1000.2(i).

Text of rule and any required statements and analyses may be obtained from: Linda Shkreli, Office of Homeland Security, 633 Third Ave., 32nd Fl., New York, NY 10017, (212) 867-7060, e-mail: LShkreli@security.state.ny.us

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

A revised statement on the above is not required since the amendment in the text of the rule Section 1000.2(i) reflected a non-substantive change in application period to allow for administrative flexibility between when the rule is published and when the applications are made available to eligible applicants. This administrative change in no way affects the JIS/RAFA/RFA/RIS.

Assessment of Public Comment

The 45 day comment period on the Office of Homeland Security's Security (OHS) Guard Tax Credit draft regulations began on January 24, 2007 and will end on or about March 11th. OHS has taken every step to fulfill legal requirements of filing a regulation. A notice of adoption of the final rule has been submitted to the Department of State on March 13, 2007 for final publication in the State Register two on March 28, 2007.

The Office of Homeland Security received comments on two occasions from SEIU 32BJ. Below are summaries of 32BJ's comments and the Office of Homeland Security analysis of the comments.

Issue #1: The union proposes the use of a random lottery drawing for awarding of credits.

Response: The law specifically calls for the assignment of tax credits on a first-come-first-serve basis. The use of a random drawing will increase the potential for challenges from those applicants whose applications were received contemporaneously with all others. "Such aggregate amount of credits shall be allocated by the state office of homeland security among taxpayers in order of priority based upon the date of filing an application for allocation of security training tax credit with such office, and any taxpayer who is allocated such a credit in a taxable year shall receive such credit for the succeeding two taxable years and shall have priority over all other taxpayers who file an application therefore in such succeeding two taxable years.

Issue #2: 32BJ raises issue with the fact that the credit program will be issued in two years, at \$10 million and \$5 million. In terms of the union's issue limiting the program to two years rather than extending it to three years.

Response: A sunset provision acts to terminate all provisions of the law after a specific date, unless further legislative action is taken to extend it. The bill states that, "This act shall take effect immediately and shall apply to taxable years beginning on and after January 1, 2005 . . ."

Issue #3: 32BJ raises the with respect to OHS verification of the ability of an employee to enforce their employment contract and the addition of a requirement that the applicants notify security guards of the existence of a contract.

Response: OHS fully acknowledges the provision in the legislation which defines an eligible guard as among other things, "employed in positions which are under a legally binding written agreement, including a service contract between qualified building owners and security contractors, enforceable by employees . . ." 32BJ proffers that a notification provision should be read into the legislation and included in the application. OHS intends to require signed stipulations by applicant that, among other things, there are legally enforceable contracts in existence, including wage provisions and other requirements spelled out in the law, which will also be one of several items verified by random spot audits.

Issue #4: 32 BJ requests that OHS issue advanced certifications of credit.

Response: This issue is a prospective approach that would give estimates to taxpayers on how much they would receive if they followed through on their applications rather than after the fact. Since those applicants who receive credits in the first year jump to the front of the line in the following year, so it will serve to ensure advance notification. If there are a substantial number of unused credits from the 2006 calendar year, OHS may issue a preliminary application utilizing the prospective approach.

Comments of SEIU Local 32BJ regarding the Security Officer Training Tax Credit, Chapter 537 of the Laws of 2005

The following comments are submitted on behalf of Service Employees International Union, Local 32BJ ("SEIU Local 32BJ"). We have over 65,000 members in New York State, including over 5,000 security officers. Several provisions in the proposed regulations should be modified to conform to the intent of the legislature as embodied in the statute.

1) Eligibility in Subsequent Years

The proposed regulations provide at Section 3(e) that any qualified building owner who is allocated a credit in the first calendar year shall be given priority in the second calendar year. This provision should be modified to conform to the statute, which requires that any building owner that receives a credit in a given year should receive priority over other applicants for the two subsequent years.

2) Distribution of Credits

Section 3 of the proposed regulations would reduce the amount of the credit received by each qualified building owner if applications received on a given day would exceed the legislative cap. This means that if there is widespread demand for the program, the value of the credit could be diluted to the point where it does not provide a reasonable economic incentive to building owners to continue their commitment to utilize qualified security officers for three years as intended.

If the eligible applications exceed the legislative cap, the State should utilize a lottery system to allocate the credits, with those qualified owners who are chosen through the lottery receiving the full credit. The State of Ohio utilizes a similar system to distribute training tax credits. The advantage of a lottery is that the winners would receive a sufficient incentive to encourage their participation for all three years.

3) Timing of Certification

The proposed regulations provide at Section 2(i) that the filing period is:

January 2nd through January 30th following the calendar year for which the tax credit is being sought. (emphasis added)

This would require building owners to expend resources on training and increased compensation before the availability of tax credits is determined. Given the limited availability of credits and the proposed system for distributing credits equally if the total numbers of applicants exceeds the legislative cap, otherwise qualified building owners may not receive any credits or receive a greatly reduced amount for money they have already spent.

The statute contemplated a certification mechanism by which building owners would be able to determine at the beginning of the calendar year whether they will be eligible for tax credits. Section (1)(D) of Chapter 537 reads:

(d) Credit certification. Upon application by a taxpayer, the state office of homeland security may issue a credit certification where the taxpayers meet the standards established in paragraph two of this subdivision and have demonstrated that they have provided the appropriate training, or, within the year, will provide the appropriate training to all employees for whom they will claim the credit. (emphasis added)

The regulations should follow the intent of statute to allow building owners to properly budget for security expenses by understanding at the beginning of the year what tax relief they will receive from the state if they comply with the program requirements.

Because many building owners made a good faith effort to provide qualified training and the necessary compensation in 2006 while the regulations were pending, there should be a special procedure for distributing the 2006 credits. Going forward however, taxpayers should have the opportunity to pre-certify their eligibility for the program.

4) Ensuring that Service Contracts are Enforceable by Employees

The statute provides at Section 1(B)(4)(I) that a building owner can meet the criteria for "qualified security officers" by employing security officers through a service contract with a security contractor that is enforceable by employees. The regulations should include a mechanism for certifying that such agreements exist, as well as a mechanism for ensuring that security officers have a meaningful opportunity to enforce the terms of those service contracts. No building owner should be eligible for the tax credit unless they provide evidence that the security officers have been notified of the terms of the service contract and their right to enforce those terms.

We thank you for the opportunity to submit comments on this important industry initiative. We welcome any feedback or discussion regarding our submission. Thank you.

We are writing to follow-up on our earlier comment regarding the absence of any proposed regulation to implement the requirement in the

statute that a building owner is only eligible for the credit if certain wages are paid to security officers pursuant to a contract that is enforceable by the security officers.

Although the statute provides that the building owner's service contract may qualify as a contract enforceable by employees, the regulations ought to be based on the reality that in ordinary circumstances security officers would never see the service contract between their employer and the building owner, and they would have no reason to believe that they have any right to enforce the terms of that agreement. Furthermore, they would not even suspect that the service contract mandates any particular wages for them. In fact, the ordinary practice of building owners is not to mandate wages for their service contractors' employees for fear of becoming joint employers.

We think that it is entirely consistent with the principle that administrative agencies have "the power to fill in the interstices in the legislative product," *Nicholas v. Kahn*, 47 NY 2d 24, 31 (1979) for the Office of Homeland Security to provide in the implementing regulations that in order for a building owner to rely upon its service contract with its security vendor as the contract that is enforceable by employees, the building owner must first inform the employees of the relevant terms of that agreement, and that they have a right to enforce it.

The agency could easily enforce such a requirement simply by requiring an applicant for the tax credit to provide a sworn statement that all security officers for whom it is claiming the credit have been notified of the relevant terms of the contract, and of their right to enforce the contract.

While the statute does not specifically provide that the building owner must give notice of the contract to employees, it stands to reason that an employee cannot enforce an agreement if he does not know that it exists.

The legislature specifically required that the contract providing the wages must be enforceable by employees. As the administrative agency taxed with drafting the implementing regulations, it is incumbent upon the agency to "breathe life into the guarantee" set forth in the statute. *Bates v. Toia*, 45 NY2d 460, 463 (1978).

Finally, any concern that adding such a notice requirement to the regulations would somehow result in invalidation of the regulations is entirely unfounded. It is well established that an agency "may promulgate regulations going beyond the statute itself as long as they are consistent with legislative intent." *Godwin v. Perales*, 88 NY2d 383, 395-6 (1996). Court review of regulations is limited to inquiring whether the regulation is "so lacking in reason for its promulgation that it is essentially arbitrary." *GE Capital Corp. v. State Div. of Tax Appeals*, 2 NY3d 249, 254 (2004). Here, the notice requirement could hardly be deemed arbitrary or irrational. The legislature wanted to make sure that wages were set forth in contract enforceable by security officers. If the security officers or their representatives are not parties to the contract, then security officers would have no way to enforce the contract unless they are first told that it exists.

employees and to encourage uninsured individual proprietors and working uninsured individuals to purchase insurance coverage. The federal Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, added a new Section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. In his 2006 State of the Union Address, President Bush emphasized the importance of high deductible health plans and health savings accounts (HSAs) in expanding health care options and reducing the number of the uninsured. Changes to the federal law at the end of 2006 made high deductible health plans more advantageous for tax savings by removing many limitations and making certain retirement funds as eligible for deposit into an HSA. People with HSAs can now roll over funds from a health reimbursement arrangement, flex spending account, or individual retirement account into an HSA on a one-time basis.

Prior to January 1, 2007, Healthy New York participants seeking comprehensive health insurance coverage could not access high deductible health plans and establish health savings accounts in accordance with the federal standards. These employers and individuals were not eligible for the tax deductions they would otherwise enjoy for funds deposited into health savings accounts and used for qualified medical expenses. The funds deposited into the health savings accounts accrue tax-deferred until the account owner seeks reimbursement for medical expenses or reaches Medicare eligibility.

Health insurance costs have escalated dramatically in recent years, with some health plans implementing increases in the range of 25% to 30%. The increased cost of insurance has, in turn, contributed to a decline in the number of employers who offer insurance to their employees. Recent census data indicates that approximately 15% of New York's population is uninsured. A large portion of New York State's uninsured population is individuals who are self-employed or who work for small employers.

This amendment to Part 362 of 11 NYCRR requires health maintenance organizations and insurers participating in the Healthy New York program to offer high deductible health plans, as defined by the federal Medicare legislation, to qualifying small employers and individuals. The high deductible health plans have lower premiums than the standard Healthy New York plans. The reduction in cost encourages more small businesses and individuals to purchase health insurance coverage and should therefore result in a decrease in the number of uninsured. In addition, the high deductible health plans purchased with the health savings accounts give New Yorkers access to another health insurance alternative that complies with federal standards. The new option also provides New Yorkers with access to a tax-advantaged method of purchasing health insurance that was previously not available to individuals.

Employers generally renew existing insurance arrangements or enroll in new insurance policies during the fall. These new policies become effective in January of the following year. In order for these high deductible health plans to be sold with a January 1, 2007 effective date, the health plans had to be able to market them to employers along with other new product offerings in the fall. The prior emergency filings of this amendment required health plans to issue high deductible health plan contracts beginning January 1, 2007. This amendment must be filed as an emergency measure in order to keep existing program requirements concerning high deductible health plans in place.

This emergency filing is necessary to continue the requirement that health plans provide new benefits under the program. A prior emergency filing of this amendment added the following new benefits to the Healthy New York program as of January 1, 2007: diagnostic screening for prostate cancer and a limited number of post-hospital or post-surgical home health care and physical therapy services. The addition of the prostate cancer screening benefit facilitates prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. Prior to January 1, 2007, the Healthy New York program covered surgery and hospitalizations but did not cover subsequent home health care and physical therapy care. Consequently, Healthy New York enrollees experienced extended hospitalizations in order to receive therapy. It is anticipated that the addition of post-hospitalization and post-surgical home health and physical therapy services will result in shorter hospital stays and lower hospital costs, which will in turn reduce costs to the State.

Consequently, it is critical that this amendment be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

Insurance Department

EMERGENCY RULE MAKING

Healthy New York Program

I.D. No. INS-13-07-00003-E

Filing No. 268

Filing date: March 9, 2007

Effective date: March 9, 2007

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

Action taken: Addition of sections 362-2.7(d)-(f) and 362-2.8 to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326

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

Specific reasons underlying the finding of necessity: Chapter 1 of the Laws of 1999 enacted the Healthy New York program, an initiative designed to encourage small employers to offer health insurance to their

Subject: Minimum standards for the form and content of policies and contracts subject to the provisions of section 4326 of the Insurance Law.

Purpose: To create additional health insurance options for qualifying small employers and individuals by requiring health maintenance organizations and participating insurers to offer high deductible health plans in conjunction with the Healthy New York Program.

Text of emergency rule: New subdivisions (d), (e) and (f) are added to section 362-2.7 to read as follows:

§ 362-2.7 *Healthy New York benefit adjustments.*

(d) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to forty post-hospital or post-surgical home health care visits per calendar year.*

(e) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to thirty post-hospital or post-surgical physical therapy visits.*

(f) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for diagnostic screening for prostatic cancer consistent with the benefit set forth in section 4303(z-1) of the Insurance Law.*

A new section 362-2.8 is added to read as follows:

§ 362-2.8 *High deductible health plan under the Healthy New York Program.*

(a) *For purposes of this section:*

(1) *“High deductible health plan” shall mean a qualifying health insurance contract with a plan year deductible of at least \$1,150 for individual coverage and \$2,300 for family coverage. Out-of-pocket expenses, including the deductible and copayments, shall be capped at \$5,250 for individual coverage and \$10,500 for family coverage for the plan year.*

(2) *“Family coverage” means any coverage that is not self-only.*

(b) *Effective January 1, 2007, every health maintenance organization and insurer participating in the Healthy New York program shall offer a high deductible health plan with a plan year deductible of \$1,150 for individual coverage and \$2,300 for family coverage to qualifying small employers and qualifying individuals under the Healthy New York program in connection with a Health Savings Account (hereinafter “HSA”) authorized by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Pub. L. No. 108-173). The health maintenance organization or insurer must provide qualifying small employers and qualifying individuals that select a high deductible health plan with a separate disclosure statement which prominently discloses the existence of the deductible.*

(c) *Health maintenance organizations and participating insurers may also offer additional high deductible health plans with deductibles exceeding the minimum amounts set forth in subdivision (a) of this section in connection with qualifying health insurance contracts. Any such additional options must contain the cap on out-of-pocket expenses set forth in subdivision (a) of this section.*

(d) *When necessary to meet the federal minimums for a high deductible health plan, each of the dollar amounts referred to in subdivision (a) of this section shall be adjusted by an amount which is consistent with the automatic cost-of-living adjustment as set forth in section 223(g) of the Internal Revenue Code, 26 USC section 223.*

(e) *The plan year deductible shall not apply to those services described in section 4326(d)(7) and (8) of the Insurance Law, prostatic cancer screenings, or routine prenatal care. Health maintenance organizations and participating insurers may also exempt from the deductible such other preventive services which would not jeopardize the eligibility of the high deductible health plan to be used in conjunction with an HSA.*

(f) *The calendar year prescription drug deductible set forth in section 4326(e)(5) of the Insurance Law shall not be applied in addition to the overall plan year deductible for the high deductible health plan.*

(g) *At the time of application, the health maintenance organization or participating insurer shall obtain a certification that the applicant or their employees, as appropriate, intend to establish an HSA, or if applicable, HSAs. At the time of annual recertification, the qualifying employer or individual shall submit a recertification confirming the status of the HSA or HSAs.*

(h) *A small employer or individual may choose between a high deductible health plan or a qualifying health insurance contract at the time of enrollment. Once enrolled, any change from one type of plan to another may occur only at the time of the annual recertification.*

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 June 6, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. **Statutory authority:** The superintendent’s authority for the adoption of the third amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326 of the Insurance Law.

Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law, effectuate any power granted to the superintendent under the Insurance Law, and prescribe forms.

Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization (HMO) and its subscribers.

Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies.

Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers.

Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued.

Section 4303 governs the accident and health insurance contracts written by non-for-profit corporations and sets forth the benefits that must be covered under such contracts.

Section 4304 includes requirements for individual health insurance contracts written by not-for-profit corporations.

Section 4305 includes requirements for group health insurance contracts written by not-for profit corporations.

Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) also authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002.

2. **Legislative objectives:** The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. Chapter 1 of the Laws of 1999 enacted the Healthy New York program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage individual proprietors and working uninsured individuals to purchase insurance coverage.

3. **Needs and benefits:** Currently, small employer and individual participants in the Healthy New York program seeking comprehensive health insurance coverage cannot purchase high deductible health plans and establish health savings accounts in accordance with federal standards. These participants in the Healthy New York program are not currently eligible for the tax deductions for funds deposited into health savings accounts and used for qualified medical expenses. This amendment will create products that are compatible with health savings accounts. Health savings accounts allow users to deposit pre-tax money into an account and withdraw the money tax-free for qualified medical expenses.

Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. The high cost of insurance prevents many individual proprietors and working individuals from purchasing their own coverage.

These amendments to Part 362 of 11 NYCRR will require HMOs and participating insurers to offer high deductible health plans using the Healthy New York small employer and individual programs. The high deductible health plans will have lower premiums than current Healthy New York benefit packages. The reduction in premium will encourage more small businesses and individuals to purchase comprehensive health insurance coverage. In addition, the high deductible health plans purchased for use with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with recently-enacted

federal standards. This new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance.

In addition, this amendment will provide for prostatic cancer screening and a limited home health care and physical therapy benefit. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. The addition of post-hospitalization and post-surgical home health and physical therapy services will result in insureds being discharged from the hospital sooner now that they can obtain these services in an outpatient setting. Shorter hospital stays will reduce costs. The addition of the new benefits will in turn reduce costs to the State, because the State reimburses the health plans for certain claims.

4. Costs: This amendment imposes no compliance costs upon state or local governments. HMOs and participating insurers will incur some minor costs in drafting the contract riders that will create the high deductible health plans and add the new benefits. The Department has provided HMOs and participating insurers with model language and forms to use in implementing the amendment. The Health Care Reform Act allocated a fixed amount to the Healthy New York program to encourage uninsured businesses and individuals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment may decrease the per head cost to the State to be distributed from the overall allocation for the program for workers enrolled in Healthy New York because the addition of the home health care and physical therapy benefits will reduce hospitalization costs by allowing insureds to receive services in less costly settings. In addition, the prostatic screening benefit may reduce costs to the state by resulting in some instances of cancer being detected earlier, with fewer medical costs. The amendment creates a less expensive option under Healthy New York, which should attract additional people to the program and increase enrollment. The overall costs of the program are capped at the appropriated funding amounts.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county-by-county basis are submitted to the Insurance Department. This amendment will not impose any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: The adoption of this amendment will require high deductible health plans to be issued under the Healthy New York program for qualifying individuals and small employers. One alternative would be to not offer the high deductible health plan option. The Department has determined that this is not an attractive alternative, because without a high deductible health plan, these small businesses, individuals, and sole proprietors could not open health savings accounts. The Department also considered alternative levels of deductibles. However, deductible amounts lower than those chosen would either not qualify for use with health savings accounts, or would require revision soon after implementation due to deductible limit adjustments each year for use with health savings accounts. Another alternative considered by the Department was to require only one set of deductible amounts, rather than to allow additional amounts. After discussions with industry representatives, the flexibility to offer additional deductible amounts in qualifying health insurance contracts appeared to better serve the intended enrollees, and allowed the health plans to be creative in their product offerings. This amendment also adds prostatic cancer screening and a limited post-hospital and post-surgical physical therapy and home health care benefit to the Healthy New York program. Currently, the program does not cover these benefits. The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and health savings accounts. These industry representatives have provided the Department with comments and suggestions on the drafting of this regulation, including technical advice and cost analysis of the deductibles and benefits.

9. Federal standards: The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a

new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish tax-deductible health savings accounts to pay for certain medical expenses.

10. Compliance Schedule: HMOs and participating insurers were required to comply by January 1, 2007.

Regulatory Flexibility Analysis

This amendment will not impose reporting, recordkeeping or other requirements on small businesses since the provisions of this Part apply only to health maintenance organizations (HMOs) and participating insurers. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of HMOs and participating insurers and concluded that none of them comes within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none that are both independently owned and that employ fewer than 100 persons.

This amendment will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at participating insurance companies and HMOs, none of which is a local government.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Health maintenance organizations (HMOs) and participating insurers to which this regulation is applicable do business in every county of the State, including rural areas as defined under section 102(13) of the State Administrative Procedure Act. Small employers and individuals in need of health insurance coverage are located in every county of the State, including rural areas as defined under section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department. This revision will not add any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option. Nothing in this revision distinguishes between rural and non-rural areas. No special type of professional services will be needed in a rural area to comply with this requirement.

3. Costs: HMOs and participating insurers may incur some modest costs in drafting the contract riders that will create the high deductible plans and include the additional benefits. There are no costs to local governments. This amendment has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will have the same impact on all affected entities.

5. Rural area participation: None.

Job Impact Statement

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for small employers and working individuals. This amendment provides qualifying small employers and individuals with the ability to obtain a federal tax deduction through the purchase of a high deductible health plan. It also reduces the cost of Healthy New York health insurance by adding a deductible and benefits that will reduce costs to the program, which will in turn improve access to health insurance by lowering health insurance premiums.

EMERGENCY RULE MAKING

Rules Governing Individual and Group Accident and Health Insurance Reserves

I.D. No. INS-13-07-00006-E

Filing No. 273

Filing date: March 13, 2007

Effective date: March 13, 2007

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

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

Statutory authority: Insurance Law, sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517

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

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

However, New York authorized insurers are required to use the 1964 CDT because it was required by Regulation No. 56 (see, e.g., 11 NYCRR Part 94.1(a)(4)(iii)(A)). Also, Regulation No. 56 did not apply to group insurance, providing little or no guidance to New York insurers that write this important form of protection. The effect of the application of this outdated regulation is that New York authorized insurers are required to hold reserves far in excess of the national standard for disability insurance active lives reserves, but below the prevailing standard for claims reserves. Most New York authorized insurers hold reserves in excess of the amount needed to pay claims due to the required use of the outdated tables. For these insurers, the adoption of the more recent tables will significantly reduce the cost of doing business and allow them to compete more effectively with insurers that are not subject to New York standards and to pass the cost savings on to consumers. For some insurers, this regulation may require an increase in reserves especially for coverages such as group health insurance for which there had been no standards previously. The adoption of these standards will help to ensure that such insurers remain financially capable of paying claims as they come due.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on December 31 of the preceding year. The filing date for the March 31, 2007 quarterly statement is May 15, 2007. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

The regulation was previously promulgated as an emergency measure on 18 occasions effective December 31, 2002, March 24, 2003, June 17, 2003, September 8, 2003, December 2, 2003, February 26, 2004, May 19, 2004, August 11, 2004, November 4, 2004, January 26, 2005, April 21, 2005, July 15, 2005, October 12, 2005, January 6, 2006, April 5, 2006, June 29, 2006, September 21, 2006, and December 14, 2006. The original Pre-Proposal for Regulation 56 was sent to GORR on January 28, 2003. Minor changes were made to the text in the March 24, 2003 and June 17, 2003 emergency regulations. Subsequently, the National Association of Insurance Commissioners ("NAIC") Accident & Health Working Group of the Life & Health Actuarial Task Force adopted changes to the NAIC's Health Insurance Reserves Model Regulation. These changes include sections discussing: disability income claim reserves, unearned premium reserves for Single Premium Credit disability income business, lapse and mortality rates for contract reserves for long term care insurance, as well as changes to the effective dates associated with these changes. Changes to the NAIC's Health Insurance Reserves Model Regulation were incorporated into the February 26, 2004 emergency regulation. In the July 15, 2005 version, the regulation was made applicable to Health and Property and Casualty insurers as well as life insurers.

The Revised Proposal was approved by GORR on October 2, 2006 and a Notice of Proposed Rulemaking will be published in the State Register in the near future. In order to enable New York authorized insurers to file the March 31, 2007 quarterly financial statement based upon minimum reserve standards in effect on December 31, 2006, the regulation must be continued on an emergency basis.

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

Subject: Rules governing individual and group accident and health insurance reserves.

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

Substance of emergency rule: Section 94.1 lists the main purposes of the regulation including implementation of sections 1303, 4117, 4217(d), 4517(d) and 4517(f) of the Insurance Law and prescribing rules for valuing certain accident and health benefits in the life insurance policies.

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

Section 94.3 is the definitions section.

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

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

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

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

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

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

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

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

Section 94.12 establishes the severability provision of the regulation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 10, 2007.

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

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation No. 56 (11 NYCRR 94) is derived from sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517 of the Insurance Law.

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

Section 1303 covers loss or claim reserves for insurers.

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

Section 1305 covers unearned premium reserves for insurers.

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

Section 4117 covers loss reserves for Property and Casualty (P&C) insurers.

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

Section 4310 covers investments, financial conditions, and reserves for non-profit health plans.

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

2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure

solvency is through requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

3. Needs and benefits:

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

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

4. Costs:

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

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

5. Local government mandates:

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

6. Paperwork:

The regulation imposes no new reporting requirements.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered allowing an additional grade-in period, beyond the grade-in period currently cited in the emergency rule, for health and property and casualty insurers. The Department has decided against allowing an additional grade-in period since during an outreach effort to the property and health industries, only one insurer notified the Department that a material reserve increase would result. That insurer was notified of the proposed change to the rule during 2004 and has had ample time to prepare for the reserve change. Additionally, it is important that all insurers hold the correct amount of reserves as soon as possible and therefore be held to the same grade-in period.

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

9. Federal standards:

There are no federal standards in the subject area.

10. Compliance schedule:

Beginning with year-end 2003, where the requirements of this regulation produce reserves higher than those calculated at year-end 2002, the insurer may linearly interpolate, over a four year period, between the higher reserves and those calculated based on the year-end 2002 standards. Insurers must be in full compliance with this Part by year-end 2006. This

allows insurers subject to the regulation ample time to achieve full compliance.

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 insurance companies licensed to do business in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of small business, because there are none which are both independently owned and have under one hundred employees.

2. Local Governments:

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

The regulation was drafted after consultation with member companies of the Life Insurance Council of New York (LICONY). A copy of the draft was distributed to LICONY in November, 2002. Additional changes were made to the text of the regulation based on changes made to the NAIC's Health Insurance Reserves Model Regulation in December 2003 and a revised draft of the regulation was distributed to LICONY in January 2004. The draft was sent to American Insurance Association (AIA), Property Casualty Insurers Association of America (PCI) and National Association of Mutual Insurance Companies (NAMIC) for property and casualty insurers and to selected health insurers during late 2004 and early 2005. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the January 3, 2007 issue of the State Register.

Job Impact Statement

Nature of impact:

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

Categories and numbers 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.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-13-07-00004-E

Filing No. 269

Filing date: March 9, 2007

Effective date: March 9, 2007

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

Action taken: Amendment of Parts 588 and 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 709(b) and 31.04(a); and Social Services Law, sections 364(3) and 364-a

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

Specific reasons underlying the finding of necessity: These amendments provide authority to simplify and make equitable Comprehensive Outpatient Program (COPS) funding and non-COPS funding as authorized by the 2006-2007 enacted budget. Failure to initiate this program immediately would result in recipients losing access to services necessary to their health, safety and the general welfare.

Subject: Comprehensive outpatient programs.

Purpose: To equalize Comprehensive Outpatient Program (COPS) and non-COPS funding.

Text of emergency rule: 1. Subdivision (g) of Section 588.13 of Title 14 NYCRR is amended to read as follows:

(g) Clinic, continuing day treatment, and/or day treatment programs for which an operating certificate has been issued and which are not designated as *Level I* comprehensive outpatient programs pursuant to Part 592 of this Title may qualify to become *Level II* comprehensive outpatient programs under such Part, and shall comply with the applicable provisions of such Part. [, may be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.]

2. Section 592.4 of Title 14 NYCRR is amended to read as follows:

§ 592.4 Definitions

(a) *Level I* Comprehensive Outpatient Program means a provider of services which has been licensed to operate an outpatient mental health program in accordance with Part 587 of Title 14 and has been annually designated by a local governmental unit to be eligible to receive supple-

mental medical assistance reimbursement for a specific program or specific programs under its auspice which agrees to provide the services required of a *Level I* Comprehensive Outpatient Program as set forth in this Part.

(b) *Level II* Comprehensive Outpatient Program means a provider of services, other than a *Level I* Comprehensive Outpatient Program, which has been licensed to operate a mental health clinic, day treatment or continuing day treatment program in accordance with Part 587 of this Title, which is not also licensed under Article 28 of the Public Health Law, and which agrees to provide the services required of a *Level II* Comprehensive Outpatient Program as set forth in this Part.

(c) Grant means the funds received by the provider pursuant to section 41.18, 41.23 or 41.47 of the mental hygiene law including State aid and any mandatory local contribution provided by a local government or a voluntary agency.

[c] (d) Provider, for the purpose of this Part, means the specific location of the licensed mental health outpatient program which received the mental health grant utilized in the initial calculation of the supplemental rate under the medical assistance program.

[d] (e) Eligible deficit means those funds received by the provider as a grant which are used as the basis for the supplemental Medicaid rate calculation in subdivision 592.8(c). The original grants may have been adjusted in accordance with this Part, where necessary.

[e] (f) Comprehensive outpatient program allocation means the maximum amount of comprehensive outpatient program reimbursement that a provider is allowed to retain in each local fiscal year.

3. The heading, and subdivision (a), of Section 592.5 of Title 14 NYCRR are amended to read as follows:

§ 592.5 Designation as a *Level I* comprehensive outpatient program.

(a) A *Level I* comprehensive outpatient program shall be designated by the local government unit in accordance with the criteria provided in section 592.7 of this Part. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) be determined by the commissioner or his or her designee to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(2) have received a current operating certificate that is of at least a total of six months in duration; and

(3) be a current enrollee in good standing in the medical assistance program.

4. Subdivision (a) of Section 592.6 of Title 14 NYCRR is amended to read as follows:

(a) The local government unit shall designate and enter into written agreements with appropriate providers of services as *Level I* comprehensive outpatient programs. Such agreements shall, at a minimum reflect the requirements established in sections 592.6 and 592.7 of this Part;

5. The heading, subdivision (a), and paragraph (a) (2) of Section 592.7 of Title 14 NYCRR are amended to read as follows:

§ 592.7 *Level I* comprehensive outpatient program – criteria for designation and responsibilities

(a) In order to be designated as a *Level I* comprehensive outpatient program, a provider of services:

(2) shall have been designated as a *Level I* comprehensive outpatient program pursuant to subdivision 592.8(j) of this Part and shall:

6. Subdivisions (a), (c) (d), (h), (i), and (k) of Section 592.8 of Title 14 NYCRR are amended to read as follows:

(a) In addition to the medical assistance reimbursement rates available pursuant to Part[s 579 and] 588 of this Title, providers with at least one *Level I* comprehensive outpatient program are eligible to receive supplemental medical assistance reimbursement in accordance with the rules of this Part.

(c) The supplemental rate, for providers with at least one *Level I* comprehensive outpatient program, shall be calculated as follows:

(1) For outpatient mental health programs which are designated *Level I* providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

(2) The sum of grants received by the provider, as recalculated under paragraph (1) of this subdivision, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) The combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by

using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

(ii) Rates calculated pursuant to subparagraph (i) of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within one year after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph (3) of this subdivision.

(3) The supplemental rate for a provider operating [an] a licensed outpatient mental health program shall be the lesser of the rate calculated in paragraph (2) of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget, provided, however, the supplemental rate of an Article 31 provider which operates a comprehensive outpatient program shall not be less than an amount that, when added to the base fee, yields an amount that is less than the total of the corresponding fee and supplemental reimbursement for any provider which is not eligible to be designated as comprehensive outpatient program].

(d) In order to recoup supplemental payments for those visits in excess of 110% of the number of visits used to calculate the supplemental rate for a *Level I* provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

(h) The Office of Mental Health may amend the supplemental rate and/or the comprehensive outpatient program allocation to account for program changes required by the Office of Mental Health, local governmental unit, or other administrative agency, or approved by the commissioner pursuant to Part 551 of this Title.

(1) When a *Level I* provider receives reimbursement under this part which is less than its comprehensive outpatient program allocation in a local fiscal year (beginning with Calendar Year 2001 for upstate or Long Island based providers or Local Fiscal Year 2000-01 for New York City based providers), the local governmental unit may, subject to the approval of the Commissioner of Mental Health and the Director of the Division of Budget, allocate any amount of the providers comprehensive outpatient program reimbursement which is less than its comprehensive outpatient program allocation to [one or more designated *Level I* comprehensive outpatient programs within the same county beginning in the following fiscal year. In making such adjusted allocations, the local governmental unit shall consider the extent to which a provider receiving an additional allocation is in compliance with the program requirements set forth in Section 592.7 of this Part. This adjusted allocation process shall be accomplished through the revision of each affected providers comprehensive outpatient program allocations for the previous fiscal year. In no case shall such adjusted allocation be less than the amount of comprehensive outpatient program reimbursement received by a provider consistent with its applicable comprehensive outpatient program allocation received in either the 2000 local fiscal year or the local fiscal year before the year in which such reimbursement is received, whichever amount is less.

(2) When a provider closes down one or more program location, but continues to operate the other locations of the designated program, the supplemental revenue to the designated program shall be reduced proportionately by the number of Medicaid visits associated with the closed location(s). The State share of the reduced Medicaid supplemental revenue may be allocated to the county in the form of additional local assistance grants, or the visits previously reimbursed to the closed program location(s) may be added to the visits of one or more other designated outpatient programs of the same outpatient category in the same county.

(i) When a designated *Level I* program has ceased or will cease to provide services or the local governmental unit has not designated an

eligible or previously designated *Level I* program and discontinued all grants to that program, visits reimbursed under the medical assistance program to that program may be added to the visits of one or more other outpatient programs of the same outpatient category in the same county to be included in the supplemental rate adjustments pursuant to subdivisions (e) - (g) of this section subject to the following:

(1) the local governmental unit must recommend such consideration to the commissioner prior to June 1, 1991 for the initial year and the commencement of the local fiscal year in all succeeding years;

(2) the recommendation must specify the volume of visits to be allowed to each alternative provider;

(3) each alternative provider must be licensed in the same program category as the eligible provider;

(4) each alternative provider must be eligible to be designated prior to the local government unit's recommendation under this subdivision;

(5) the local governmental unit recommendation may be less than, but may not exceed, the volume of visits reimbursed, in the base year under the medical assistance program, to the provider not designated as a *Level I* comprehensive outpatient program;

(6) the allowance of additional visit volume approved by the commissioner under this subdivision may be less than the volume recommended by the local governmental unit where the calculated supplemental rate of payment for the alternative provider is greater than that for the provider not designated. In no instance will the supplemental revenue to all designated providers in the county exceed the estimated supplemental revenue to all eligible providers in the county; and

(7) if a program ceases to provide services in all program locations it shall not be eligible for designation as a *Level I* comprehensive outpatient program or for any additional local assistance grants for the period of at least one local fiscal year following the year during which the program ceased to provide services.

(j) When a [designated] *comprehensive outpatient* program has ceased or will cease to provide services and the local governmental unit determines that no existing, [designated] *comprehensive outpatient* program of the same outpatient category within the same county is capable of providing services to the clients of the program ceasing operation, the local governmental unit, with the approval of the commissioner, may designate any not-for-profit or municipally operated agency operating an outpatient mental health program of the same category as a comprehensive outpatient program. When no agency operating an outpatient program in the same category is available, the local governmental unit may, with the approval of the commissioner, designate an agency already designated in another outpatient program category which has not previously been licensed in the category of the closing program. The designation of such program shall not be effective until the designated program commences operation within the designating county. Supplemental rates or supplemental rate adjustments for successor programs designated pursuant to this subdivision shall be calculated as follows:

(1) Supplemental rates shall be based upon the lesser of the successor program's budgeted eligible grant amount recommended by the local governmental unit and approved by the Office of Mental Health pursuant to Part 551 of this Title, or the supplemental revenue and Medicaid visit volume used to establish the supplemental rate for the closing provider for the year of closure.

(2) The rate established in paragraph (1) of this subdivision shall be approved on an interim basis until receipt of a consolidated fiscal report including one complete local fiscal year of operation as a comprehensive outpatient program, after which the Office of Mental Health shall recalculate the final supplemental rate or supplemental rate adjustments subject to the limitations in paragraph (1) of this subdivision.

(3) Such rates shall not be otherwise limited by the provisions of paragraphs (i)(3) and (4) of this section.

(k) Each general hospital, as defined by Article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to Section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989 shall be designated as a *Level I* comprehensive outpatient program for all outpatient programs licensed pursuant to Part[s] 585 and] 587 of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

7. Subdivisions (c) and (d) of Section 592.9 of Title 14 NYCRR are amended to read as follows:

(c) A program which the Commissioner determines has failed to substantially comply with the requirements of this section or any other requirements established by the local governmental unit shall be referred to the local governmental unit with a recommendation that it not be designated as a *Level I* comprehensive outpatient program for the subsequent local fiscal year.

(1) The local governmental unit may designate such provider of services as a *Level I* comprehensive outpatient program for the following local fiscal year, but shall notify the Commissioner of such designation and the reason(s) therefore.

(2) The Commissioner shall review such program prior to the end of the following local fiscal year. If the program is found to have continued to have failed to substantially comply with the requirements of this Part, or any other requirements established by the local governmental unit, the Commissioner shall instruct the local governmental unit that such provider of services shall not be designated as a *Level I* comprehensive outpatient provider for the next local fiscal year.

(3) A determination that a provider of services shall not be designated as a *Level I* comprehensive outpatient program does not affect the status of such provider of services as a licensed provider of outpatient.

(d) A provider of services that has been discontinued as a *Level I* comprehensive outpatient program pursuant to Paragraph (c)(2) of this section, may be designated by the local governmental unit as a *Level I* comprehensive outpatient program in the local fiscal year subsequent to the local fiscal year for which such designation was discontinued, providing that the local governmental unit shall provide assurances to the Commissioner that such program has taken such steps as are necessary to substantially comply with the requirements of this Part and all other requirements established by the local governmental unit.

8. A new Section 592.10 is added to Title 14 NYCRR to read as follows:

§ 592.10 *Level II Comprehensive Outpatient Program*

(a) *A clinic, continuing day treatment, and/or day treatment provider, other than a provider licensed under Article 28 of the Public Health Law, that has not been designated as a Level I Comprehensive Outpatient Program pursuant to this Section shall be eligible to be a Level II Comprehensive Outpatient Program, and shall be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to be a Level II Comprehensive Outpatient Program and receive supplemental medical assistance reimbursement, a program shall:*

(1) *agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;*

(2) *directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;*

(3) *be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;*

(4) *have received a current operating certificate that is of at least a total of six months duration; and*

(5) *be a current enrollee in good standing in the medical assistance program.*

(6) *In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.*

9. A new Section 592.11 is added to Title 14 NYCRR to read as follows:

§ 592.11 *Comparability of fees*

The sum of the base fee, as established in Section 588.13(a)(1) of this Part, and the supplement, calculated in accordance with Section 592.8 of this Part, received by a clinic treatment program that is not licensed under Article 28 of the Public Health Law and which has been designated as a Level I comprehensive outpatient program, shall not be less than the base fee and the supplement received by any Level II comprehensive outpatient provider in the region.

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 June 6, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regula-

tion, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: dodell@omh.state.ny.us

Consolidated Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364(3) and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2006 provides funding appropriations in support of programs not formerly designated as Comprehensive Outpatient Programs. (Section 1, State Agencies, Office of Mental Health, line 44, page 277.)

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law gives the Commissioner authority to set certain rates. Under Section 364(3) and 364-a of the Social Services Law, OMH is granted responsibility for standards of care for certain Medicaid funded programs under its jurisdiction.

3. Needs and Benefits: The intent and impact of this regulatory change is to simplify and make more equitable the Medicaid reimbursement which outpatient mental health providers receive. Every provider, and the clients they serve, will either be unaffected by or will benefit from these amendments.

Generally, outpatient Medicaid rates are separated into two components: a base fee and either a COPs supplement or a Non-COPs supplement. COPs providers generally receive a higher base rate than Non-COPs providers. Some providers received neither a COPs nor a Non-COPs component.

COPs providers are required to meet both higher standards than Non-COPs providers. They also must have received State deficit financing when the program was established in 1993. Many Non-COPs providers currently meet many of the standards applicable to COPs providers, but still cannot qualify for COPs reimbursement. These amendments attempt to mitigate this by combining all of the above providers into COPs, leveling up the base fees they receive, and allowing providers previously categorized as Non-COPs to bill for COPs-only visits on behalf of managed care recipients. Providers who were neither COPs nor Non-COPs will now be included as well.

In order to accomplish this, two levels, of COPs have been established by this rulemaking. The first level, Level I, contains the current nine special programmatic standards and deficit funding requirement of COPs. The second level, Level II, contains the four special programmatic standards for Non-COPs. Both tiers will receive the same base fees and operate under the same set of billing rules.

4. Costs: (a) Costs to private regulated parties: There will be no mandated unreimbursed costs to the regulated parties.

(b) Costs to state and local government: The annual state cost for the program is estimated to be \$2,122,500.00. These additional funds are included in an appropriation for the State share of Medicaid. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated by adding the \$2,000,000 available in the appropriation for leveling up to the \$122,500 available in the appropriation to address the non-COPs only adjustment, for a total of \$2,122,500.00.

5. Local Government Mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative would be inaction. As this initiative has been established and funded in statute, this alternative was rejected, since it is contrary to the intent of the legislation.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The authority to establish and fund this initiative deemed effective on April 1, 2006, consistent with the enacted budget.

Consolidated Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The establishment of this initiative, which equalizes Article 31 outpatient fees and non-COPS programs, is required by the enacted 2006-2007 state budget.

Consolidated Rural Area Flexibility Analysis

A Rural Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Recipients of services in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new statewide program.

Consolidated Job Impact Statement

The proposed amendments to 14 NYCRR will not adversely impact jobs or employment opportunities in New York, nor should these amendments impact existing employees of Comprehensive Outpatient Programs for adults (COPs), non-COPs programs, or other programs under the jurisdiction of OMH. The purpose of this rulemaking is to equalize funding for Article 31 outpatient fees and non-COPs programs, as required by the enacted 2006-2007 state budget.

**EMERGENCY
RULE MAKING**

Comprehensive Psychiatric Emergency Program (CPEP) Rates

I.D. No. OMH-13-07-00005-E

Filing No. 272

Filing date: March 13, 2007

Effective date: March 13, 2007

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

Action taken: Amendment of Part 591 of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: These changes must be made immediately in order to avoid a reduction in comprehensive psychiatric emergency program services which would otherwise take place.

Subject: Comprehensive Psychiatric Emergency Program (CPEP) rates.

Purpose: To increase the Medicaid reimbursement rates associated with CPEP programs.

Text of emergency rule: Pursuant to the authority granted the Commissioner in §§ 7.09(b) and 31.04(a) of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows:

Section 591.5 of Part 591 of 14 NYCRR is amended as follows:

§ 591.5 Reimbursement for comprehensive psychiatric emergency programs. Reimbursement for comprehensive psychiatric emergency programs under the medical assistance program shall be in accordance with the following fee schedule:

Brief emergency visit	\$[76.00]	80.18
Full emergency visit	[445.00]	470.82
Crisis outreach service visit	[445.00]	470.82
Interim crisis service visit	[445.00]	470.82

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 June 10, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regula-

tion, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: dodell@omh.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and Benefits: These amendments provide a cost of living adjustment (COLA) for the Office of Mental Health's Comprehensive Psychiatric Emergency Program (CPEP). Such COLA is required by Chapter 54 of the Laws of 2006, the enacted budget for State Fiscal Year 2006-07. The language authorizing the COLA for CPEP and certain other programs appears on pages 274-275 of Chapter 54 of the Laws of 2006. As required by the language of the enacted state budget, these rate increases have been approved by the Director of the Division of the Budget.

4. Costs: a) Costs of regulated parties: There are no costs to providers associated with these amendments.

b) Costs to State and Local government and the agency: Implementation of the amendment to the Comprehensive Psychiatric Emergency Program rate has been budgeted to cost New York State \$117,943 annually, and appropriations for the state share of medicaid are included on page 273, line 20, of Chapter 54 of the Laws of 2005. There are no costs to local government.

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected as inconsistent with statutory requirements of the enacted budget.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after October 1, 2006.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant economic impact on small businesses, or local governments. The rate increase associated with this rule is required by state statute, the enacted state budget for state fiscal year 2006-2007.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule impacts Comprehensive Psychiatric Emergency Program (CPEP) rates. The impact of the rate change will be to increase the medicaid reimbursement rates associated with CPEP programs in rural and non-rural areas. This will support the continued provision of these vital programs which serve children, adolescents and adults.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves adjustments to financing mechanisms for existing outpatient treatment programs and will not have a substantial adverse impact on jobs and employment activities.

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waiver of Road and Written Tests

I.D. No. MTV-13-07-00016-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 8.2 and 8.5 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 502(4)(a)(i), (b), (f), 508(1) and 508(4).

Subject: Waiver of road and written tests.

Purpose: To provide for the waiver of the road and written test if the applicant for an original license makes application for license within one year from the date he or she was last validly licensed in New York State.

Text of proposed rule: Subdivision (b) of section 8.2 is amended to read as follows:

(b) if the applicant is applying for an original license after revocation of a prior New York license, provided that application is made within [one year] *two years* from the date subject was last validly licensed in this State.

Subdivision (c) of section 8.5 is amended to read as follows:

(c) if the applicant is applying for an original license after revocation of a prior New York license, provided that application is made within [one year] *two years* from the date subject was last validly licensed in this State.

Text of proposed rule and any required statements and analyses may be obtained from: Michele L. Welch, Counsel's Office, Department of Motor Vehicles, 6 Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, Supervising Attorney, Department of Motor Vehicles, 6 Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: itras@dmv.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 502(4)(b) provides that the Commissioner may waive road test requirements for certain classes of applicants. VTL section 502(4)(f) provides that the Commissioner shall promulgate rules and regulations as are necessary to carry out the provisions of VTL section 502, Requirements for Licensing. VTL section 508(4) provides that the Commissioner may promulgate regulations with respect to the administration of the provisions Article 19, Licensing of Drivers. Thus, VTL sections 502(4)(f) and 508(4) give the Commissioner broad authority to promulgate regulations for the efficient and effective administration of procedures regarding the licensing of drivers. VTL section 502(4)(a)(i) provides that an applicant for a license shall be required to take and pass a test, or submit evidence of passage of a test, relating to traffic and the rules of the road, i.e., the written test. According to the Department's procedures, if a licensee has been revoked for less than two years from the date he or she was last validly licensed in this State, evidence of previously valid licensure is sufficient "evidence of passage of the written test," permitting such test to be waived. VTL § 508(1) provides that the Commissioner may prescribe internal procedures with respect to the issuance of licenses.

2. Legislative objectives: Article 19 of the Vehicle and Traffic Law sets forth the requirements for driver's license applicants, including road and written test requirements. The purpose of these requirements is to insure that motorists are qualified to operate on our State's highways. The Legislature, however, has recognized that in certain situations it is appropriate to waive the road and written tests, where such waiver would provide for administrative efficiencies but would not diminish highway safety. The road and written test waiver requirements established in Part 8 accord with the Legislature's goals of insuring safe highways with strict licensing requirements, while giving the Commissioner discretion to waive certain requirements for experienced drivers who have already passed the road and written tests. This proposal, which would waive the road and written

tests for applicants who have been revoked for less than two years, is consistent with Vehicle and Traffic Law section 502(6)(b) which provides that a license may be renewed if the application for such renewal is filed within two years from the date of expiration of the prior license. Thus, the Legislature has recognized that a licensee who has not held a license for two years may have such license restored without taking the road and written tests.

3. Needs and benefits: This proposal is necessary to increase efficiencies in Department of Motor Vehicles' offices while maintaining the Department's commitment to highway safety. Currently, if a driver's license is revoked, upon application for relicensure, the Department waives the road and written tests if such application is submitted within one year from the date the licensee was last validly licensed. There is no evidence that the waiver of these tests has in any way diminished highway safety. We now propose to waive the road and written tests if such application is submitted within two years from the date the licensee was last validly licensed. This amendment will align Part 8 with Vehicle and Traffic Law section 502(6)(b) which provides that a license may be renewed if the application for such renewal is filed within two years from the date of expiration of the prior license. Again, there is no evidence that renewing a license that has expired less than two years without requiring additional tests in any way diminishes highway safety.

This proposal will benefit the Department by reducing the number of road and written tests our already overburdened staff must give. It currently takes about 15 minutes to conduct a road test and from 10 to 30 minutes to complete a written test. It is estimated that adoption of this proposed amendment would eliminate approximately 2,800 road and written tests annually. This would free up Motor Vehicle License Examiners to road test first time license applicants who often must wait weeks to take the road test. Currently, a license applicant must wait approximately four weeks for a road test, with even longer time periods in the Downstate region of the State. In addition, the Department must employ 40 seasonal Motor Vehicle License Examiners during the summer to meet the road test needs. This proposal will reduce the road test lag time and the need for MVLEs.

The proposal will also benefit applicants for re-licensure who will not have to take these tests because they have already demonstrated their ability to pass such tests. It is critical to note that an application for re-licensure is only approved if it passes the strict requirements set forth in 15 NYCRR Part 136. This proposal does not lessen the weight afforded a Part 136 assessment, which examines a driver's entire driving history to assess whether he or she poses a highway safety risk. The assessment takes account of the number of alcohol violations and other serious traffic offenses, including operation with a suspended or revoked license.

4. Costs: a. Cost to regulated parties and customers: This proposal will have no impact on any regulated parties. There will be a \$10.00 cost savings to DMV customers whose road and written tests are waived.

b. Costs to the agency and local governments: There is no cost to local governments.

Adoption of this regulation will result in the elimination of about 2,800 road and written tests annually. This will save valuable staff resources and allow such staff to attend to the needs of other DMV customers.

5. Local government mandates: There are no local government mandates.

6. Paperwork: There are no additional paperwork requirements associated with this proposal.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: No significant alternatives were considered. A no action alternative was not considered.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The Department would begin compliance immediately.

Regulatory Flexibility Analysis

A RFA is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A JIS is not submitted because this rule will have no adverse impact on job creation or job development in New York State.

Public Service Commission

NOTICE OF ADOPTION

Submetering of Electricity by Herbert E. Hirschfeld, P.E. on behalf of Oceangate Associates, LP

I.D. No. PSC-33-06-00025-A

Filing date: March 8, 2007

Effective date: March 8, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-0847 approving the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Oceangate Associates, LP to submeter electricity at 2730 W. 33rd St., Brooklyn, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Herbert E. Hirschfeld, P.E. on behalf of Oceangate Associates, LP to submeter electricity at 2730 W. 33rd St., Brooklyn, NY.

Substance of final rule: The Commission approved a request by Herbert E. Hirschfeld, P.E., on behalf of Oceangate Associates, LP to submeter electricity at 2730 West 33rd Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(06-E-0847SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Lenox Condominium, LLC

I.D. No. PSC-45-06-00008-A

Filing date: March 8, 2007

Effective date: March 8, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1224 approving the petition filed by The Lenox Condominium, LLC to submeter electricity at 380 Lenox Ave., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of The Lenox Condominium, LLC to submeter electricity at 380 Lenox Ave., New York, NY.

Substance of final rule: The Commission approved a request by The Lenox Condominium, LLC to submeter electricity at 380 Lenox Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(06-E-1224SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Stellar Management on behalf of Stellar 341, LLC

I.D. No. PSC-45-06-00012-A

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1234 approving the petition filed by Stellar Management, on behalf of Stellar 341, LLC, to submeter electricity at 341 10th St., Brooklyn, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Stellar Management, on behalf of Stellar 341, LLC, to submeter electricity at 341 10th St., Brooklyn, NY.

Substance of final rule: The Commission approved a request by Stellar Management, on behalf of Stellar 341, LLC, to submeter electricity at 341 10th Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(06-E-1234SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Stellar Management on behalf of Boulevard Story, LLC

I.D. No. PSC-45-06-00013-A

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1235 approving the petition filed by Stellar Management, on behalf of Boulevard Story, LLC to submeter electricity at 2001 and 2045 Story Ave., Bronx, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Stellar Management, on behalf of Boulevard Story, LLC to submeter electricity at 2001 and 2045 Story Ave., Bronx, NY.

Substance of final rule: The Commission approved a request by Stellar Management, on behalf of Boulevard Story, LLC to submeter electricity at 2001 and 2045 Story Avenue, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(06-E-1235SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Stellar Management on behalf of WB Stellar IP Owner, LLC

I.D. No. PSC-45-06-00014-A

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1236 approving the petition filed by Stellar Management, on behalf of WB Stellar IP Owner, LLC, to submeter electricity at 310 Greenwich St., 40 Harrison St. and 80 North Moore St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Stellar Management, on behalf of WB Stellar IP Owner, LLC, to submeter electricity at 310 Greenwich St., 40 Harrison St. and 80 North Moore St., New York, NY.

Substance of final rule: The Commission approved a request by Stellar Management, on behalf of WB Stellar IP Owner, LLC, to submeter electricity at 310 Greenwich Street, 40 Harrison Street and 80 North Moore Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(06-E-1236SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Stellar Management on behalf of Town House West, LLC

I.D. No. PSC-45-06-00015-A

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1237 approving the petition filed by Stellar Management, on behalf of Town House West, LLC, to submeter electricity at 5 W. 91st St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Stellar Management, on behalf of Town House West, LLC, to submeter electricity at 5 W. 91st St., New York, NY.

Substance of final rule: The Commission approved a request by Stellar Management, on behalf of Town House West, LLC, to submeter electricity at 5 West 91st Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(06-E-1237SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Stellar Management on behalf of Stevenson Towers, LLC

I.D. No. PSC-45-06-00016-A

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1238 approving the petition filed by Stellar Management, on behalf of Stevenson Towers, LLC, to submeter electricity at 831 Bartholdi St., Bronx, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Stellar Management, on behalf of Stevenson Towers, LLC, to submeter electricity at 831 Bartholdi St., Bronx, NY.

Substance of final rule: The Commission approved a request by Stellar Management, on behalf of Stevenson Towers, LLC, to submeter electricity at 831 Bartholdi Street, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(06-E-1238SA1)

NOTICE OF ADOPTION

Submetering of Electricity by American Metering and Planning Services, Inc.

I.D. No. PSC-47-06-00015-A

Filing date: March 8, 2007

Effective date: March 8, 2007

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

Action taken: The commission, on Feb. 27, 2007, adopted an order in Case 06-E-1315 approving the petition filed by American Metering & Planning Services, Inc. to submeter electricity at 110 Livingston St., Brooklyn, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of American Metering & Planning Services, Inc. to submeter electricity at 110 Livingston St., Brooklyn, NY.

Substance of final rule: The Commission approved a request by American Metering & Planning Services, Inc. to submeter electricity at 110 Livingston Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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. (06-E-1315SA1)

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

Direct Current Charges by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-13-07-00007-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) to make various changes in the rates, charges, rules and regulations contained in its four schedules for electric service, P.S.C. No. 9 — Electricity, P.S.C. No. 2 — Retail Access, Power Authority of the State of New York No. 4 and economic development delivery service No. 2 to become effective May 18, 2007.

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

Subject: Direct current charges.

Purpose: To revise the direct current charges applicable to the few customers remaining on direct current service.

Substance of proposed rule: The Commission is considering Consolidated Edison Company of New York, Inc.'s (Con Edison's) request to revise the direct current (DC) service charges applicable to the few customers remaining on DC service. The filing is being made pursuant to the Commission's Order Adopting Three-Year Rate Plan issued and effective March 24, 2005 in Case 04-E-0572. The proposed filing revises Con Edison's four tariff schedules with regard to DC service charges as follows: 1) for those customers taking DC service under Service Classifications (S.C.) Nos. 1, 2 and 7 of P.S.C. No. 9 - Electricity and analogous retail access service classifications under P.S.C. No. 2 — Retail Access and non-demand billed customers served under Power Authority of the State of New York, No. 4 (PASNY No. 4), customer charges will be increased from \$49.00 to \$1,004.00; 2) for those customers taking DC service and are demand billed PASNY No. 4 and Economic Development Delivery Service No. 2 customers, or served under S.C. Nos. 4, 8 and 9 of P.S.C. No. 9 — Electricity and analogous retail access service classifications and customers taking Con Edison's standby service under S.C. No. 14-RA of P.S.C. No. 2-Retail Access, customer charges will be increased from \$7,599.00 to \$148,933.00; and 3) the DC distribution charge, which is applicable to all customers taking DC service, will increase from \$2.32 per kWh to \$45.43 per kWh. The proposed filing has an effective date of May 18, 2005. The Commission may approve, reject or modify, in whole or in part, Con Edison's request.

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.

(04-E-0572SA11)

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

Northeast Power Coordinating Council's Criteria and Regional Reliability Plan

I.D. No. PSC-13-07-00008-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, the portions of the criteria and of the regional reliability plan of the Northeast Power Coordinating Council (NPCC) that are more stringent than the national standards developed by the North American Electric Reliability Corporation (NERC) and proposed for enforceability by the Federal Energy Regulatory Commission (FERC).

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1) and (2)

Subject: Adoption by the PSC of the portions of NPCC's criteria and regional reliability plan that are more stringent than the NERC national standards, which have been proposed for enforceability by FERC.

Purpose: To consider adopting in whole or in part the portions of NPCC's criteria and regional reliability plan that are more stringent than the NERC national standards, which have been proposed for enforceability by FERC.

Substance of proposed rule: As a result of recent federal legislation, the Public Service Commission is considering whether to adopt in whole or in part the portions of the criteria and of the Regional Reliability Plan of the Northeast Power Coordinating Council (NPCC) that are more stringent than the national standards developed by the North American Electric Reliability Corporation (NERC), which have been proposed for enforceability by the Federal Energy Regulatory Commission (FERC), to augment the previously adopted reliability rules of the New York State Reliability Council. Subtitle A (Reliability Standards) of Title XII of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) added a new Section 215 to the Federal Power Act. Section 215(h)(3) provides that "the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards" approved by FERC under Section 215.

The Commission may accept, reject, or modify any proposals relating to these matters.

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.

(05-E-1180SA4)

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

Lightened Regulation by Sheldon Energy, LLC

I.D. No. PSC-13-07-00009-P

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

Proposed action: The Public Service Commission is considering whether to grant or deny (in whole or in part) a request by Sheldon Energy, LLC (Sheldon) for lightened regulation.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Sheldon's request for lightened regulation.

Purpose: To consider the request.

Substance of proposed rule: In a petition filed February 16, 2007 Sheldon Energy, LLC (Sheldon) seeks a Certificate of Public Convenience and Necessity to construct and operate a wind-power generating facility and related facilities in the Town of Sheldon, Wyoming County. In connection with this request for licensing, Sheldon requests lightened regulation as an electric corporation.

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.

(07-E-0213SA1)

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

Lightened Regulation by Noble Chateaugay Windpark, LLC

I.D. No. PSC-13-07-00010-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 grant or deny (in whole or in part) a request by Noble Chateaugay Windpark, LLC (Noble) for lightened regulation.

Statutory authority: Public Service Law, sections 4(1) 66(1), 69, 70 and 110

Subject: Noble's request for lightened regulation.

Purpose: To consider Noble's request for lightened regulation.

Substance of proposed rule: In a petition filed March 1, 2007 Noble Chateaugay Windpark, LLC (Noble) seeks a Certificate of Public Convenience and Necessity to construct and operate a wind-power generating facility and related facilities in the Town of Chateaugay, Franklin County. In connection with this request for licensing, Noble requests lightened regulation as an electric corporation.

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.

(07-E-0257SA1)

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

Lightened Regulation by Noble Wethersfield Windpark, LLC

I.D. No. PSC-13-07-00011-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 grant or deny (in whole or in part) a request by Noble Wethersfield Windpark, LLC (Noble) for lightened regulation.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Noble's request for lightened regulation.

Purpose: To consider Noble's request for lightened regulation.

Substance of proposed rule: In a petition filed March 1, 2007 Noble Wethersfield Windpark, LLC (Noble) seeks a Certificate of Public Convenience and Necessity to construct and operate a wind-power generating facility and related facilities in the Towns of Wethersfield and Eagle,

Wyoming County. In connection with this request for licensing, Noble requests lightened regulation as an electric corporation.

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.

(07-E-0258SA1)

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

Submetering of Electricity by Herbert E. Hirschfeld, P.E. on behalf of SP 20 Park, LLC

I.D. No. PSC-13-07-00012-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 grant, deny or modify, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of SP 20 Park, LLC, to submeter electricity at 20 Park Ave., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Herbert E. Hirschfeld, P.E., on behalf of SP 20 Park, LLC, to submeter electricity at 20 Park Ave., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of SP 20 Park, LLC, to submeter electricity at 20 Park Avenue, New York, New York.

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.

(07-E-0264SA1)

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

Submetering of Electricity by 257/117 Realty, LLC

I.D. No. PSC-13-07-00013-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 grant, deny or modify, in whole or part, the petition filed by 257/117 Realty, LLC, to submeter electricity at 257 W. 117th St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1)-(4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 257/117 Realty, LLC, to submeter electricity at 257 W. 117th St., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 257/117 Realty, LLC, to submeter electricity at 257 West 117th Street, New York, New York.

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.

(07-E-0273SA1)

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

Transfer of Ownership of a Gas Fired Electric Generation Facility by Rensselaer Cogeneration LLC, et al.

I.D. No. PSC-13-07-00014-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 a petition from Rensselaer Cogeneration LLC, Bison Power LLC, and Rensselaer Holdings LLC requesting approval of the transfer of ownership interests in an approximately 79 MW natural gas fired electric generation facility located in Rensselaer, NY and that the facility be lightly regulated.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b, 119-c

Subject: Transfer of ownership and light regulation of an approximately 79 MW gas fired electric generation facility.

Purpose: To approve transfer of ownership and light regulation of an approximately 79 MW gas fired electric generation facility.

Substance of proposed rule: The Public Service Commission is considering a petition from Rensselaer Cogeneration LLC, Bison Power LLC, and Rensselaer Holdings LLC requesting approval of the transfer of ownership interests in an approximately 79 MW natural gas fired electric generation facility located in Rensselaer, New York and that the facility be lightly regulated. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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.

(07-E-0300SA1)

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

Gas Efficiency Program by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-13-07-00015-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 require the filing and implementation of a gas efficiency program for Consolidated Edison Company of New York, Inc. (Con Edison) for the 2007-08 heating season and, if so, whether to adopt, modify or reject the recommendations of the New York State Energy Research and Development Authority (NYSERDA) or those contained in a March 9, 2006 study commissioned by NYSERDA regarding such a gas efficiency program.

Statutory authority: Public Service Law, sections 2, 4, 5, 65, 66 and 66-c

Subject: Gas efficiency program for Con Edison.

Purpose: To require filing and implementation of gas efficiency plan.

Substance of proposed rule: The Public Service Commission is considering whether to require the filing and implementation of a gas efficiency program for Consolidated Edison Company of New York, Inc. for the 2007-08 heating season and, if so, whether to adopt, modify or reject the recommendations of the New York State Energy Research and Development Authority (NYSERDA) or those contained in a March 9, 2006 study commissioned by NYSERDA regarding such a gas efficiency program.

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.

(03-G-1671SA7)

Racing and Wagering Board

**EMERGENCY
RULE MAKING**

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

I.D. No. RWB-13-07-00001-E

Filing No. 263

Filing date: March 7, 2007

Effective date: March 7, 2007

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

Action taken: Addition of sections 4043.8, 4043.9, 4043.10, 4038.19(g), 4120.13, 4120.14, 4120.15 and 4109.7(f) to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902

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

Specific reasons underlying the finding of necessity: In January 2005, Federal prosecutors obtained indictments against 17 people related to the operation of an illegal gambling operation, including charges that a trainer had administered an alkalinizing agent to a horse in order to affect the

outcome of a race, and subsequently the wagering on that race. In March 2006, trainer Gregory Martin admitted in Federal court that he administered a "milkshake" to a horse before the opening race at Aqueduct Raceway on December 18, 2003. The horse went on to win by 10 lengths. According to an article in *The Thoroughbred Times*, Martin told the court that after he administered the milkshake to the horse, he contacted an associate with the understanding that such information would be passed along to other bettors in an alleged gambling ring. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

Subject: Post-race blood gas testing procedures for thoroughbred and harness race horses.

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

Substance of emergency rule: 4043.8(a) Authorizes pre-race and post-race methods of testing thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO₂), establishes the threshold for excess TCO₂ at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4043.8(b) Establishes procedures in cases where excess TCO₂ levels are found and an owner or trainer challenges the findings to assert a claim of naturally occurring excess TCO₂ levels in a horse.

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

4043.8(d) Establishes minimum penalties for excess TCO₂ violations in a thoroughbred racehorse ranging from a minimum 60-day license suspension and \$1,000 fine for a first offense to a minimum one-year license suspension with a \$5,000 fine with a possible additional suspension term prescribed by the Board. Authorizes an additional two-year suspension for race-day medication violation. Includes provision for purse redistribution in case of a positive excess TCO₂ test.

4043.8(e) Directs that horses that are found to have excess TCO₂ levels will be disqualified, any monies won will be forfeited/redistributed and pre-race detention shall be imposed.

4043.9(a) Establishes pre-race detention procedures and requirements where a racehorse has been tested and found to have excess TCO₂ levels that are not physiologically normal, including a minimum six-month period of detention.

4043.9(b) Establishes pre-race detention where a trainer has had more than one racehorse under his or her care have excess TCO₂ levels in a 12-month period, including a minimum eight-month period of detention for all horses under the trainer's care.

4043.10 Establishes punishment for failure to cooperate in the thoroughbred TCO₂ testing program.

4038.19(g) Allows claimants in a claiming race to void a claim on a thoroughbred horse that is subsequently found to have excess TCO₂ levels that are not physiologically normal.

4120.13(a) Authorizes pre-race and post-race testing of harness racehorses to detect excess levels of total carbon dioxide (TCO₂), establishes the threshold for excess TCO₂ at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4120.13(b) Establishes procedures in cases where excess TCO₂ levels are found and an owner or trainer challenges the findings to assert a claim of naturally occurring excess TCO₂ levels in a horse.

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

4120.13(d) Establishes minimum penalties for excess TCO₂ violations in a harness racehorse ranging from a minimum 60-day license suspension and \$1,000 fine for a first offense to a minimum one-year license suspension with a \$5,000 fine with a possible additional suspension term prescribed by the Board. Authorizes an additional two-year suspension for race-day medication violations. Includes provision for purse redistribution in case of a positive excess TCO₂ test.

4120.13(e) Directs that horses that are found to have excess TCO₂ levels will be disqualified, any monies won will be forfeited/redistributed and pre-race detention shall be imposed.

4120.14(a) Establishes pre-race detention procedures and requirements where a racehorse has been tested and found to have excess TCO₂ levels that are not physiologically normal, including a minimum six-month period of detention.

4120.14(b) Establishes pre-race detention where a trainer has had more than one racehorse under his or her care have excess TCO₂ levels in a 12-month period, including a minimum eight-month period of detention for all horses under the trainer's care.

4120.15 Establishes punishment for failure to cooperate in the Board's TCO₂ testing.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Gail Ponti, Secretary to the Board, Racing and Wagering Board, One Broadway Ctr., Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

Regulatory Impact Statement

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902.

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

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

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

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

Horses that have received an alkalizing agent will exhibit elevated levels of TCO₂ over and above normal levels. This rulemaking will establish the ion selective electrode method with a clinical auto analyzer as a standard means of detecting elevated TCO₂ in horses. The rule will establish a TCO₂ threshold of 37 millimoles per liter for horses who have not been administered furosemide (Lasix) prior to a race, and 39 millimoles for horses that have been administered furosemide prior to a race.

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

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

(d) Costs.

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

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

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

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

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

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

(h) Alternatives. The Board did not consider any other significant alternatives because no other significant alternates are available. The rulemaking is based upon an established TCO2 testing program already adopted and in use by the New Jersey Racing Commission. The testing procedure included in this rulemaking is the only TCO2 test that has been reviewed and declared reliable by a state court, in this case, the New Jersey Supreme Court recognized the reliability of the Beckman test generally and as applied by the New Jersey Racing Commission (Campbell v. New Jersey Racing Commission, New Jersey Supreme Court, 169 N.J. 579, 781 A.2d 1035, October 11, 2001.) The TCO2 threshold levels in this rule are supported by findings of the Canadian Pari-Mutual Agency, which are published "Effects of Sampling and Analysis Times and Furosemide Administration on TCO2 Concentrations in Standardbred and Thoroughbred Horses." This paper was presented at the 13th International Conference of Racing Analysts and Veterinarians in Cambridge, U.K., in 2000 and published in the Conference Proceedings. The data in this study supports the thresholds of 37 mmol/L (non-furosemide) and 39 mmol/L (furosemide) which has been adopted in both Canada and Australia.

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

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

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment would expand the existing medication testing rules to include a test for alkalinizing agents in thoroughbred and harness race horses. This testing will utilize the current framework for post-race testing. The pre-race testing component will merely require that a veterinarian take a few minutes to obtain a blood sample from a horse, which is a routine procedure and imposes no new burden upon regulated parties. These amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, because the Board rules has existing rules for post-race testing for the presence of performance altering drugs and other substances.

Department of Taxation and Finance

ERRATUM

A Notice of Proposed Rule Making, I.D. No. TAF-10-07-00001-P pertaining to Fuel Use Tax on Motor Fuel and Diesel Motor Fuel, published in the March 7, 2007 issue of the *State Register* contained incorrect text. The correct text follows:

Pursuant to the authority contained in subdivision First of section 171, subdivision (c) of section 301-h, subdivision 7 of section 509, subdivision (b) of section 523, and subdivision (a) of section 528 of the Tax Law, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner of Taxation and Finance, hereby proposes to make and adopt the following amendment to the Fuel Use Tax Regulations, as published in Article 3 of Subchapter C of Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

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

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xlv) January - March 2007					
14.0	22.0	38.6	14.0	22.0	36.85
(xlvi) April - June 2007					
14.0	22.0	38.6	14.0	22.0	36.85

The Department of State apologizes for any confusion this may have caused.