

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.

Office of Children and Family Services

EMERGENCY RULE MAKING

National Criminal History Record Checks through the FBI

I.D. No. CFS-27-07-00003-E

Filing No. 1013

Filing date: Sept. 24, 2007

Effective date: Sept. 24, 2007

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

Action taken: Amendment of Parts 421 and 443 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 378-a(2); and L. 2006, ch. 668, sec. 3

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

Specific reasons underlying the finding of necessity: To adoption of these regulations on an emergency basis is necessary for the preservation of the health, safety and welfare of foster children needing foster and adoptive placement. New Federal and State statutes require a national criminal history record check through the Federal Bureau of Investigation (FBI) of persons applying for certification or approval as foster or adoptive parents and new State statute requires a national criminal history record

check through the FBI of other persons over the age of 18 who reside in the home of such applicants.

The current criminal history record check authorized by section 378-a(2) of the Social Services Law (SSL) and Office of Children and Family Services (OCFS) regulations 18 NYCRR Parts 421 and 443 only authorize a check of the data base maintained by the Division of Criminal Justice Services (DCJS). The DCJS data base generally does not reflect crimes committed outside of the State of New York. Therefore, authorized agencies to which persons apply for certification or approval as a foster or adoptive parent would not be aware of whether an applicant or another person over the age of 18 residing in the home of an applicant has a criminal history in another state which could present a health and safety issue for foster children placed in the applicant's home. The regulations enable authorized agencies to conduct a national criminal history record check on such persons, thereby enhancing the safety of children placed in such foster or adoptive homes.

Subject: National criminal history record checks through the FBI of prospective foster or adoptive parents and persons over the age of 18 residing in the homes of such individuals.

Purpose: To require a national criminal history record check through the FBI of all persons applying for certification or approval as foster or adoptive parents and all other persons over the age of 18 who reside in the homes of such applicants. The amendment to section 378-a(2) of the SSL became effective on Jan. 11, 2007. Section 3 of chapter 3 of the Laws of 2006 grants OCFS emergency rule making authority to implement the law by its effective date. The regulations implement the requirements of chapter 668 of the Laws of 2006 that amended section 378-a(2) of the SSL.

The regulations also implement the requirements of the Federal Adam Walsh Child Protection Act of 2006 (P.L. 109-248) that require states to conduct a national criminal history record check on all persons applying for certification or approval as foster or adoptive parents, irrespective of whether Federal Title IV-E funding is being sought for the placement of a foster child in the home of such a person. Compliance with the Federal act is required for New York to have a compliant Title IV-E State plan and to satisfy Federal safety requirements for individual foster care placements.

Substance of emergency rule: Section 421.11 (First Contact With Prospective Adoptive Parents)

The regulations require authorized agencies that operate an adoption program to inform a person applying to be an approved adoptive parent of the requirement that the applicant and each person over the age of 18 who resides in the home of the applicant be fingerprinted for the purpose of conducting a national criminal history record check through the Federal Bureau of Investigation (FBI).

In addition, the regulations require that a voluntary authorized agency must notify a person applying for approval as an adoptive parent that the applicant and each person over the age of 18 who resides in the home of the applicant will be asked to sign a consent for the release to the voluntary authorized agency of crime specific information provided to the Office of Children and Family Services (OCFS) by the FBI. The voluntary authorized agency must also advise the applicant that the refusal to sign the consent is a basis, in and of itself, to deny the person's application.

Section 421.15 (Adoption Study Process)

The regulations require authorized agencies that operate an adoption program to inform the applicant at the initial appointment or meeting with the authorized agency that a national criminal history record check through the FBI must be performed before the conclusion of the applicant's home study.

Section 421.19 (Foster Parents)

The regulations require voluntary authorized agencies to inform a person who is currently a certified or approved foster parent and who applies to such agency for approval as an adoptive parent that the applicant and each person over the age of 18 who resides in the home of the applicant will be asked to sign a consent for the release of crime specific information received by OCFS from the FBI and that the refusal to provide such a consent is a basis, in and of itself, for denial of the person's application.

The regulations require authorized agencies that operate an adoption program to perform a national criminal history record check through the FBI of a foster parent seeking approval as an adoptive parent and each person over the age of 18 who resides in the home of such person.

Section 421.27 (Criminal History Record Review)

The regulations require that authorized agencies perform a national criminal history record check through the FBI for each person seeking approval as an adoptive parent and each person over the age of 18 who resides in the home of the applicant. The regulations set forth the process for collecting and processing fingerprints for the national criminal history record check and the standards for the review and dissemination to authorized agencies of criminal history record information received by OCFS from the FBI.

The regulations provide that a voluntary authorized agency must deny an application when the applicant or other person over the age of 18 who resides in the home of the applicant has a criminal conviction or open charge reported to OCFS by the FBI for a crime committed outside of New York State and such person thereafter refuses to consent to disclosure of the specific crime or crimes when requested to do so by the voluntary authorized agency.

In addition, the regulations provide that if an application for approval is denied, the authorized agency must include within its notice of denial a description of the record review process available through the FBI.

Section 443.2 (Authorized Agency Operating Requirements)

The regulations require authorized agencies that operate a foster boarding home program to inform a person applying for certification or approval as a foster parent of the requirement that the applicant and each person over the age of 18 who resides in the home of the applicant must be fingerprinted for the purpose of conducting a national criminal history record check through the FBI.

The regulations require that each applicant for certification or approval as a foster parent and each person over the age of 18 who resides in the home of the applicant must submit completed fingerprint cards for a national criminal history check performed by the FBI.

In addition, the regulations provide that if an application for certification or approval is denied, the authorized agency must include within its notice of denial a description of the record review process available through the FBI.

The regulations clarify that the records maintained by the authorized agency must include such criminal history responses from OCFS to reflect that both FBI and DCJS checks have been completed.

Section 443.7 (Agency Procedures for Certification or Approval of Potential Emergency Foster Homes and Emergency Relative Foster Homes)

The regulations provide that when a foster child is placed in a foster home that is certified or approved on an emergency basis that the authorized agency placing the child must secure fingerprints from the foster parent and each person over the age of 18 who resides in the home of the foster parent for the purpose of conducting a national criminal history record check through the FBI.

Section 443.8 (Criminal History Record Review)

The regulations require that authorized agencies perform a national criminal history record check through the FBI for each person applying for certification or approval as a foster parent and each person over the age of 18 who resides in the home of the applicant. The regulations set forth the process for collecting and processing fingerprints for the national criminal history record check and the standards for the review and dissemination to authorized agencies of criminal record information received by OCFS from the FBI.

The regulations require that when a person applies for certification or approval to a voluntary authorized agency that the voluntary authorized agency must notify the applicant that the applicant and each person over the age of 18 who resides in the home of the applicant will be asked to sign a consent for the release of crime specific information provided to OCFS by the FBI and that the voluntary authorized agency must advise the applicant that the refusal to sign the consent is a basis, in and of itself, to deny the person's application.

The regulations provide that a voluntary authorized agency must deny an application when the applicant or other person over the age of 18 who resides in the home of the applicant has a criminal conviction or open charge reported to OCFS by the FBI for a crime committed outside of New York State and such person thereafter refuses to consent to disclosure of the specific crime or crimes when requested to consent by the authorized agency.

Section 443.10 (Annual Renewal of Certified and Approved Foster Homes)

The regulations require that an authorized agency that operates a foster boarding home program must, at the time of renewal of the certification or approval of a foster home, conduct a national criminal history record check through the FBI of any person over the age of 18 who currently resides in such foster home, other than the foster parent, who has not previously had a national criminal record check completed pursuant to 18 NYCRR Part 443.

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. CFS-27-07-00003-P, Issue of July 3, 2007. The emergency rule will expire November 22, 2007.

Text of emergency 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

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its duties pursuant to the provisions of the SSL.

Section 378-a(2) of the SSL requires criminal history record checks be made on foster and adoptive parent applicants and other persons over the age of 18 who reside with such applicants.

2. Legislative objectives:

The regulations implement the requirements of Chapter 668 of the Laws of 2006 that amended section 378-a(2) of the SSL to require a national criminal history record check through the Federal Bureau of Investigation (FBI) for all persons applying for certification or approval as foster or adoptive parents and all other persons over the age of 18 who reside in the home of the applicants.

The regulations also implement the requirements of the federal Adam Walsh Child Protection Act of 2006 (P. L. 109-248) that requires states to conduct a national criminal history record check on all persons applying for certification or approval as foster or adoptive parents, irrespective of whether or not the social services district seeks federal Title IV-E funding for the placement. Compliance with the federal act is required for the state to have a compliant Title IV-E State Plan and to satisfy federal safety requirements for individual foster care placements.

The requirements for a national criminal history record check set forth in the regulations are in addition to the existing provisions in section 378-a(2) of the SSL that require a New York State criminal history record check to be conducted through the New York State Division of Criminal Justice Services (DCJS). In addition, the applicant must provide a sworn statement attesting to any criminal convictions of any applicable family member in New York State or any other jurisdiction.

By enacting Chapter 668 of the Laws of 2006, the legislature sought to enhance the scope of the criminal background checks performed by social services districts and voluntary authorized agencies by requiring that fingerprints also be checked through the FBI, thus allowing officials to corroborate information and gain a more accurate picture about any crimes committed nationally, including arrests and/or convictions.

3. Needs and benefits:

Both federal and state lawmakers enacted new laws requiring national criminal background checks to determine the complete criminal history of applicants to be foster or adoptive parents and adults who reside in their households. It is important that foster and adoptive parents not be fully certified or approved without taking into account all applicable criminal records, and where such records are found, doing a safety assessment as prescribed by OCFS. These new requirements should afford a safer environment for foster children placed in foster homes or for the purpose of adoption.

4. Costs:

The federal and State statutory provisions requiring national criminal history background checks, which are being implemented through these regulations, will result in increased costs to the State. Based on the current

statistics for conducting State criminal history background checks, it is projected that 17,000 persons will be subject to the new required national criminal history records checks during the first year of implementation. Based on that projection, OCFS estimates that the total costs associated with the national criminal history database check process during the first year of implementation will be approximately \$875,000. The estimate includes \$408,000 to cover the \$24 fee that must be paid to the FBI for processing each set of fingerprints, as well as \$467,000 for the costs to enhance OCFS' criminal history review administrative and legal units and the OCFS criminal history computer system to process the national criminal history database checks.

It is anticipated that approximately \$188,125 in federal reimbursement under Title IV-E of the federal Social Security Act will be available for the annual costs of conducting the national criminal history record checks. The remaining cost of \$686,875 will be State share.

5. Local government mandates:

The regulations require social services districts and voluntary authorized agencies that certify or approve foster and/or adoptive parents, to include as part of the licensing process conducting national criminal history background checks through the FBI in order to compile a complete criminal record on applicants and other adults residing in their household and take any such record into account by performing the OCFS prescribed safety assessment, prior to fully certifying or approving the home.

6. Paperwork:

Social services districts and voluntary authorized agencies will need to review all results of the national criminal background checks as they currently must review the results of the state criminal background checks. Where a criminal record exists, safety assessments must be documented. Pertinent information must be recorded on the State's SACWIS system, CONNECTIONS.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

There are no alternatives to imposing these regulations, as they are required by both State and federal statutes.

9. Federal standards:

The aforementioned Adam Walsh Child Protection Act of 2006, contains comparable standards and requirements to Chapter 668 of the Laws of 2006.

10. Compliance schedule:

Compliance with the regulations must begin upon the effective date of Chapter 668 of the Laws of 2006, January 11, 2007.

Regulatory Flexibility Analysis

1. Effect of Rule:

Social services districts will be affected by the regulations. There are 58 social services districts and the St. Regis Mohawk Tribe which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (OCFS). Most voluntary foster care and adoption agencies also will be affected by the regulations. There are approximately 68 voluntary agencies operating foster care programs that include foster boarding home programs. There are 119 voluntary agencies authorized that operate adoption programs, including 19 agencies located out-of-state and approved to do adoptions in New York State pursuant to Article 13 of the Not-For-Profit Corporation Law.

2. Compliance Requirements:

The regulations require social services districts and voluntary authorized agencies that certify or approve foster and/or adoptive parents, to include as part of the licensing process conducting national criminal history background checks through the Federal Bureau of Investigation (FBI) in order to compile a complete criminal record on applicants and other adults residing in their household and take any such record into account by performing the OCFS prescribed safety assessment, prior to fully certifying or approving the home.

3. Professional Services:

The regulations would not require social services districts or voluntary agencies to hire additional staff in order to implement them. Existing staff will be able to procedurally accommodate the minimal changes on the business process these regulations entail.

4. Compliance Costs:

The federal and State statutory provisions requiring national criminal history background checks, which are being implemented through these regulations, will result in increased costs to the State. Based on the current statistics for conducting State criminal history background checks, it is projected that 17,000 persons will be subject to the new required national

criminal history records checks during the first year of implementation. Based on that projection, OCFS estimates that the total costs associated with the national criminal history database check process during the first year of implementation will be approximately \$875,000. The estimate includes \$408,000 to cover the \$24 fee that must be paid to the FBI for processing each set of fingerprints, as well as \$467,000 for the costs to enhance OCFS' criminal history review administrative and legal units and the OCFS criminal history computer system to process the national criminal history database checks.

It is anticipated that approximately \$188,125 in federal reimbursement under Title IV-E of the federal Social Security Act will be available for the annual costs of conducting the national criminal history record checks. The remaining cost of \$686,875 will be State share.

5. Economic and Technological Feasibility:

The regulations will not impose additional economic or technological burdens on social services districts or voluntary authorized agencies.

6. Minimizing Adverse Impact:

OCFS will use card scan, which will enable social services districts and voluntary authorized agencies to continue to submit a single fingerprint card per person. Card scan allows OCFS to electronically send fingerprint cards to the Division of Criminal Justice Services (DCJS). DCJS then electronically sends the fingerprint cards to the FBI. This process reduces the timeframe for the receipt of results from weeks to days, consequently allowing for more timely approval or certification decisions.

7. Small Business and Local Government Participation:

The timeframes prescribed by the State and federal legislation precluded the participation of small businesses and local governments in the development of these regulations. They are being filed on an emergency basis in order to meet the State and federal timeframes; those affected will have an opportunity to comment upon publication of this Notice of Proposed Rulemaking in the *State Register*.

Rural Area Flexibility Analysis

1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas and the St. Regis Mohawk Tribe, which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (OCFS). Those voluntary authorized agencies in rural areas contracting with social services districts to provide foster care and adoption services also will be affected by the proposed regulations. Currently, there are approximately 85 such agencies.

2. Compliance Requirements:

The regulations require social services districts and voluntary authorized agencies that certify or approve foster and/or adoptive parents, to include as part of the licensing process conducting national criminal history background checks through the Federal Bureau of Investigation (FBI) in order to compile a complete criminal record on applicants and other adults residing in their household and take any such record into account by performing the OCFS prescribed safety assessment, prior to fully certifying or approving the home.

3. Professional Services:

The regulations do not require social services districts or voluntary authorized agencies to hire additional staff in order to implement them. Existing staff will be able to procedurally accommodate the minimal changes to the business process these regulations entail.

4. Compliance Costs:

The federal and State statutory provisions requiring national criminal history background checks, which are being implemented through these regulations, will result in increased costs to the State. Based on the current statistics for conducting State criminal history background checks, it is projected that 17,000 persons will be subject to the new required national criminal history records checks during the first year of implementation. Based on that projection, OCFS estimates that the total costs associated with the national criminal history database check process during the first year of implementation will be approximately \$875,000. The estimate includes \$408,000 to cover the \$24 fee that must be paid to the FBI for processing each set of fingerprints, as well as \$467,000 for the costs to enhance OCFS' criminal history review administrative and legal units and the OCFS criminal history computer system to process the national criminal history database checks.

It is anticipated that approximately \$188,125 in federal reimbursement under Title IV-E of the federal Social Security Act will be available for the annual costs of conducting the national criminal history record checks. The remaining cost of \$686,875 will be State share.

5. Minimizing Adverse Impact:

OCFS will utilize card scan which will enable social services districts and voluntary authorized agencies to continue to submit a single fingerprint card per person. Card scan allows OCFS to electronically send fingerprint cards to the Division of Criminal Justice Services (DCJS). DCJS in turn electronically sends them to the FBI. This process reduces the timeframe for the receipt of results from weeks to days, consequently allowing for more timely licensing decisions.

6. Small Business Participation:

The timeframes prescribed by the State and federal legislation precluded the participation of small businesses in the development of these regulations. They are being filed on an emergency basis in order to meet the State and federal timeframes; those affected will have an opportunity to comment upon publication of this Notice of Proposed Rulemaking in the *State Register*.

Job Impact Statement

A full job statement has not been prepared for the proposed regulation implementing portions of the federal Adam Walsh Child Protection Act of 2006 and Chapter 668 of the Laws of 2006. The regulations will not have a substantial adverse impact on jobs or employment opportunities and in fact will not result in the loss of any jobs. This finding is based upon the fact that the regulations prescribe small additional duties for child welfare staff.

EMERGENCY RULE MAKING

Home Studies for Adoptive and Foster Placements for Out-of-State Children and Inter-County Placements

I.D. No. CFS-27-07-00004-E

Filing No. 1015

Filing date: Sept. 24, 2007

Effective date: Sept. 24, 2007

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

Action taken: Amendment of Parts 357, 421, 428, 430, 441 and 443 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 374-a and 378-(5)

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

Specific reasons underlying the finding of necessity: To enhance permanency for foster children by expediting the home study process and by requiring agencies to consider all viable placement options where a child may not return home, including out of state options. The regulations increase the frequency of caseworker visits of foster children placed outside of New York State and expands the options available for who may conduct such visits. The regulations will enhance the health and well-being of former foster children by providing them with relevant available health and education information where the child is discharged to his or her own care. The regulations will also enhance the safety of foster and adoptive children by broadening the scope of screening prospective foster and adoptive parents and other adults residing in the home of the prospective foster or adoptive parents. The regulations are also necessary to satisfy Federal Title IV-E State plan requirements that impact the availability of Federal funding for foster care and adoption assistance.

Subject: Home studies for adoptive and foster placements for out-of-state children and for inter-county placements; child abuse and maltreatment screening for prospective adoptive and foster parents.

Purpose: To implement the requirements of the Federal Safe and Timely Interstate Placement of Foster Children Act of 2006 (Public Law 109-239) which establishes timeframes for the completion and submission of home studies of prospective foster or adoptive parents who are being considered as potential resources for foster children from other states and for the frequency of casework visits of foster children placed outside of New York State and provisions of the Federal Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248) which requires that whenever a person applies for certification or approval as a foster or adoptive parent, or any other person over the age of 18 who resides in the home of such applicant resided in another state or states in the five years preceding the application for certification or approval, be screened for request child abuse and maltreatment information maintained by the previous state(s) of residence. Both laws took effect on Oct. 1, 2006.

Substance of emergency rule: Section 357.3 (Access to Medical and Education Records)

The amendment provides for access to education and medical information at no cost to a foster child who is discharged to his or her own care.

Part 421 (Standards of Practice for Adoption Services)

The amendment clarifies who may adopt a child. The amendment requires authorized agencies to seek child protective services information from other states regarding a person applying for approval as an adoptive parent and any other person who resides with the applicant where such applicant or other person resided in the other state within 5 years of the application for approval. The amendment establishes timeframes for the completion of home studies for a person seeking to be approved as an adoptive parent to receive a child from another state or social services district. The amendment also sets forth who may perform such home studies. The amendment clarifies that a social services district or a voluntary authorized agency may not delay or deny an application or the conducting of a home study of a person seeking to adopt a child in the custody of another authorized agency.

Sections 428.3, 428.5 and 428.6 (Standards for Uniform Case Recording)

The amendment addresses case recording requirements for foster children placed outside of New York State and reflects the change in standards for the frequency of casework visits with such children. The amendment clarifies that when reunification with the parent is not the child's permanency planning goal, the social services district or the voluntary authorized agency must document the reasonable efforts made to finalize the child's permanency plan, including the identification of both in-state and out-of-state placement options. The amendment provides that when concurrently planning for the permanency of a child in foster care, the social services district or the voluntary authorized agency must document the description of the alternative plan to achieve permanency for the child which must include identification of appropriate in-state and out-of-state placements, if the child can not be safely returned home to his or her parents.

Section 430.11 (Appropriateness of Placement)

The amendment increases the frequency of caseworker visits of foster children placed outside of New York State from every 12 months to every six months. The amendment also expands the entities that may conduct such visits to include a private agency under contract with either the authorized agency in New York or the state in which the foster child is placed.

Section 430.12 (Diligence of Effort)

The amendment clarifies that if the child's permanency planning goal is adoption or placement in a permanent home other than that of the child's parent, the social services district or the voluntary authorized agency must document the reasonable efforts made to place the child in-state or out-of-state in a timely and orderly manner.

Section 441.22 (Health and Medical Services)

The amendment provides for access to health information at no cost to a foster child who is discharged to his or her own care.

Part 443 (Certification, Approval and Supervision of Foster Boarding Homes)

The amendment requires authorized agencies to seek child protective services information from other states regarding a person applying for certification or approval as a foster parent and any other person who resides with the applicant where the applicant or other person resided in another state within 5 years of the application for certification or approval. The amendment establishes timeframes for the completion of home studies for a person seeking to be certified or approved as a foster parent to receive a child from another state or social services district. The amendment also sets forth who may perform such home studies. The amendment clarifies that a social services district or a voluntary authorized agency may not delay or deny an application or the conducting of a home study of a person seeking to care for a foster child in the custody of another authorized agency. The amendment allows an emergency certified or approved foster parent to remain in the status of an emergency certified or an emergency approved foster parent pending the completion of the Statewide Central Register of Child Abuse and Maltreatment data-base check required by section 424-a of the Social Services Law.

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. CFS-27-07-00004-P, Issue of July 3, 2007. The emergency rule will expire November 22, 2007.

Text of emergency 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

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

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

Section 372-b(3) of the SSL requires OCFS to promulgate regulations to maintain enlightened adoption policies and to establish standards and criteria for adoption practices.

Section 374-a of the SSL sets forth the standards and procedures relating to the Interstate Compact on the Placement of Children (ICPC) that involve the placement of children from one state to another for the purpose of foster care or adoption.

Section 378(5) of the SSL authorizes OCFS to establish and amend regulations governing the issuance and revocation of a certificate to board foster children and to prescribe standards for the care of foster children.

Section 471(a) of the Social Security Act provides that in order for a state to be eligible for federal Title IV-E funding for foster care and adoptions assistance, the state must have a State Plan approved by the federal Department of Health and Human Services which reflects the standards set forth in such section.

2. Legislative objectives:

The regulations implement the requirements of the federal Safe and Timely Interstate Placement of Foster Children Act of 2006 (Interstate Placement Act) that took effect on October 1, 2006. The Interstate Placement Act establishes timeframes for the completion and submission of home studies of prospective foster or adoptive parents who are being considered as potential resources for foster children from other states. The regulations impose standards on the content and timeframes for the completion of such home studies.

The regulations also implement federal requirements for the dissemination of the foster child's health and education records at no cost when the child is being discharged from care. Furthermore, the regulations implement federal requirements relating to the documentation of reasonable efforts to finalize a child's permanency plan, including consideration of both in-state and out-of-state placement options.

In addition, the regulations implement federal requirements relating to case recording requirements for foster children placed outside of New York and the frequency of caseworker visits with such children. The frequency of such visits is increased from every 12 months to every six months. The regulations also add the option that such visits may be made by a private agency under contract with either the authorized agency in New York with custody of the child or the state in which the foster child is placed.

The regulations implement the requirements of the federal Adam Walsh Child Protection Act of 2006 (Walsh Protection Act), parts of which also took effect on October 1, 2006. The Walsh Protection Act requires that whenever a person applies for certification or approval as a foster or adoptive parent, or any other person over the age of 18 who resides in the home of such applicant resided in another state or states in the five years preceding the application for certification or approval, the licensing or approving agency must request child abuse and maltreatment information maintained by the previous state(s) of residence.

3. Needs and benefits:

The regulations will enhance permanency for foster children by expediting the home study process and by requiring agencies to consider all viable placement options where a child may not return home. Currently, the ICPC does not set forth any timeframes for the conducting of home studies of persons seeking to be foster parents or adoptive parents of foster children. Regarding the consideration of out-of-state options for children in foster care, current regulatory standards do not expressly refer to out-of-state placement options.

The regulations establish that upon receipt of a referral, the social services district may conduct such home study directly or may use a voluntary authorized agency under contract with such district or a voluntary authorized agency under contract with the OCFS to conduct the home study, and that if the latter option is selected, the costs of the home study will be charged back to the district in which the prospective foster or adoptive parent(s) reside.

The regulations codify the policies regarding the time frames for completion of a home study and which entity is permitted to do a home study to apply to New York State inter-county placements, when an inter-county

placement is sought for a foster child for the purposes of foster care in another county or to make an adoptive placement in another county.

The regulations will also enhance the safety and permanency of foster children placed outside of New York by increasing the frequency of caseworker visits of the child in the home or facility in which the child is placed.

The regulations will enhance the health and well-being of former foster children by providing them with relevant available health and education information where the child is discharged to his or her own care.

The regulations will also enhance the safety of foster and adoptive children by broadening the scope of screening prospective foster and adoptive parents and other adults residing in the home of the prospective foster or adoptive parents. It is possible that such persons may have a child abuse or maltreatment history in their prior state of residence. Such information is highly relevant to whether a foster or adoptive child may be safely cared for in such home. The regulations are necessary to satisfy federal Title IV-E State Plan requirements that impact the availability of federal funding for foster care and adoption assistance. Furthermore, the regulations allow an emergency certified or approved foster parent to remain in that status pending completion of the Statewide Central Register of Child Abuse and Maltreatment data-base check required by section 424-a of the SSL. A similar provision currently exists for the completion of the criminal history record check.

4. Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, OCFS will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

The regulations also increase the frequency of caseworker visits and reports for foster children placed outside of New York State from every 12 months to every six months. In general, such visits and reports are already requested and conducted within these timeframes, and in many cases are done more frequently. To facilitate this activity, the regulations expand the entities that may conduct such visits to include a private agency under contract with either the authorized agency in New York or the state in which the foster child is placed. In accordance with the ICPC, such reports and visits often are done by the state where the child is placed and are typically completed within these timeframes. As a result, it is anticipated that there will be no significant cost impact on local social services districts for this activity.

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

5. Local government mandates:

When the ICPC office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized agency under contract with the social services district is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with the child's comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must be provided at no cost and include the child's current health providers. The regulations also require the provision of the child's education record at the

time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency. The regulations require the social services district to expressly document the consideration of out-of-state placement options if the child will not be returned to his or her parent.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states.

6. Paperwork:

The regulations require the specific documentation of the consideration of out-of-state placement as an option for foster children who do not have the permanency goal of return to the parent. Such documentation will be recorded in the CONNECTIONS system.

Documentation relating to home studies for the certification or approval of a foster or adoptive parent will be maintained in the state's CONNECTIONS system. This reflects current standards.

Documentation of health information is already mandated by OCFS regulations 18 NYCRR 357.3 and 441.22. Documentation of educational information is already mandated by OCFS regulation 18 NYCRR 428.5.

The regulations require the documentation of requests to appropriate child welfare agencies in the prior state(s) of residence (5 years preceding the date of the application for certification or approval) of prospective foster or adoptive parents and/or any other persons over the age of 18 who resides in the home of the applicant and the results of such requests. As is currently required for in-State inquiries made pursuant to section 424-a of the SSL, if the agency decides to certify or approve an applicant where there is a history of abuse or maltreatment, the agency must document the basis for making such decision.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

These regulations are necessary to comply with federal statutory mandates. Therefore, there are no alternatives to these regulations.

9. Federal standards:

The regulations are required to implement the federal Safe and Timely Interstate Placement of Foster Children Act of 2006 and the federal Adam Walsh Child Protection Act of 2006 and to maintain compliance with federal Title IV-E State Plan requirements.

10. Compliance schedule:

Compliance with the regulations must begin immediately upon emergency filing.

Regulatory Flexibility Analysis

1. Effect of Rule:

Social services districts will be affected by the regulations. There are 58 social services districts and the St. Regis Mohawk Tribe which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (OCFS). Most voluntary foster care and adoption agencies also will be affected by portions of the regulations. There are approximately 114 voluntary agencies operating foster care programs. Of those, 68 such agencies operate foster boarding home programs. There are 119 voluntary agencies authorized that operate adoption programs, including 19 agencies located out-of-state and approved to do adoptions in New York State pursuant to Article 13 of the Not-For-Profit Corporation Law.

2. Compliance Requirements:

When the Interstate Compact on the Placement of Children (ICPC) office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized agency under contract with the social services district or under contract with OCFS is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social

services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with his or her comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must include the child's current health providers and clarify that there is no cost to the child for these records. The regulations also require the provision of the child's education record at the time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency, including whether the child will be returned home or to another placement resource (see section 409-e of the SSL and 18 NYCRR Part 428). The regulations require the social services district to expressly document the consideration of out of state placement options if the child will not be returned to his or her parent.

When a foster child is placed outside of New York State, the child must be visited periodically by a caseworker pursuant to 18 NYCRR 430.11(c)(2)(ix) and the visits must be recorded in the child's case record. The regulations increase the frequency of such visits from every 12 months to every six months. The regulations also authorize that such visits may be conducted by a private agency under contract with either the authorized agency in New York with custody of the child or the state in which the foster child is placed.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants, irrespective of how long such persons resided in New York State. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. Furthermore, the regulations allow an emergency certified or approved foster parent to remain in that status pending completion of the Statewide Central Register of Child Abuse and Maltreatment data-base check required by section 424-a of the SSL. A similar provision currently exists for the completion of the criminal history record check.

3. Professional Requirements:

The regulations would not require social services districts or voluntary authorized agencies to hire additional staff in order to implement them. Current training programs will be enhanced to emphasize the casework support that these amendments bring. In addition, OCFS will issue a request for applications in order to make available the services of one or more voluntary authorized agencies to conduct home studies for out-of-state placements or inter-county placements, in accordance with these regulations.

4. Compliance Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, OCFS will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

The regulations also increase the frequency of caseworker visits and reports for foster children placed outside of New York State from every 12 months to every six months. In general, such visits and reports are already requested and conducted within these timeframes, and in many cases are done more frequently. To facilitate this activity, the regulations expand the entities that may conduct such visits to include a private agency under contract with either the authorized agency in New York or the state in which the foster child is placed. In accordance with the ICPC, such reports and visits often are done by the state where the child is placed and are

typically completed within these timeframes. As a result, it is anticipated that there will be no significant cost impact on local social services districts for this activity.

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

5. Economic and Technological Feasibility:

The regulations will not impose additional economic or technological burdens on social services districts or voluntary authorized agencies.

6. Minimizing Adverse Impact:

The aforementioned request for applications will be issued by OCFS in order to provide an additional resource to the field for the purpose of conducting home studies in accordance with these regulations, including meeting the new timeframes prescribed by the federal law.

7. Small Business and Local Government Participation:

The timeframes prescribed by the federal legislation precluded the participation of small businesses in the development of these regulations. They are being filed on an emergency basis in order to meet the federal timeframes; those affected will have an opportunity to comment upon publication of a Notice of Proposed Rule-Making in the *State Register*.

Rural Area Flexibility Analysis

1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas and the St. Regis Mohawk Tribe, which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (OCFS). Those voluntary authorized agencies in rural areas contracting with social services districts to provide foster care and adoption services also will be affected by the proposed regulations. Currently, there are approximately 85 such agencies.

2. Compliance Requirements:

When the Interstate Compact on the Placement of Children (ICPC) office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized agency under contract with the social services district or under contract with OCFS is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with his or her comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must include the child's current health providers and clarify that there is no cost to the child for these records. The regulations also require the provision of the child's education record at the time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency, including whether the child will be returned home or to another placement resource (see section 409-e of the SSL and 18 NYCRR Part 428). The regulations require the social services district to expressly document the consideration of out-of-state placement options if the child will not be returned to his or her parent.

When a foster child is placed outside of New York State, the child must be visited periodically by a caseworker pursuant to 18 NYCRR 430.11(c)(2)(ix) and the visits must be recorded in the child's case record. The regulations increase the frequency of such visits from every 12 months to every six months. The regulations also authorize that the caseworker visit may be performed by a private agency under contract with either the authorized agency in New York with custody of the child or the state in which the foster child is placed.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants, irrespective of how long such persons resided in New York

State. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. Furthermore, the regulations allow an emergency certified or approved foster parent to remain in that status pending completion of the Statewide Central Register of Child Abuse and Maltreatment data-base check required by section 424-a of the SSL. A similar provision currently exists for the completion of the criminal history record check.

3. Professional Services:

The regulations would not require social services districts or voluntary authorized agencies to hire additional staff in order to implement them. Current training programs will be enhanced to emphasize the casework support that these amendments bring. In addition, OCFS will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct home studies for out-of-state placements or inter-county placements, in accordance with these regulations.

4. Compliance Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, OCFS will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

The regulations also increase the frequency of caseworker visits and reports for foster children placed outside of New York State from every 12 months to every six months. In general, such visits and reports are already requested and conducted within these timeframes, and in many cases are done more frequently. To facilitate this activity, the regulations expand the entities that may conduct such visits to include a private agency under contract with either the authorized agency in New York or the state in which the foster child is placed. In accordance with the ICPC, such reports and visits often are done by the state where the child is placed and are typically completed within these timeframes. As a result, it is anticipated that there will be no significant cost impact on local social services districts for this activity.

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

5. Minimizing Adverse Impact:

The aforementioned request for applications will be issued by OCFS in order to provide an additional resource to the field for the purpose of conducting home studies in accordance with these regulations, including meeting the new timeframes prescribed by the federal law.

6. Small Business Participation:

The timeframes prescribed by the federal legislation precluded the participation of small businesses in the development of these regulations. They are being filed on an emergency basis in order to meet the federal timeframes; those affected will have an opportunity to comment upon publication of a Notice of Proposed Rulemaking in the *State Register*.

Job Impact Statement

A full job statement has not been prepared for the regulations implementing the federal Safe and Timely Interstate Placement of Foster Children Act of 2006, and portions of the federal Adam Walsh Child Protection Act of 2006. The regulations would not have a substantial adverse impact on jobs or employment opportunities and in fact would not result in the loss of any jobs. This finding is based upon the fact that the regulations prescribe additional duties for child welfare staff. In addition, these regulations allow for a potential increase in jobs based upon the contracting authority granted by these regulations, if the social services district so chooses to contract for certain activities.

NOTICE OF ADOPTION

National Criminal History Record Checks through the FBI**I.D. No.** CFS-27-07-00003-A**Filing No.** 1014**Filing date:** Sept. 24, 2007**Effective date:** Oct. 10, 2007

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

Action taken: Amendment of Parts 421 and 443 of Title 18 NYCRR.**Statutory authority:** Social Services Law, sections 20(3)(d) and 378-a(2); and L. 2006, ch. 668, sec. 3**Subject:** National criminal history record checks through the FBI.**Purpose:** To require a national criminal history record check through the FBI of all persons applying for certification or approval as foster or adoptive parents and all other persons over the age 18 who reside in the homes of such applicants.**Text or summary was published** in the notice of proposed rule making, I.D. No. CFS-27-07-00003-P, Issue of July 3, 2007.**Final rule as compared with last published rule:** No changes.**Text of 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**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Home Studies for Adoptive and Foster Placements for Out-of-State Children and for Inter-County Placements**I.D. No.** CFS-27-07-00004-A**Filing No.** 1016**Filing date:** Sept. 24, 2007**Effective date:** Oct. 10, 2007

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

Action taken: Amendment of Parts 357, 421, 428, 430, 441 and 443 of Title 18 NYCRR.**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 374-a and 378-(5)**Subject:** Home studies for adoptive and foster placements for out-of-state children and for inter-county placements; child abuse and maltreatment screening for prospective adoptive and foster parents.**Purpose:** To implement the requirements of the Federal Safe and Timely Interstate Placement of Foster Children Act of 2006 (Public Law 109-239) which establishes timeframes for the completion and submission of home studies of prospective foster or adoptive parents who are being considered as potential resources for foster children from other states and for the frequency of casework visits of foster children placed outside of New York State and provisions of the Federal Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248) which requires that whenever a person applies for certification or approval as a foster or adoptive parent, or any other person over the age of 18 who resides in the home of such applicant resided in another state or states in the five years preceding the application for certification or approval, be screened for request child abuse and maltreatment information maintained by the previous state(s) of residence. Both laws took effect on Oct. 1, 2006.**Text or summary was published** in the notice of proposed rule making, I.D. No. CFS-27-07-00004-P, Issue of July 3, 2007.**Final rule as compared with last published rule:** No changes.**Text of 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**Assessment of Public Comment**

The Office of Children and Family Services (OCFS) received one comment on the proposed regulations, from the New York City Department of Probation.

The comment was that the required frequency of visiting foster children placed out-of-state is inadequate. The commenter thought the frequency should be increased to four times per year.

Response:

OCFS will not make the recommended change. The regulations meet the time frames established by the federal Safe and Timely Interstate Placement of Foster Children Act of 2006. In making this decision, OCFS considered both the fiscal and programmatic consequences of the recommended change.

Delaware River Basin Commission

INFORMATION NOTICE DELAWARE RIVER BASIN COMMISSION NOTICE OF PROPOSED RULEMAKING AND PUBLIC HEARING

The Delaware River Basin Commission ("Commission" or "DRBC") is a federal-state regional agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its members are the governors of the four Basin states – New Jersey, New York, Pennsylvania and Delaware – and a federal representative appointed by the President of the United States. The Commission is not subject to the requirements of the New York State Administrative Procedures Act. This notice is published by the Commission for informational purposes.

Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Classify the Lower Delaware River as Special Protection Waters

Summary: The Commission will hold a **public hearing** to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to establish numeric values for existing water quality for the reach of the main stem Delaware River known as the "Lower Delaware" and to assign this reach the SPW classification "Significant Resource Waters" (SRW). The Lower Delaware extends from the southern boundary of the Delaware Water Gap National Recreation Area at River Mile ("RM") 209.4 to the head of tide at Trenton, New Jersey, RM 133.4. The amendments also would incorporate language intended to clarify aspects of the SPW regulations that have been a source of confusion for some DRBC docket holders and applicants since the program was originally adopted in 1992 for point sources and in 1994 for non-point sources. The entire area of the watershed that lies within New York State was designated Special Protection Waters by the Commission in 1992.

The Lower Delaware River has carried the SPW-SRW classification on a temporary basis since January of 2005, making this reach and its drainage area subject for the past three years to those provisions of the Commission's SPW regulations that do not depend for implementation upon the use of numeric values for existing water quality. The amendments that currently are proposed would make projects within the Lower Delaware drainage subject to all applicable SPW requirements, including those for "no measurable change" to existing water quality as defined by the rule. Notably, the amendments proposed to clarify the rules that have been in effect since 1992 for point sources and since 1994 for non-point sources include the following: A new term — "substantial alternations or additions" — is proposed to be added to the Definitions section of the regulations and to be inserted in other sections of the rule to clarify which types of additions or alterations to existing wastewater treatment facilities will trigger certain SPW requirements that are deemed appropriate in connection with capital investment projects. A new paragraph also is proposed to expressly authorize effluent trading between point sources to satisfy the requirement for no measurable change to existing water quality under certain circumstances.

Background: The special Protection Waters regulations, consisting of Section 3.10.3.A.1. of the Commission's Water Quality Regulations, are intended to maintain the quality of interstate waters where existing water quality is better than the established stream quality objectives. They include rules that discourage new and increased discharges to designated waters. Where such discharges are permitted, the rules ensure that incremental pollutant loadings and visual impacts are minimized, that minimum standards of treatment are applied, and that new loadings cause no measurable change from existing water quality, as defined by the rule, except toward natural conditions. The SPW regulations currently include a table establishing the numeric values that define existing water quality in the

stream reaches permanently designated by the Commission as SPW in 1992. These reaches include the main stem Delaware River from Hancock, New York, to the downstream boundary of the Delaware Water Gap National Recreation Area as well as the portions of intrastate tributaries to the Delaware located within the boundaries of the Upper Delaware Scenic and Recreational River Corridor and the Middle Delaware Scenic and Recreational River (Delaware River between River Miles 250.1 and 209.5). The locations of water quality control points between Hancock and River Mile 209.5 are provided in a second table. The water quality control points are the locations used to assess water quality for purposes of defining and protecting it. No changes are proposed to the permanent designations and water quality control points that were established in 1992.

Since 2005, the SPW regulations have listed the Lower Delaware River as "Significant Resource Waters" (SRW) on a temporary basis and have applied to this reach only a portion of the SPW regulations, pending the development of numeric values for existing water quality in the Lower Delaware; a determination as to whether the SRW classification should be assigned to the entire reach or whether the alternative classification, "Outstanding Basin Waters" (OBW), should be used for those portions eligible for that classification by virtue of their inclusion in the National Wild and Scenic Rivers System; and resolution of a number of questions relating to implementation of the program. The proposed amendments would permanently classify the entire Lower Delaware reach as SRW. By incorporating into the regulation numeric values for existing water quality at a set of Lower Delaware River water quality control points, the amendments also would allow all applicable provisions of the SPW regulations to apply to projects within the Lower Delaware drainage.

Key provisions of the SPW regulations that will continue to apply within the drainage area to the Lower Delaware River if the proposed amendments are approved include the following: sections 3.10.3 A.2.c.1. through 3., in part requiring that no new or expanded wastewater discharges may be permitted in waters classified as SPW until all non-discharge-load reduction alternatives have been fully evaluated and rejected because of technical or financial infeasibility; sections 3.10.3 A.2.d.1. through 7., setting forth requirements for wastewater treatment facilities; and sections 3.10.3 A.2.e.1. and 2., conditioning project approval on the existence of an approved Non-Point Source Pollution Control Plan for the project area and requiring that approval of a new or expanded withdrawal and/or wastewater discharge project be subject to the condition that new connections to the project system be limited to service areas regulated by a non-point source pollution control plan approved by the Commission.

If the proposed amendments are adopted, numeric values for twenty parameters will be established, defining existing water quality by rule for purposes of the SPW program at 24 water quality control points in the Lower Delaware River. The parameters include: ammonia-ammonium $\text{NH}_3\text{-NH}_4$ (mg/l), chloride (mg/l), chlorophyll a (mg/m^3) dissolved oxygen (mg/l), dissolved oxygen saturation (%), E. coli (colonies/100 ml), enterococcus (colonies/100 ml), fecal coliform (colonies/100 ml), nitrate $\text{NO}_3\text{-N}$ (mg/l), orthophosphate (mg/l), pH, specific conductance (umhos/cm), total dissolved solids (mg/l), total Kjeldahl nitrogen (mg/l), total nitrogen (mg/l), total phosphorus (mg/l), total suspended solids (mg/l), turbidity (NTU), alkalinity (mg/l), and hardness (mg/l). The proposed values are based upon five years of ambient water quality monitoring, from 2000 through 2004.

Adoption of numeric values for existing water quality and creation of a set of Boundary Control Points in the Lower Delaware River will mean that applicants seeking approval to construct new facilities or to expand existing facilities in the Lower Delaware drainage will be required for the first time to demonstrate that their new or increased discharges will cause no measurable degradation of existing water quality at the established water quality control points (sections 3.10.3 A.2.b.2. and 3.10.3 A.2.f.). As in the upper and middle portions of the non-tidal Delaware, the "no measurable change" requirement will apply whether a project discharges directly to the main stem or to a tributary. For certain main stem discharges, if minimum treatment standards alone do not ensure no measurable change at the downstream water quality control point, additional treatment may be required (section 3.10.3 A.2.b.2. in combination with section 3.10.3A.2.d.6.).

Importantly, the proposed amendments, if approved, will add language to clarify that for projects involving existing facilities discharging to SPW - whether in the upper, middle or lower portion of the Delaware River - only substantial additions or alterations as defined by the rule will trigger the requirements that no such project may be approved until (1) all non-discharge load reduction alternatives have been fully evaluated and rejected because of technical or financial infeasibility (section 3.10.3.A.2.c.1.) (OBW and SRW discharges); (2) the applicant has demonstrated the technical and/or financial infeasibility of using natural wastewater treatment technologies for all or a portion of the incremental load (section 3.10.3.A.2.d.5.) (OBW, SRW and tributary discharges); (3) the Commission has determined that the project is demonstrably in the public interest as defined by the rule (section 3.10.3.A.2.c.3.) (SRW discharges); and (4) the minimum level of treatment to be provided for such projects is Best Demonstrable Technology as defined by the rule (section 3.10.3.A.2.d.6.) (direct OBW and SRW discharges). The proposed amendments further clarify that alterations limited to changes in the method of disinfection and/or the addition of treatment works for nutrient removal at existing facilities are not deemed to be "substantial alterations or additions" triggering the foregoing requirements.

The proposed amendments include clarification as to the baseline to be used in measuring predicted changes to existing water quality, and the effect of discharge/load reduction alternatives and/or natural treatment alternatives for projects that involve substantial alterations or additions to existing facilities.

Previous register notices concerning designation of the Lower Delaware River as Special Protection Waters include notices published in the New York State Register of Regulations on Wednesday, October 20, 2004 (XXVI NYS Reg. 4-6) (proposed designation) and in the Federal Register on September 23, 2004 (69 FR 57008) (proposed designation), August 22, 2005 (70 FR 48923) (proposed extension), August 21, 2006 (71 FR 48497) (proposed extension), and August 22, 2007 (72 FR 46931) (proposed extension). The proposed and final versions of the initial designation and the subsequent extensions also were published on the Commission's website, www.drbc.net.

Dates: The public hearing will be held on December 4, 2007, at the Commission's office building, located at 25 State Police Drive, West Trenton, New Jersey. Driving directions are available on the Commission's website, www.drbc.net. Please do not rely on Internet mapping services as they may not provide accurate directions to the DRBC. The hearing will begin at 2:30 P.M. and will continue until all those who wish to testify are afforded an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224. **Written comments** will be accepted through the close of business on December 6, 2007. Written comments may be submitted by email to paula.schmitt@drbc.state.nj.us; by fax to Commission Secretary at 609-883-9522; by U.S. Mail to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; or by overnight mail to Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation if any in the comment document and include "SPW" in the subject line.

Further Information: The current rule and the full text of the proposed amendments are posted on the Commission's website, www.drbc.net, along with supporting data, reports, maps and related documents. Hard copies may be obtained by contacting Ms. Paula Schmitt at 609-883-9500, ext. 224. The Commission will hold two **informational meetings** on the proposed rulemaking. The first will take place on Thursday, October 25, 2007 from 7:00 P.M. to 9:00 P.M. at the office of the Delaware and Raritan Canal Commission at the Prallsville Mills Complex, 33 Risler Street (Route 29) in Stockton, New Jersey. The second will be held on Thursday, November 1, 2007 from 7:00 P.M. to 9:00 P.M. in Room 315 of the Acopian Engineering Building at Lafayette College, located at High Street, Easton, Pennsylvania. Please contact Commission Secretary Pamela Bush, 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Migratory Game Bird Hunting Regulations for the 2007-2008 Season

I.D. No. ENV-41-07-00004-EP

Filing No. 1012

Filing date: Sept. 21, 2007

Effective date: Sept. 21, 2007

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

Action taken: Amendment of section 2.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

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

Specific reasons underlying the finding of necessity: The Department of Environmental Conservation (Department) is adopting this rule by emergency rulemaking in order to conform state migratory game bird hunting regulations with the federal regulations for the 2007-2008 season and flyway guidelines for resource conservation. Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. Environmental Conservation Law Section 11-0307 requires that the Department adjust state migratory game bird regulations to maintain consistency with federal regulations. The final federal regulations are adopted in late summer, thereby necessitating emergency adoption of state regulations in order to have them in place for the migratory game bird seasons that begin in September.

Immediate adoption of this rule is necessary to preserve the general welfare by implementing New York State's 2007-2008 waterfowl hunting regulations. Our regulations need to be amended to be in compliance with ECL 11-0307, which requires state regulations to conform with federal regulations. In addition, law enforcement problems, public dissatisfaction, and adverse economic impacts would ensue if migratory game bird hunting regulations were not adjusted annually to conform with federal regulations and hunter preferences.

Subject: Migratory game bird hunting regulations for the 2007-2008 season.

Purpose: To adjust migratory game bird hunting regulations to conform with Federal regulations.

Text of emergency/proposed rule: Subparagraph 2.30(d)(6)(viii) is repealed and a new subparagraph (viii) is adopted to read as follows:

(viii) *The Western Long Island Goose Hunting Area is that area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.*

Subparagraphs 2.30(e)(1)(i) through (iv) are amended to read as follows:

- (i) ducks, coot and mergansers

- (a) Western Zone Open for [47] 45 consecutive days beginning on *the Tuesday after* the third Saturday in October, and for [13] 15 consecutive days beginning on *the last Saturday in* December [26].
- (b) Northeastern Zone Open for 9 consecutive days beginning on the first Saturday in October, and for 51 consecutive days beginning on the Wednesday following the third Saturday in October.
- (c) Lake Champlain Zone Open for [9] 5 consecutive days beginning on *the Wednesday after* the first Saturday in October, and for [51] 55 consecutive days beginning on [the Wednesday following] the [third] *fourth* Saturday in October.
- (d) Southeastern Zone Open for 9 consecutive days beginning on the second Saturday in October, and for 51 consecutive days beginning on the second Saturday in November.
- (e) Long Island Zone Open for [5 consecutive days beginning on the Wednesday just prior to Thanksgiving Day, and for 55] 60 consecutive days ending on the last Sunday in January.
- (ii) Canada geese, cackling geese, and white-fronted geese
- (a) Lake Champlain Goose Hunting Area Open for 45 consecutive days beginning on the first Saturday after October 19.
- (b) Northeast Goose Hunting Area Open for 45 consecutive days beginning on the fourth Saturday in October.
- (c) West Central Goose Hunting Area Open for 30 consecutive days beginning on the first Saturday in November, and for 15 consecutive days beginning on December 26.
- (d) East Central Goose Hunting Area Open for [21] 30 consecutive days beginning on the [fourth] *first* Saturday in [October] *November*, and for [24] 15 consecutive days beginning on the [fourth] *last* Saturday in [November] *December*.
- (e) Hudson Valley Goose Hunting Area Open for 21 consecutive days beginning on the fourth Saturday in October, and for 24 consecutive days beginning on the [first] *third* Saturday in December.
- (f) South Goose Hunting Area Open for [50] 51 consecutive days beginning on the fourth Saturday in October, and for [20] 19 consecutive days beginning on December 26, and from March 1 through March 10.
- (g) Western Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone, and for 10 consecutive days immediately following the regular duck season.
- (h) Eastern Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone.
- (iii) snow geese and Ross' geese
- (a) Western Zone Open for [85] 34 consecutive days beginning on the [fourth] *first* Saturday in [October] *November*, and for [22] 73 days ending on March 10.
- (b) Northeastern Zone Open for [85] 66 consecutive days beginning on the first Saturday in October, and for [22] 41 days ending on March 10.

- (c) Lake Champlain Zone Open for [84] 81 consecutive days beginning on *the Wednesday after the first Saturday in October*.
- (d) Southeastern Zone Open for 85 consecutive days beginning on the fourth Saturday in October, and for 22 days ending on March 10.
- (e) Long Island Zone Open for 107 consecutive days beginning on [the first day of the regular duck season in the Long Island Zone] *November 1*.
- (iv) brant
 - (a) Western Zone Open for [the first 30] 50 consecutive days [of the regular duck season in the Western Zone] *beginning on October 1*.
 - (b) Northeastern Zone Open for [the first 30] 50 consecutive days *beginning on the first day of the regular duck season in the Northeastern Zone*.
 - (c) Lake Champlain Zone Open for [30] 50 consecutive days beginning on the first day of the regular duck season in the Lake Champlain Zone.
 - (d) Southeastern Zone Open for the first [30] 50 days of the regular duck season in the Southeastern Zone.
 - (e) Long Island Zone Open for [the first 5 days, and] the last [25] 50 days of the regular duck season in the Long Island Zone.

Subparagraph 2.30(e)(2)(iii) is amended to read as follows:
 (iii) Hunters may take Canada geese in the Special Late Canada Goose Hunting Area from February [8th] 7th through February [15th] 14th.

Subparagraph 2.30(e)(2)(v) is amended to read as follows:
 (v) Youth Waterfowl Hunt Days are as follows:

- (a) Western Zone *Saturday and Sunday [and Monday] of the [Columbus Day] second full weekend in October.*
- (b) Northeastern Zone *Saturday and Sunday of the [last] fourth full weekend in September.*
- (c) Lake Champlain Zone *Saturday and Sunday of the last full weekend in September.*
- (d) Southeastern Zone *Saturday and Sunday of the [last] fourth full weekend in September.*
- (e) Long Island Zone *Saturday and Sunday of the second full weekend in November.*

Subparagraph 2.30(g)(3)(i) is amended to read as follows:

Species	Times and/or places within seasons	Daily bag limit	Possession limit
(i) ducks	All times and places	6*	12

* The daily bag limit for ducks includes mergansers, and may include no harlequin ducks and no more than 4 mallards (no more than 2 hens), 1 black duck, 2 wood ducks, 1 pintail, [1] 2 canvasbacks, 2 redheads, 2 scaup, 4 scoters or 2 hooded mergansers. Possession limits for all duck species are twice the daily limit.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 19, 2007.

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8866, e-mail: blswift@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

- 1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) authorizes the Department of Environmental Conservation (DEC) to provide for the recreational harvest of wildlife giving due consideration to ecological factors, the natural maintenance of wildlife, public safety, and the protection of private property. ECL Sections 11-0307, 11-0903, 11-0905 and 11-0909 and 11-0917 authorize DEC to regulate the taking, possession, transportation and disposition of migratory game birds.

2. Legislative Objectives

The legislative objective of the above-cited laws is to ensure adoption of state migratory game bird hunting regulations that conform with federal regulations made under authority of the Migratory Bird Treaty Act (16 U.S.C. "703-711). Season dates and bag limits are used to achieve harvest objectives and equitably distribute hunting opportunity among as many hunters as possible. Regulations governing the manner of taking upgrade the quality of recreational activity, provide for a variety of harvest techniques, afford migratory game bird populations with additional protection, provide for public safety and protect private property.

3. Needs and Benefits

The primary purpose of this rulemaking is to adjust annual migratory game bird hunting regulations to conform with federal regulations, as required by ECL 11-0307, for the 2007-2008 season and flyway guidelines for resource conservation. This rulemaking also reflects preferences of migratory game bird hunters in New York.

Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. The Department annually reviews and promulgates state regulations in order to maintain conformance with federal regulations, as required by Environmental Conservation Law Section 11-0307, and to address ecological considerations and user desires.

The Department is proposing the following regulatory changes: changes to the delineation of goose hunting area boundaries for Canada geese during regular goose seasons on Long Island; season date adjustments for ducks, geese, brant and Youth Waterfowl Hunt Days in all areas; and an increase in the daily bag and possession limits for canvasback ducks.

Changes to Canada goose hunting areas will provide for more effective management of resident (local-nesting) and migrant populations that occur in New York.

Season date adjustments contained in this rulemaking are intended to maximize hunting opportunities when they are most desired by hunters (for example, maximizing the number of weekend days open to hunting), within constraints established by the U.S. Fish and Wildlife Service (USFWS).

An increase in the daily bag and possession limits for canvasbacks was allowed by USFWS this year due to a record high population estimate for this species in North America in spring 2007.

Season dates, bag limits and shooting hours for the Lake Champlain Zone are consistent with regulations established in adjoining areas of Vermont, in accordance with federal regulations and a long standing interstate agreement.

4. Costs

These revisions to 6 NYCRR 2.30 will not result in any increased expenditures by state or local governments or the general public. Costs to DEC for implementing and administering this rule are continuing and annual in nature. These involve preparation and distribution of annual regulations brochures and news releases to inform the public of migratory game bird hunting regulations for the coming season.

5. Paperwork

The proposed revisions to 6 NYCRR 2.30 do not require any new or additional paperwork from any regulated party.

6. Local Government Mandates

This amendment does not impose any program, service, duty or responsibility upon any county, city, town village, school district or fire district.

7. Duplication

Each year, the USFWS establishes "framework" regulations which specify allowable season lengths, dates, bag limits and shooting hours for various migratory game bird species based on their current population status. Within constraints of the federal framework, New York selects specific hunting season dates and bag limits for various migratory game birds, based primarily on hunter preferences. These selections are subsequently included in a final federal rule making (50 CFR Part 20 Section 105), which appears annually in the Federal Register in September. However, Section 11-0307 of the ECL specifies that the Department's migra-

tory game bird hunting seasons and bag limits conform with the federal regulations. This requires that Section 2.30 be amended annually.

8. Alternatives

The principal alternative, which is no action, would result in state waterfowl hunting regulations that do not conform with federal guidelines which would be in conflict with ECL 11-0307. Leaving season dates and bag limits unchanged would also result in a significant loss of hunting opportunity, public dissatisfaction, and adverse economic impacts because they would not reflect hunter preferences or alleviate goose damage through sport harvest to the extent possible.

9. Federal Standards

There are no federal environmental standards or criteria relevant to the subject matter of this rulemaking. However, there are federal regulations for migratory game birds. This rulemaking will conform state regulations to federal regulations, but will not establish any environmental standards or criteria.

10. Compliance Schedule

All waterfowl hunters must comply with this rulemaking during the 2007-2008 and subsequent hunting seasons.

Regulatory Flexibility Analysis

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with migratory bird hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, sell hunting licenses, but this rule does not affect that activity. Thus, there will be no effect on reporting or recordkeeping requirements imposed on those entities.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese and canvasback ducks. Some small businesses currently benefit from migratory bird hunting because migratory bird hunters spend money on goods and services, and thus an increase in hunter participation should lead to positive economic impacts on such businesses.

Additional hunting activity will not require any new or additional reporting or recordkeeping by any small businesses or local governments. For these reasons, the Department has concluded that this rulemaking does not require a Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas, other than individual hunters. Therefore, a Rural Area Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, issue hunting licenses, but this rulemaking does not affect that activity.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese and canvasback ducks. Rural areas benefit when migratory bird hunters spend money on goods and services.

Additional hunting activity will not require any new or additional reporting or recordkeeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rulemaking is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the Department has concluded that this rulemaking does not require a Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rulemaking is to amend migratory game bird hunting regulations. The Department of Environmental Conservation (Department) has historically made regular revisions to its migratory game bird hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with

the specific areas of the state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Moreover, this rulemaking is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. In fact, this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese and canvasback ducks.

For these reasons, the Department anticipates that this rulemaking will have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

NOTICE OF ADOPTION

Nonattainment Area

I.D. No. ENV-15-07-00007-A

Filing No. 1008

Filing date: Sept. 19, 2007

Effective date: 30 days after filing

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

Action taken: Amendment of section 200.1(av) of Title 6 NYCRR.

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

Subject: Nonattainment area.

Purpose: To incorporate the new Federal PM_{2.5} designation and geographic boundaries and clarify that the annual National Ambient Air Quality Standards for PM₁₀ has been revoked by EPA.

Text or summary was published in the notice of proposed rule making, I.D. No. ENV-15-07-00007-P, Issue of April 11, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Robert D. Bielawa, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: airsips@gw.dec.state.ny.us

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

Assessment of Public Comment

Comment: The Adirondack Council agrees with the Department's designation of Marginal non-attainment for the portion of Essex County surrounding Whiteface Mountain above an elevation of 4,500 feet for the 1-hour ozone NAAQS. This is consistent with the Department's previous designation of the area under the old standard. (The Adirondack Council, May 24, 2007)

Response: As acknowledged by the commenter, no changes have been made to the non-attainment area definition in 6 NYCRR 200.1(av) for the 1-hour ozone standard. No further action required.

NOTICE OF ADOPTION

Federal NESHAP Rules and Emission Guidelines

I.D. No. ENV-15-07-00008-A

Filing No. 1019

Filing date: Sept. 20, 2007

Effective date: 30 days after filing

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

Action taken: Amendment of Part 200 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 19-0319, 70-0109

Subject: Federal NESHAP rules, and emission guidelines for other solid waste incinerators and for large municipal waste combustors.

Purpose: To incorporate by reference: 1) the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations, 2) amendments to the guidelines for existing large municipal waste combustors and 3) new guidelines for existing other solid waste incinerators.

Text of final rule: Part 200, General Provisions

Sections 200.1 through 200.8 remain unchanged.
Existing Section 200.9 is amended to read as follows:

Regulation	Table 1 Referenced Material	Availability
6 NYCRR Part/ sec./etc. 200.10(b) Table 2	40 CFR Part 60 (July 1, 2003) <i>71 FR 27324-27348 May 10, 2006</i> <i>70 FR 74870-74924 December 16, 2005</i>	* * *
Table 4 Existing subdivision 200.10(a) remains unchanged. Existing subdivision 200.10(b) is amended to read as follows:	40 CFR Part 63 (July 1, [2003]2005)	*

40 CFR 60 Subpart	Source Category	Page Numbers in July 1, 2003 Edition of 40 CFR 60 or Federal Register Citation [84-92]71 FR 27324-27348 May 10, 2006
Cb	Large Municipal Waste Combustors That Are Constructed on or Before September 20, 1994	92-95
Cc	Municipal Solid Waste Landfills	95
Cd	Sulfuric Acid Production Units	95-101
Ce	Hospital/Medical/Infectious Waste Incinerators	101-108
D*	Fossil-Fuel Fired Steam Generation for which Construction Commenced after August 17, 1971 (Steam Generators and Lignite Fired Steam Generators)	108-123
Da	Electric Utility Steam Generating Units for which Construction is Commenced after September 18, 1978	123-146
Db	Industrial-Commercial-Institutional Steam Generating Units (only for units which are subject to the certification requirements of Part 201 of this Title)	146-158
Dc	Small Industrial-Commercial-Institutional Steam Generating Units	158-159
E*	Incinerators	158-174
Ea	Municipal Waste Combustors	174-201
Eb	Large Municipal Waste Combustors for Which Construction is Commenced After September 20, 1994 or for Which Modification or Reconstruction is Commenced After June 19, 1996	202-216
Ec	Hospital/Medical/Infectious Waste Incinerators for Which Construction is Commenced After June 20, 1996	216-218
F*	Portland Cement Plants	218-220
G*	Nitric Acid Plants	220-222
H*	Sulfuric Acid Plants	222-223
I*	Asphalt Plants	223-235
J*	Petroleum Refineries	235-237
K*	Storage Vessels for Petroleum Liquids Constructed after June 11, 1973, and prior to May 19, 1978	237-242
Ka*	Storage Vessels for Petroleum Liquids Constructed after May 18, 1978 and prior to July 24, 1984	242-252
Kb	Volatile Organic Liquid Storage Vessels (including Petroleum Liquids) Constructed after July 23, 1984	252-253
L*	Secondary Lead Smelters	253
M*	Secondary Brass and Bronze Ingot Production Plants	254-256
N*	Iron and Steel Plants	

Na	Secondary Emissions from basic Oxygen Process Steelmaking Facilities	256-260
O*	Sewage Treatment Plants	260-264
P*	Primary Copper Smelters	265-267
Q*	Primary Zinc Smelters	267-269
R*	Primary Lead Smelters	269-271
S*	Primary Aluminum Reduction Plants	271-273
T*	Phosphate Fertilizer Industry: Wet Process Phosphoric Acid Plants	273-274
U*	Phosphate Fertilizer Industry: Superphosphoric Acid Plants	274-276
V*	Phosphate Fertilizer Industry: Diammonium Phosphate Plants	276-277
W*	Phosphate Fertilizer Industry: Triple Superphosphate Plants	277-278
X*	Phosphate Fertilizer Industry: Granular Triple Superphosphate	279-280
Y*	Coal Preparation Plants	280-282
Z*	Ferroalloy Production Plants	282-286
AA*	Steel Plants; Electric Arc Furnaces	286-292
AAa*	Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels in Steel Plants	292-298
BB*	Kraft Pulp Mills	298-303
CC*	Glass Manufacturing Plants	303-306
DD*	Grain Elevators	307-309
EE*	Surface Coating of Metal Furniture	309-314
GG*	Stationary Gas Turbines	315-319
HH*	Lime Plants	319-321
KK*	Lead Acid Battery Manufacturing Plants	321-323
LL*	Metallic Mineral Processing Plants	323-326
MM*	Automobile and Light-Duty Truck Surface Coating Operations	326-339
NN*	Phosphate Rock Plants	339-341
PP*	Ammonium Sulfate Manufacturing Plants	341-343
QQ*	Graphic Art Industry Publication Rotogravure Printing	343-351
RR*	Pressure Sensitive Tape and Label Surface Coating Operations	351-356
SS*	Industrial Surface Coating: Large Appliances	356-362
TT*	Metal Coil Surface Coating	362-369
UU*	Asphalt Processing and Asphalt Roofing Manufacture	370-373
VV	Equipment Leaks of VOC in Synthetic Organic Chemicals Manufacturing Industry	373-391
WW*	Beverage Can Surface Coating	391-397
XX*	Bulk Gasoline Terminals	397-401
AAA	New Residential Wood Heaters	401-419
BBB	Volatile Organic Compound (VOC) Emissions from the Rubber Tire Manufacturing Industry	419-416
DDD	Volatile Organic Compound (VOC) Emissions from the Polymer Manufacturing Industry	416-464
FFF*	Flexible Vinyl and Urethane Coating and Printing	464-469
GGG	Equipment Leaks of VOC in Petroleum Refineries	469-470
HHH	Synthetic Fiber Production Facilities	470-473
III	Volatile Organic Compound (VOC) Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Air Oxidation Processes	473-486
JJJ*	Petroleum Dry Cleaning	486-488
KKK	Equipment Leaks of VOC from Onshore Natural Gas Processing Plants	489-492
LLL*	Onshore Natural Gas Processing: SO2 Emissions	492-500

			40 CFR 63 Subpart	Source Category	Page Number in July 1, [2003]2005 Edition or Date of Promulgation Federal Register Cite
NNN	Volatile Organic Compounds (VOC) Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Distillation Operations	500-516			
OOO*	Nonmetallic Mineral Processing	516-523			
PPP*	Wool Fiberglass Insulation Manufacturing	523-525	*A	General Provisions	[10-65]11-69 Vol. 1
QQQ	VOC Emissions from Petroleum Refinery Wastewater Systems	525-536	*B	Requirements for Control Technology Determination for Major Sources in Accordance with Clean Air Sections, Sections 112(g) and 112(j)	[65-88]69-91 Vol. 1
RRR	VOC Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Reactor Processes	536-552			
SSS	Magnetic Tape Coating Facilities	552-569	*F	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry	[133-168]144-179 Vol. 1
TTT	Surface Coating of Plastic Parts for Business Machines	569-573			
UUU	Calciners and Dryers in Mineral Industries	573-574	*G	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater	[168-326]179-339 Vol. 1
VVV	Polymeric Coating of Supporting Substrates Facilities	574-576			
WWW	Municipal Solid Waste Landfills	590-609			
AAAA	Standards of Performance for Small Municipal Waste Combustion Units for Which Construction is Commenced After August 30, 1999 or for Which Modification or Reconstruction is Commenced After June 6, 2001	609-640	*H	Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiate Regulation For Equipment Leaks	[326-368]339-380 Vol. 1
BBBB	Emission Guidelines and Compliance Times for Small Municipal Waste Combustion Units Constructed on or before August 30, 1999	640-672	*I	Polyvinyl Chloride and Copolymers	[368-377]380-390 Vol. 1
			*J	Organic Hazardous Air Pollutants for Certain Processes Subject to Negotiated Regulations for Equipment Leaks	[377-379]390-391 Vol. 1
			*L	Coke Oven Batteries	[379-403]391-418 Vol. 1
CCCC	Standards of Performance for Commercial and Industrial Solid Waste Incineration Units for Which Construction is Commenced After November 30, 1999 or for Which Modification or Reconstruction is Commenced on or After June 1, 2001	673-691	*M	Emission Standards for Dry Cleaning Facilities	[403-411]418-426 Vol. 1
			*N	Chromium Electroplating and Anodizing	[411-440]426-456 Vol. 1
			*O	Ethylene Oxide Commercial Sterilizers	[440-455]456-471 Vol. 1
			*Q	Industrial Process Cooling Towers	[455-458]471-474 Vol. 1
DDDD	Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incineration Units that Commenced Construction On or Before November 30, 1999	692-713	*R	Gasoline Distribution Facilities	[458-471]475-488 Vol. 1
			*S	Pulp and Paper (P&P I and III)	[471-500]488-520 Vol. 1
			*T	Halogenated Solvent Cleaning	[500-528]520-548 Vol. 1
EEEE and FFFF*	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units	70 FR 74870-74924 December 16, 2005	*U	Group I Polymer and Resins	[528-649]549-671 Vol. 1
			*W	National Emission Standard for Hazardous Air Pollutants for Epoxy Resins Production and non-nylon Polyamides Production	[649-662]672-685 Vol. 1
Appendix A	Reference Methods 1-29A	5-605 [Book 2] Appendices			
Appendix B	Performance Specifications 1-9	650-656 [Book 2] Appendices	*X	Secondary Lead Smelters	[662-675]685-698 Vol. 1
Appendix C	Determination of Emission Rate Change	656-657 [Book 2] Appendices	*Y	Marine Tank Vessel Loading Operations	[675-705]698-728 Vol. 1
Appendix D	Required Emission Inventory Information	657 [Book 2] Appendices	*AA	Phosphoric Acid Manufacturing Plants	11-21 [Book] Vol. 2
Appendix F	Quality Assurance Procedures	657-661 [Book 2] Appendices	*BB	Phosphate Fertilizers Production Plants	21-31 [Book] Vol. 2
Appendix G	Provisions for an Alternative Method of Demonstrating Compliance with 40 CFR 60.43 for the Newton Power Station of Central Illinois Public Service Company	661-666 [Book 2] Appendices	*CC	Petroleum Refineries	31-93 [Book] Vol. 2
			*DD	Off-site Waste and Recovery Operations	93-146 [Book] Vol. 2
Appendix I	Removable Label and Owner's Manual	666-667 [Book 2] Appendices	*EE	Magnetic Tape Manufacturing Operations	[147-175]146-174 [Book] Vol. 2
	Existing subdivision 200.10(c) remains unchanged. (d) 'Table 4'.		*GG	Aerospace Manufacturing and Rework Facilities	[175-227]174-226 [Book] Vol. 2
			*HH	Oil and Natural Gas Production Plants	[227-261]226-259 [Book] Vol. 2
			*II	Shipbuilding/Ship Repair (Surface Coating)	[261-276]260-275 [Book] Vol. 2

Table 4

National Emission Standards for Hazardous Air Pollutants

*JJ	Wood Furniture Manufacturing Operations	[276-305]276-304 [Book] Vol. 2	*CCCC	Manufacturing of Nutritional Yeast	[192-204]208-221 [Book] Vol. 4
*KK	Printing and Publishing Industry	[305-334]304-333 [Book] Vol. 2	*DDDD	<i>Plywood and Composite Wood Products</i>	221-270 [Book] Vol. 4
*LL	Primary Aluminum Reduction Plants	[334-354]333-353 [Book] Vol. 2	*EEEE	<i>Organic Liquid Distribution (Non-Gasoline)</i>	271-303 [Book] Vol. 4
*MM	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfitite, and Stand-Alone Semicheical Pulp Mills	[354-373]353-371 [Book] Vol. 2	*FFFF	<i>Miscellaneous Organic Chemical Manufacturing</i>	304-342 [Book] Vol. 4
*OO	National Emission Standards for Tanks – Level 1	[373-378]371-376 [Book] Vol. 2	*GGGG	Solvent Extraction For Vegetable Oil Production	[205-229]343-367 [Book] Vol. 4
*PP	National Emission Standards for Containers	[378-386]376-384 [Book] Vol. 2	*HHHH	Wet Formed Fiberglass Mat Production	[229-244]367-382 [Book] Vol. 4
*QQ	Surface Impoundments	[386-393]384-390 [Book] Vol. 2	*IIII	<i>Surface Coating of Automobiles and Light-Duty Trucks</i>	382-440 [Book] Vol. 4
*RR	Individual Drain Systems	[393-397]390-394 [Book] Vol. 2	*JJJJ	Paper and Other Web Surface Coating	[244-277]440-471 [Book] Vol. 4
*SS	Closed Vent Streams, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process	[397-435]395-432 [Book] Vol. 2	*KKKK	<i>Surface Coating of Metal Cans</i>	471-529 [Book] Vol. 4
*TT	Equipment Leaks – Control Level 1	[435-456]432-454 [Book] Vol. 2	*MMMM	<i>Surface Coating of Miscellaneous Metal Parts and Products</i>	530-584 [Book] Vol. 4
*UU	Equipment Leaks – Control Level 2	[456-489]454-487 [Book] Vol. 2	*NNNN	Large Appliance Surface Coating	[277-318]584-624 [Book] Vol. 4
*VV	Oil-Water Separators and Organic-Water Separators	[489-498]487-495 [Book] Vol. 2	*OOOO	Printing, Coating, and Dyeing of Fabrics	[318-384]624-688 [Book] Vol. 4
*WW	Storage Vessels – Control Level 2	[498-504]496-502 [Book] Vol. 2	*PPPP	<i>Surface Coating of Plastic Parts and Products</i>	688-739 [Book] Vol. 4
*XX	Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations	[504-513]502-511 [Book] Vol. 2	*QQQQ	Wood Building Products	[384-429]739-782 [Book] Vol. 4
*YY	Generic Maximum Achievable Control Technology Standards	[514-574]511-572 [Book] Vol. 2	*RRRR	Metal Furniture Surface Coating	[429-473]782-824 [Book] Vol. 4
*CCC	Steel Pickling – HCl Facilities and HCl Regeneration	[574-583]572-581 [Book] Vol. 2	*SSSS	Metal Coil Surface Coating	[474-499]824-850 [Book] Vol. 4
*DDD	Mineral Wool Production	[583-595]581-592 [Book] Vol. 2	*TTTT	Leather Finishing Operations	[499-514]850-866 [Book] Vol. 4
*EEE	Hazardous Air Pollutants From Hazardous Waste Combustors	8-68 [Book] Vol. 3	*UUUU	Cellulose Production Manufacturing	[515-569]867-913 [Book] Vol. 4
*GGG	Pharmaceuticals Production	68-179 [Book] Vol. 3	*VVVV	Boat Manufacturing	[569-599]913-942 [Book] Vol. 4
*HHH	Natural Gas Transmission and Storage Facilities	179-208 [Book] Vol. 3	*WWWW	Reinforced Plastic Composites	[599-655]942-998 [Book] Vol. 4
*III	Flexible Polyurethane Foam Production	[208-238]208-237 [Book] Vol. 3	*XXXX	Tire Manufacturing	[655-692]998-1033 [Book] Vol. 4
*JJJ	Group IV Polymers and Resins	[238-358]237-358 [Book] Vol. 3	*YYYY	<i>Stationary Combustion Turbines</i>	1033-1049 [Book] Vol. 4
*LLL	Portland Cement Manufacturing Industry	[358-380]358-379 [Book] Vol. 3	*ZZZZ	<i>Stationary Reciprocating Internal Combustion Engines</i>	15-38 [Book] Vol. 5
*MMM	Pesticide Active Ingredient Production	[380-462]380-461 [Book] Vol. 3	*AAAAA	<i>Lime Manufacturing</i>	38-62 [Book] Vol. 5
*NNN	Wool Fiberglass Manufacturing	[462-477]461-476 [Book] Vol. 3	*BBBBB	Semiconductor Manufacturing	[692-701 Book 4]62-71 Vol. 5
*OOO	Amino/Phenolic Resins Manufacturing	[477-543]476-541 [Book] Vol. 3	*CCCCC	Coke Oven: Pushing, Quenching, Battery Stacks	[701-728 Book 4]72-98 Vol. 5
*PPP	Polyether Polyols Production	[543-621]541-619 [Book] Vol. 3	*EEEEE	<i>Iron and Steel Foundries</i>	149-177 [Book] Vol. 5
*QQQ	Primary Copper	[27-52]27-51 [Book] Vol. 4	*FFFFFF	Integrated Iron and Steel Manufacturing	[728-750 Book 4]178-200 Vol. 5
*RRR	Secondary Aluminum Production	[52-96]51-94 [Book] Vol. 4	*GGGGG	<i>Site Remediation</i>	200-254 [Book] Vol. 5
*TTT	Primary Lead Smelting	[96-104]95-103 [Book] Vol. 4	*HHHHH	<i>Miscellaneous Coating Manufacturing</i>	255-281 [Book] Vol. 5
*UUU	Petroleum Refineries: Catalytic Cracking, Catalytic Reforming, and Sulfur Plant Units	[104-164]103-180 [Book] Vol. 4	*IIIII	<i>Mercury Emissions from Mercury Cell Chlor-Alkali Plants</i>	281-308 [Book] Vol. 5
*VVV	Publicly Owned Treatment Works	[164-173]180-189 [Book] Vol. 4	*JJJJJ & KKKKK	[Brick and Structural Clay Products]	[751-799 Book 4]
*XXX	Ferroalloys Production: Ferromanganese and Silicomanganese	[173-185]189-201 [Book] Vol. 4	*LLLLL	Asphalt Roofing and Processing	[800-821 Book 4]355-377 Vol. 5
*AAAA	Municipal Solid Waste Landfills	[185-192]201-208 [Book] Vol. 4	*MMMMM	Flexible Polyurethane Foam Fabrication	[821-836 Book 4]377-391 Vol. 5
			*NNNNN	Hydrochloric Acid & Fumed Silica Production	[836-855 Book 4]9-27 Vol. 6
			*PPPPP	Engine Test Cells	[855-881 Book 4]27-53 Vol. 6
			*QQQQQ	Friction Products Manufacturing	[882-890 Book 4]53-61 Vol. 6

*RRRRR	Taconite Iron Ore Processing	61-86 [Book] Vol. 6
*SSSSS	Refractory Products Manufacturing	[890-938 Book 4]86-134 Vol. 6
*TTTTT	Primary Magnesium Refining	134-146 [Book] Vol. 6
*Appendix A	Test Methods	[939-1139 Book 4]146-347 Vol. 6
*Appendix B	Sources Defined for Early Reduction Provisions	[1140 Book 4]348 Vol. 6
*Appendix C	Determination of the Fraction Biodegraded in a Biological Treatment Unit	[1140-1171 Book 4]348-379 Vol. 6
*Appendix D	Alternative Validation Procedure for EPA Waste and Wastewater Methods	[1171-1172 Book 4]379-380 Vol. 6
*Appendix E	Monitoring Procedure For Nonthoroughly Mixed Open Biological Treatment Systems at Kraft Pulp Mills Under Unsafe Sampling Conditions	[1172-1184 Book 4]380-392 Vol. 6

The remainder of 200.10 remains unchanged.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 200.10(d) Table 4. Due to recent decisions by the United States Court of Appeals, the Department will not finalize adoption of two NESHAP regulations which were recently vacated by the court: Subpart DDDDD for Industrial, Commercial, and Institutional Boilers and Process Heaters, and Subparts JJJJJ & KKKKK for Brick and Structural Clay Products. The references to these regulations, which were included in the proposed rule, are not included in the final rule.

Text of rule and any required statements and analyses may be obtained from: Edward Pellegrini, P.E., Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8403, e-mail: neshaps@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to Article 8 of the State Environment Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule was approved by the Environmental Board.

Revised Job Impact Statement

No changes were made to previously published JIS.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

New York State Clean Air Interstate Rule

I.D. No. ENV-15-07-00009-A

Filing No. 1017

Filing date: Sept. 19, 2007

Effective date: 30 days after filing

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

Action taken: Amendment of Part 200 and addition of Parts 243, 244 and 245 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Laws, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0311; and Energy Law, sections 3-010 and 3-103

Subject: New York State Clean Air Interstate Rule (CAIR).

Purpose: To establish cap-and-trade programs designed to mitigate interstate transport of NO_x and SO₂ to help reduce ozone and fine particulate formation in CAIR states located in the eastern U.S.

Substance of final rule: Part 243 establishes the Clean Air Interstate Rule (CAIR) NO_x Ozone Season Trading Program, Part 244 establishes the CAIR NO_x Annual Trading Program and Part 245 establishes the CAIR SO₂ Annual Trading Program. These programs are designed to reduce ozone and particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}) in New York State and downwind states by limiting emissions of NO_x and SO₂ year-round from fossil fuel-fired electricity generating units (EGUs) and limiting NO_x during the ozone season (May 1 through September 30) from fossil fuel-fired electricity generating units, Portland cement kilns, and fossil fuel-fired non-electricity generating units.

Parts 243, 244, and 245 establish emission budgets for NO_x and SO₂, respectively. Parts 243, 244, and 245 establish trading programs by creating and allocating allowances that are limited authorizations to emit up to one ton of NO_x or SO₂ in the respective control periods or any control period thereafter. Affected units are required to hold allowances for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

Part 243 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 15 megawatts of electrical output and sells any amount of electricity, Portland cement kilns which have a maximum design heat input equal to or greater than 250 mmBtu/hr., and fossil fuel-fired non-electricity generating units, which have a maximum design heat input equal to or greater than 250 mmBtu/hr. For Part 243, the first control period commences on May 1, 2009 and concludes on September 30, 2009. Subsequent control periods begin on May 1 and conclude on September 30 of that calendar year.

Parts 244 and 245 apply to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Part 244 runs from January 1 to December 31 starting in 2009. The control period for Part 245 runs from January 1 to December 31 starting in 2010.

Parts 243 and 244 require each CAIR NO_x unit to have a CAIR authorized account representative (AAR) who shall be responsible for, among other things, complying with the CAIR NO_x permit requirements, the monitoring requirements, the allowance provisions, and the record-keeping and reporting requirements. Similarly for Part 245, each CAIR SO₂ unit needs to have a CAIR AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate CAIR designated representative to perform the above duties.

For Parts 243, 244, and 245, the CAIR AAR shall submit a complete CAIR permit application to the New York State Department of Environmental Conservation (Department) by 12 months before the date on which the applicable CAIR NO_x or CAIR SO₂ unit commences operation.

The Statewide CAIR NO_x Ozone Season Trading Program (Part 243) Budget is 31,091 tons for the control periods 2009 through 2014 and 27,652 tons for 2015 and beyond. The Statewide CAIR NO_x Trading Program (Part 244) Budget is 45,617 tons for the control periods 2009 through 2014 and 38,014 tons for 2015 and beyond.

By September 30, 2007, the Department will submit to the Administrator, in a format prescribed by the Administrator the CAIR NO_x allowance allocations (Part 243 and 244), for the 2009, 2010, and 2011 control periods. By October 31 of each year thereafter, the Department will allocate CAIR NO_x allowances for the control period that commences in the year four years after the deadline for submission.

The Department will determine the number of CAIR NO_x allowances to be allocated to each CAIR NO_x unit by: (1) multiplying the greatest heat input (EGUs and non-EGUs) experienced by the unit or clinker production (Portland cement kilns) for any single control period among the three most recent control periods, for which data is available by the applicable pound per input unit rate (first round calculation); (2) determining the allocation factor by dividing 85 percent of the Statewide CAIR NO_x budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 85 percent portion of the Statewide CAIR NO_x budget.

The Statewide CAIR SO₂ trading program budget is 135,139 tons for the 2010 through 2014 control periods and 94,597 tons for 2015 and beyond. SO₂ allowances have already been allocated and received by sources under title IV of CAA Section 403. Pre-2010 title IV SO₂ allowances can be used for compliance with CAIR. SO₂ reductions are achieved by requiring sources to retire more than one allowance for each ton of SO₂ emitted. The emission value of an SO₂ allowance is independent of the year in which it is used, but is based upon its vintage. Each sulfur dioxide allowance of vintage 2009 and earlier offsets one ton of SO₂ emissions. Vintages 2010 through 2014 offset 0.5 tons of emissions, this equates to a 50 percent emission reduction. Vintages 2015 and beyond offset 0.35 tons of emissions, this equates to a 65 percent emission reduction.

For Parts 243 and 244, new units will be allocated from set-aside accounts which consist of five percent of the Statewide CAIR NO_x budgets. The CAIR AAR of the new unit may submit a written request to the Department to reserve for the new unit allowances in an amount no greater

than the unit's control period potential to emit (CPPTE). For Part 243, the request must be made prior to May 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For Part 244, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For both Parts 243 and 244, the unit must have all of its required permits for the Department to consider these requests.

If more than one project requests allowances from the new unit set-aside and the number requested exceeds the number in the set-aside account, the Department will reserve allowances in the order in which approvable requests were submitted. Requests will be considered to be simultaneous if received in the same calendar quarter. Should approvable requests in excess of the set-aside be submitted in the same quarter, the Department will reserve allowances to each project in an amount proportional to the allowances requested. Unused set-aside allowances will flow back to the CAIR NO_x units in proportion to their original allocation.

The CAIR NO_x Trading Program Budgets are designed to allocate 10 percent of the emissions allowances to the Energy Efficiency and Renewable Energy Technology Account (the EERET Account). The EERET Account will be administered by the New York State Energy Research and Development Authority (NYSERDA) and the allowances in the account will be sold or distributed in order to help achieve the emissions reduction goals of the CAIR NO_x Trading Programs by promoting or rewarding investments in energy efficiency and renewable technologies.

The EERET Account ensures that the value of the allowances is used to further the aims of the emissions reduction program through cost-effective energy efficiency and clean energy technologies, while simultaneously helping to reduce the cost of the CAIR NO_x Trading Programs to consumers.¹

The EERET Account will be administered by NYSEDA. NYSEDA would be required to promptly sell or distribute the allowances as part of a fair, open and transparent process. The proceeds of the allowance sales will be used to fund energy efficiency projects, renewable energy, or clean energy technology. NYSEDA currently administers similar energy efficiency and clean energy technology programs, and the addition of the EERET Account should be easily accomplished. If for any reason the EERET allowances are not sold or distributed by NYSEDA, the allowances would flow back to the Department and be redistributed to the affected units (similar to the flowback method for the new unit set-aside allocations).

The EERET represents a change from the current practice under Parts 204, 237 and 238 of awarding allowances for avoided emissions attributable to the implementation of energy efficiency/renewable energy (EE/RE) projects. The Department's experience is that few sponsors of EE/RE projects have sought the award of EE/RE allowances. This is due to the difficulty in demonstrating enough avoided emissions, even when aggregating projects, to qualify for a single EE/RE allowance. It requires a savings of approximately 1,333 MWh of electricity (at the current 1.5 lbs/MWh reward rate) to yield one NO_x allowance. The value of one NO_x allowance is approximately \$2,000. The EE/RE allowances have not served as an incentive to undertake EE/RE projects to the extent originally anticipated by the Department. As the nominal NO_x rate decreases with this regulation, the reward rate would likely also be decreased. This will make applying for these allowances even less desirable.

In addition, providers of renewable and other clean energy technologies have been somewhat reluctant to apply for NO_x allowances under the structure of Parts 204, 237 and 238. This is largely because the crediting of NO_x allowances for low or zero emissions technologies would effectively assign the avoided NO_x allowances to this generation and, if these allowances are sold and used for compliance, this could reduce or eliminate the ability to sell the "green attributes" of this power. In order to more effectively provide economic incentives for energy efficiency and clean energy technologies, the Department believes that using the receipts of the allowance sales to provide financial incentives could result in an expansion in these types of projects.

The Department will establish one NO_x and one SO₂ compliance account for each CAIR NO_x and CAIR SO₂ source. Allocations will be made into compliance accounts and deductions of allowances for compliance purposes will be made from compliance accounts. Allowances may be held without discount until deducted for compliance. The CAIR AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the unit's budget emissions limitation for the control period immediately preceding, CAIR

NO_x Ozone Season allowances must be submitted for recordation in a source's compliance account by midnight of November 30, CAIR NO_x Annual allowances must be submitted for recordation in a source's compliance account by midnight of March 1, and CAIR SO₂ allowances must be submitted for recordation by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions, the Department will deduct from the source's compliance account, allocated for a subsequent control period, allowances equal to three times the unit's excess emissions.

Parts 243, 244, and 245 rely on the provisions of Part 75 for emissions monitoring and reporting. Units that are in compliance with Title IV of the Clean Air Act and 6 NYCRR Parts 204, 237, and 238 provisions for emissions monitoring and reporting should be in compliance with Parts 243, 244, and 245.

Units that are not CAIR NO_x or SO₂ units may qualify to opt-in to the programs. A unit may become a CAIR NO_x opt-in unit or CAIR SO₂ opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a CAIR NO_x or SO₂ unit. Opt-in units receive CAIR NO_x Ozone Season allowance allocations by May 31 for each control period based on the lesser of its baseline heat input or heat input for the previous control period multiplied by the lesser of its baseline NO_x emission rate or the most stringent applicable NO_x emission limitation. Opt-in units receive CAIR NO_x Annual or CAIR SO₂ allowance allocations by January 1. Opt-in units may withdraw from the program.

Part 200 cites the portions of federal statute and regulations that are incorporated by reference into Parts 243, 244, and 245.

¹ Analyses conducted by NYSEDA for the Department demonstrate that investments in energy efficiency have the effect of reducing electricity demand and the overall cost of the Program. <http://www.rggi.org/documents.htm>.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections, 200.9 - Table 1, 243-1.2(b)(4), (6), (11), (28), (31), (32), (43), (46), (57), (59) thru (79), 243-1.4(a)(1)(i), (ii), (iii), (3), (b), (c), 243-1.5, 243-2.3(a), 243-2.6(d), 243-3.1(b), 243-3.4, 243-5.2(a), (b), 243-5.3(a)(1), (2), (b)(1), (5), (c)(5), (d)(5), (e)(5), (f), (f)(2) thru (8), 243-6.2(b)(4), (b)(4)(ii), 243-6.4(a) thru (d), 243-6.5, 243-6.5(d)(2)(i), 243-8.2(d)(3)(v)(a)(5), (f), 243-8.5(d)(4), 243-9.5(e), 243-5.3(a)(3), (4), (d)(3), (g)(3), 244-1.2(b)(4), (6), (11), (28), (31) thru (76), 244-1.5, 244-2.3(a), 244-2.6(d), 244-3.1(b), 244-3.4, 244-5.2(a), (b), 244-5.3(a)(1), (5), (b)(5), (c), (c)(2) thru (8), (d)(3), 244-6.2(b)(3)(iii)(a), (4)(ii), (iii), 244-6.4(a) thru (d), 244-6.5(d)(2)(i), 244-8.2(d)(3)(v)(c), 244-8.3(b), 244-8.5(d)(4), 244-9.5(e), 244-6.2(b)(3)(iii)(b), 245-1.2(b)(6), (11), (14), (24), (28), 245-3.4, 245-6.5(d)(2)(i), 245-8.2(d)(3)(v)(c) and 245-8.5(d)(3).

Additional Matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule was approved by the Environmental Board.

Text of rule and any required statements and analyses may be obtained from: Michael Miliani, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: CAIR@gw.dec.state.ny.us

Summary of Revised Regulatory Impact Statement

On April 25, 2005, the United States Environmental Protection Agency (EPA) issued a final administrative action in which it made findings that numerous states, including New York State, had failed to submit State Implementation Plan (SIP) provisions that EPA determined are required under federal Clean Air Act (CAA) Section 110(a)(2)(D) to address interstate pollutant transport with respect to the national ambient air quality standards (NAAQS) for ozone, and particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}). 'Finding of Failure To Submit Section 110 State Implementation Plans for Interstate Transport for the National Ambient Air Quality Standards for 8-Hour Ozone and PM_{2.5}, 70 FR 21147-151 (April 25, 2005) (the Finding). CAA Section 110(a)(1) requires states to submit new SIP provisions to account for a new or revised NAAQS within three years after the promulgation of such standard, or any shorter period that EPA might mandate. The Finding started a two-year clock for the promulgation of a Federal Implementation Plan (FIP) under CAA Section 110(c)(1). For any state, including New York State, that fails to receive EPA approval for submitted SIP provisions within the two-year period, EPA will impose a FIP to implement adequate pollutant transport measures.

In a final administrative action announced on May 12, 2005, EPA identified 23 states and the District of Columbia as containing sources of ozone season¹ emissions of nitrogen oxides (NO_x) that contribute to attainment or maintenance problems in downwind states with respect to the ozone NAAQS. In addition, EPA identified 25 States and the District of Columbia as containing sources of annual NO_x and sulfur dioxide (SO₂) emissions that cause attainment or maintenance difficulties in downwind states with respect to the PM_{2.5} NAAQS. 'Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule', 70 FR 25162-405 (May 12, 2005) (CAIR). New York State was listed as a state that must address emissions of NO_x and SO₂ because it contributes to nonattainment of both the ozone and PM_{2.5} NAAQS in downwind states. CAIR specified exact tonnages of NO_x and SO₂ that New York State must reduce in order to satisfy its obligations under CAA Section 110(a)(2)(D). CAIR established budgets for electricity generating units (EGUs) in New York State and other CAIR states for emissions of NO_x and SO₂.

EPA determined the level of emissions reductions in CAIR based on an assumed imposition of highly cost-effective emissions controls on EGUs in the states subject to CAIR. For a State such as New York that contributes to downwind nonattainment of both the ozone and PM_{2.5} NAAQS, CAIR provides three model rules that the State may adopt so that it can participate in interstate emissions cap-and-trade programs. As a general matter, these cap-and-trade programs were designed by EPA to apply to EGUs. The model rules, codified at 40 CFR Part 96, place State-wide caps on the annual and ozone season emissions of NO_x and annual emissions of SO₂ from EGUs collectively. The ozone season NO_x program, found at 40 CFR 96 Sections 301-388, addresses EGU emissions reductions needed for attainment of the ozone NAAQS. The annual NO_x program and the annual SO₂ program, found at 40 CFR 96 Sections 101-188 and 40 CFR 96 Sections 201-288, respectively, address EGU emissions reductions needed for attainment of the PM_{2.5} NAAQS. While a subject state retains the discretion to reduce emissions by the requisite amounts in any manner that it sees fit, adoption of the model rules would produce SIP revisions that EPA will find readily approvable to address the SIP deficiencies identified in the Finding.

The proposed rules constitute New York State's adoption of the three emissions cap-and-trade rules of CAIR. Part 243 establishes the CAIR NO_x Ozone Season Trading Program; Part 244 establishes the CAIR NO_x Annual Trading Program; and Part 245 establishes the CAIR SO₂ Trading Program. Certain revisions to Part 200 are necessary in order to facilitate the administration of these programs. These include the addition of references to Table 1 of Section 200.9 Referenced Material.

The New York State Legislature has accorded the New York State Department of Environmental Conservation (Department) with the primary authority to formulate and implement the SIP. The provisions of State law, taken together, clearly empower the Department to promulgate and implement the proposed rules as SIP provisions. The statutory authority to promulgate Parts 243, 244, and 245 in the State derives primarily from the Department's obligation to prevent and control air pollution, as set out in the Environmental Conservation Law (ECL) at Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, and 19-0311. The promulgation of the CAIR rules is also consistent with the Department's obligations under Energy Law 3-101 and Energy Law 3-103. The legislative objectives underlying the above statutory authority are essentially directed toward promoting the safety, health and welfare of the public, protecting the State's natural environment, and also helping to assure a safe, dependable and economical supply of energy to the people of the State. The general powers of the New York State Energy Research and Development Authority (NYSERDA) that are relevant to the Program's ability to sell allowances are set forth in the Public Authorities Law Sections 1851, 1854 and 1855.

New York State contains nonattainment areas for primary and secondary ozone and PM_{2.5} NAAQS.² As such, the air quality in these areas is not, allowing for an adequate margin of safety, sufficient to protect public health, and is not sufficient to protect the public welfare from any known or anticipated adverse effects associated with the presence of the relevant air pollutants.³

CAIR and its supporting record, including the rule making records generated during the 1997 promulgations of the ozone and PM_{2.5} NAAQS, contain ample descriptions of the health and environmental rationales for controlling emissions of NO_x and SO₂ from EGUs. (70 FR 25170, 25306-08).

By action dated July 18, 1997, EPA revised the NAAQS for particulate matter to add new standards for fine particles (PM_{2.5}) (62 FR 38652). EPA established health- and welfare-based (primary and secondary) annual and 24-hour standards for PM_{2.5}. Individuals particularly sensitive to fine particle exposure include older adults, people with heart and lung disease, and children. The secondary standards are designed to protect against major environmental effects caused by PM such as visibility impairment—including Class I areas which contain national parks and wilderness areas across the country—soiling, and materials damage.

By action dated July 18, 1997, EPA promulgated identical revised primary and secondary ozone standards that specified an eight-hour ozone standard of 0.08 parts per million (ppm) (62 FR 38652). In general, the revised eight-hour standards are more protective of public health and the environment and more stringent than the pre-existing one-hour ozone standards that they replaced. EPA published the eight-hour ozone nonattainment designations that became effective on June 15, 2004. On December 22, 2006, the U.S. Circuit Court of Appeals for the District of Columbia vacated EPA's eight-hour ozone NAAQS Implementation Rule. The schedule for demonstrating attainment with the eight-hour Ozone NAAQS will change, although the standard remains in effect and the State will have to demonstrate compliance with it. Implementation of the CAIR programs remain an essential component of New York State's SIP to achieve attainment of the eight-hour ozone NAAQS.

EPA undertook extensive computer modeling which shows that CAIR will assist New York State's efforts towards reaching attainment of the eight-hour ozone and PM_{2.5} NAAQS.⁴ Measured from 2003 levels in New York State, EPA estimates that CAIR will result in SO₂ emission reductions of about 213,000 tons or 84 percent and NO_x emission reductions of about 32,000 tons or 48 percent. At the end of 2004, EPA had designated 30 New York counties as being components of ozone nonattainment areas. EPA's CAIR modeling shows that CAIR, in conjunction with existing CAA programs as well as New York State's clean air programs, are predicted to bring 19 of these counties into attainment by 2010. EPA's modeling also shows that even after the full implementation of CAIR in 2015, nine counties would remain in nonattainment of the ozone NAAQS. However, EPA expects that CAIR will further reduce ground-level ozone levels in these nine counties. The Department is currently working to establish or revise additional SIP programs to bring all areas into attainment.

EPA allows states to add the portion of the NO_x SIP Call trading budget attributed to non-EGUs and small EGUs to the State's CAIR NO_x Ozone Season Trading Budget. New York State has chosen to include all of the affected sources currently covered by Part 204, NO_x Budget Trading Program in the CAIR NO_x Ozone Season Trading Program (Part 243). The NO_x budgets for small EGUs, non-EGUs, and Portland cement kilns will be added to New York's ozone season EGU budget established under CAIR to form the sector budgets under Part 243, CAIR NO_x Ozone Season Trading Program. Small EGUs include fossil fuel-fired units serving a generator with a nameplate capacity of 15 MWe to 25 MWe. Non-EGUs include fossil fuel-fired large non-EGUs with a heat input rating of 250 MMBtu/hr or greater. Portland cement kilns consist of fossil fuel-fired cement kilns with heat input rating of 250 MMBtu/hr or greater.

The NO_x ozone season Portland Cement Kiln Unit Sector Budget has been revised as part of the CAIR rulemakings. The current Part 204 Portland Cement Kiln Unit Sector Budget is 8,085 tons per ozone season. The budget for these units has been revised to 6,271 tons per ozone season, representing a reduction of 1,814 tons of NO_x per ozone season starting in 2009.

The CAIR NO_x Trading Program budgets are designed to allocate 10 percent of the emissions allowances to the Energy Efficiency and Renewable Energy Technology Account (the EERET Account). The EERET Account will be administered by the New York State Energy Research and Development Authority (NYSERDA) and the allowances in the account will be sold in order to help achieve the emissions reduction goals of the CAIR NO_x Trading Programs by promoting or rewarding investments in energy efficiency and renewable technologies, and/or innovative abatement technologies.

ICF International has conducted electricity system modeling analysis to estimate the incremental cost of implementing CAIR and the Clean Air Mercury Rule (CAMR) in New York. The analysis compared a reference or business-as-usual case (absent either CAIR or CAMR) to each of three policy cases: New York's proposed approach for implementing both CAIR and CAMR, CAIR only, and CAMR only. CAIR and CAMR policies (implemented together) could increase wholesale electricity prices by an average of 1.7 percent or \$1.14 MWh over the 2010 to 2020 timeframe.

For a typical residential customer (using 750 Kwh per month⁵), this translates into a monthly retail bill increase of \$0.86.

Considering only this rulemaking and none of the other requirements that are resulting in reductions in NO_x and SO₂ emissions at these facilities (NSR/PSD settlements, mercury control and BART and other potential haze requirements), the annual NO_x program will cost the EGUs \$17.2 million a year from 2009 to 2014 and \$30.2 million in 2015 and beyond. This is estimated by using the average cost of NO_x control that EPA identified in the CAIR regulatory support documents multiplied by the total emission reductions required under CAIR (sum of allowances under Parts 204 and 237 minus the CAIR annual NO_x allowances). Using the same formula to estimate the cost of control, the ozone season NO_x program will cost the EGUs \$9.2 million starting in 2009 and \$24.6 million starting in 2015. It should be noted that no additional costs are expected for the non-EGU owners since there is no change to the number of allowances to be distributed to them under Part 243. In addition, the Portland cement kiln owners will not experience an increase in cost as a result of Part 243 because, as noted above, the reduction in allowances distributed to this sector under Part 243 is reflective of actual emissions of these units plus a margin for growth. The costs to EGUs associated with SO₂ control under Part 245 is expected to be \$0 in 2009 and \$25.7 million in 2015 (sum of allowances Part 238 minus the CAIR SO₂ budget multiplied by the average cost of control estimated by EPA).

There will be costs associated with Local Governments. The Jamestown Board of Public Utilities (JBPU), a municipally owned public utility, owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of CAIR. Therefore, no additional monitoring, record keeping or reporting costs will be incurred as a result of this program.

The JBPU will need to either limit emissions at the SACGS to no more than its allowance allocations under Parts 243, 244, and 245 or purchase allowances equal to the number of tons emitted in excess of the number of allowances initially allocated to it. Given the highly variable nature of control equipment cost, the Department limited the analysis of control costs to the purchase of allowances to comply with the program. The Department estimated allocations for SACGS and subtracted those allocations from 2006 facility emissions. The estimated cost for purchasing allowances was determined to be approximately \$1.4 million annually for the period from 2010 through 2014 and \$2.4 million in 2015 and beyond.

There will be costs associated with the administration of CAIR. The Department will need to review monitoring plans submitted to comply with the requirements of Parts 243, 244, and 245. However, since these plans have been used to comply with current Parts 204, 237, and 238 these costs will not amount to an increase above what is already contemplated. The administrative aspects of the regulation and central office support for permitting and compliance activities will need to increase beyond what is currently required to implement existing regulations, but not significantly. The Department estimates that three to four additional person years will be required to implement these programs at a cost of \$110,000 per person year or \$440,000 annually.

The owners and operators of each source subject to CAIR and each unit at the source shall keep each of the following documents for a period of five years from the date the document is created: the account certificate of representation form; all emissions monitoring information; copies of all reports and other submissions and all records made or required under CAIR; and copies of all documents used to complete a permit application and any other submission under CAIR or to demonstrate compliance with CAIR.

The Department considered various alternatives when developing CAIR. These include: No action, where EPA would implement a FIP to establish the federal cap-and-trade programs under 40 CFR Part 97; command-and-control; and auction versus free allocation. Free allocation can be based on heat input or energy output.

There are two ways in which the Department may allocate allowances: Sell them through an auction or give them away as has been done in the past. The Department has opted to continue to allocate the majority of allowances to affected sources based on historical operation. A precedent from other proven allowance trading programs has been established for this type of allowance allocation.⁶ The Department chose this option in order to meet the Federal deadlines of CAIR and to avoid FIP implications. CAIR is on a strict timeline that does not afford the Department the time to create the necessary structure and work out the details to include and implement a full auction as part of the allocation process. Based on the Department's experience with the EERET account under this program, the

Department will consider expanding this type of approach in CAIR at some point in the future.

SO₂ allowances have already been allocated and received by sources under title IV of CAA Section 403. Pre-2010 Title IV SO₂ allowances can be used for compliance with CAIR. SO₂ reductions are achieved by requiring sources to retire more than one allowance for each ton of SO₂ emitted. The emission value of an SO₂ allowance is independent of the year in which it is used, but is based upon its vintage. Each sulfur dioxide allowance of vintage 2009 and earlier offsets one ton of SO₂ emissions. Vintages 2010 through 2014 offset 0.5 tons of emissions, this equates to a 50 percent emission reduction. Vintages 2015 and beyond offset 0.35 tons of emissions, this equates to a 65 percent emission reduction. The Department is proposing to adopt the Federal model rule for SO₂ at this time. However, the Department may, in the future, adopt an alternative approach. In the interim, Part 238 will remain in place.

The Department considered utilizing an electricity output based allocation methodology. Advocates for use of an output based methodology agree that this type of approach rewards the most efficient generation. The Department agrees with that assertion, but has not chosen to allocate on an output basis because of the lack of available generation data, as well as deficiencies in the standardization of generation data. It is not likely that the required data will become available in time to finalize New York State's CAIR regulations. Because of the additional burden the output based methodology would place on the Department and on the affected sources, the Department has chosen not to allocate allowances in this manner at this time. The Department includes a Control Period Potential To Emit (CPPTE) component in its allowance allocation methodology which limits the amount of allowances an affected facility can receive based on the maximum capacity of a unit to emit under its physical and operational design during a control period. If the CPPTE is used in an output based allocation system, there is likely little difference in the actual allowances distributed to facilities.

The Department chose a fuel neutral approach in the allocation methodology for NO_x allowances. The Department substantially adopted the methodology used in allocating NO_x allowances under Parts 204 and 237. As with Parts 204 and 237, the Department believes that a fuel neutral allocation methodology is appropriate because of the relatively small differences in uncontrolled NO_x emission rates (as compared to SO₂) resulting from use of different types of fossil fuel.

The Department considered and rejected an energy efficiency and renewable energy generator set-aside under the program. Instead, the Department is proposing to create the EERET Account. The inclusion of the EERET Account will not cause the retail price of electricity to increase because generators incorporate the same dollar value of the allowances in their bids to supply electricity whether the allowances are obtained at no cost or purchased on the open market.

¹ Ozone season, for the purpose of this rulemaking, is defined as the time period from May 1 through September 30.

² The classifications for the ozone and PM_{2.5} nonattainment areas may be found at 40 CFR § 81.333. A graphical representation of the ozone nonattainment areas may be found at <http://www.epa.gov/oar/oaqps/greenbk/ny8.htm1>. A graphical representation of the PM_{2.5} nonattainment areas may be found at <http://www.epa.gov/oar/oaqps/greenbk/mappm25.html>.

³ CAA § 109(b); 40 CFR § 50.2(b).

⁴ <http://www.epa.gov/interstateairquality/ny.html>.

⁵ Typical customer usage numbers from the Energy Information Administration (EIA). Electricity rates from December 2005 Patterns & Trends report.

⁶ MIT Joint Program on the Science and Policy of Global Change. "Emissions Trading to Reduce Greenhouse Gas Emissions in the United States: The McCain-Lieberman Proposal." Sergy Paltsev, John M. Reilly, Henry D. Jacoby, A. Denny Ellerman and Kok Hou Tay. Report No. 97, June 2003.

Regulatory Flexibility Analysis

No changes were made to the previously published Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

No changes were made to the previously published Rural Area Flexibility Analysis.

Job Impact Statement

No changes were made to the previously published Job Impact Statement.

Summary of Assessment of Public Comment

INTRODUCTION

The Department is proposing three regulations to comply with EPA's Clean Air Interstate Rule (CAIR) that will establish cap-and-trade programs designed to mitigate interstate transport of nitrogen oxides (NO_x) and sulfur dioxide (SO₂) to help reduce ozone and fine particulate formation in CAIR states located in the eastern U.S. These rules consist of Part 243, CAIR NO_x Ozone Season Trading Program; Part 244, CAIR NO_x Annual Trading Program; and Part 245, CAIR SO₂ Trading Program. As part of this rulemaking, Part 200 will be amended to update cross references in section 200.9, Referenced Material.

The Department proposed Parts 243, 244, and 245 on March 27, 2007. Hearings were held in Avon on May 15, 2007, in Long Island City on May 16, 2007, and in Albany on May 17, 2007. The comment period closed at 5:00 P.M. on May 24, 2007. The Department received written comments on the proposed rules from 15 interested parties. These comments are summarized and responded to in this document.

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

The Environmental Protection Agency (EPA) provided many comments which addressed inconsistencies and deviations from EPA's model CAIR rule language, and suggested clarification of the Department's intent in certain areas of the regulations. The Department has incorporated most of EPA's suggested revisions into the CAIR rules.

A number of comments address the Department's allocation to the energy efficiency and renewable energy technology account (EERET Account). Some commenters requested that if the Department and/or New York State Energy Research and Development Authority (NYSERDA) take the position that they have legislative authority to raise revenue in the manner described in proposed 6 NYCRR Parts 243 and 244, that the Department and/or NYSEDA specify where such authority is derived within the Environmental Conservation Law (ECL). The commenters also suggest that the sale of emissions allowances for revenue raising purposes constitutes a tax and that under the state constitution, however, only the legislature may create a tax. The comments also state that an administrative agency, such as the Department, cannot establish a tax without unambiguous legislative authority. Because the legislature has not authorized the revenue raising/taxing measures included in the proposed CAIR NO_x Trading Program, the commenters believe that NYSDEC's proposed rules are unconstitutional and 'ultra vires'.

The Department's response to those comments is that the allocation of the CAIR NO_x ozone season allowances and CAIR NO_x allowances (hereinafter simply "allowances") to the EERET Accounts under proposed Parts 243 and 244 is an exercise of the Department's regulatory or police power under the Environmental Conservation and the State Energy Law. This power is consistent with the policy of the State as expressed in section 4 of Article XIV of the New York State Constitution. Pursuant to Energy Law Section 3-103 the Department is obligated to conduct its affairs so as to conform to the State's energy policy that is set forth in Energy Law Section 3-101. Energy Law Section 3-101 provides that it is the energy policy of the State to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the State and to accelerate development and use within the State of renewable energy sources, in order to, among other things, protect its environmental values and husband its resources for future generations. Also, ECL Section 3-0301 empowers the Department to coordinate and develop programs to carry out the environmental policy of New York State set forth in ECL Section 1-0101 which includes the prevention of air pollution and promoting technology that minimizes adverse impacts to the environment. Section 3-0301 also specifically empowers the Department to provide for the prevention and abatement of air pollution; encourage and undertake scientific investigation and research on pollution prevention and abatement; and assess new and changing technology to identify long-range implications for the environment and encourage alternatives that minimize adverse impact. In carrying out its powers and duties, ECL Section 3-0301 also provides that the Department is to consult and cooperate with officials of other State agencies having duties and responsibilities concerning the environment as well as officials and representatives of any public benefit corporation.

The Department's response also states that the EERET Account allocation is not tantamount to the imposition of a tax. The air is a public resource. As such, the air belongs to no one. Pursuant to ECL Sections 1-0101, 3-0301, 19-0103, and 19-0105, the Department is responsible for preserving this public resource by regulating sources that send pollution into the air. ECL Section 1-0101 provides that it is the responsibility of the

State government to act as trustee of the environment, including the air resource, for present and future generations.

The Department's decision on how to allocate allowances inescapably involves the transfer of some value or wealth. In the absence of a statutory directive to transfer this wealth to pollution sources for free, the Department believes the value should be retained for the benefit of the environment and the public welfare in a manner that is within the authority granted to the Department. By allocating allowances to NYSEDA, the Department has created a mechanism by which the value of the allowances may be used to promote Energy Efficiency and Renewable Energy (EE/RE) technologies to reduce air pollution. NYSEDA is the entity created by the State Legislature that is most qualified and equipped to achieve this environmental protection goal in this way.

The establishment of the EERET Account allocation and NYSEDA's possible use of the value resulting from allowance sales amounts to an adjustment in the way New York State government is addressing the problem of air pollution. By beginning the shift of allocating allowance values from polluting industries to EE/RE measures, the Department is acting within its statutory authority to protect and preserve the air resource for present and future generations. For two reasons, the Department has chosen to allocate only 10 percent of both the CAIR NO_x Ozone Season Trading Program Budget and the CAIR NO_x Annual Trading Program Budget to the EERET account at the present time. First, the proposed rules represent the first time the Department will allocate allowances in this manner and the Department wished to learn from the experience before providing for any larger EERET Account allocation.¹ Second, by signaling the Department's direction with respect to NO_x allowance allocations with this relatively small EERET Account allocation, the Department anticipates that regulated sources will be given sufficient time to adjust to the new position this type of allocation will mean for them financially. Regulated sources will benefit by having this advance notice of a possibly much larger sale of allowances in the future.

NYSEDA's statutory authority springs from Title 9 of the Public Authorities Law (PAL). In enacting Title 9, the legislature declared, in relevant part, that the purpose of NYSEDA is, among other things, to promote the development and utilization of "safe, dependable, renewable and economic energy sources and the conservation of energy and energy resources." PAL Section 1850-a. The statute directs NYSEDA to develop and implement [these] new energy technologies and energy conservation technologies in a manner consistent with economic, social and environmental objectives. PAL Sections 1851(10) and (11); 1854. In exercising its statutory powers, NYSEDA is directed to cooperate and act in conjunction with various entities, including State agencies, in exercising its powers, and is authorized to provide services to State agencies in furtherance of its corporate purposes. PAL Section 1854(2). Pursuant to PAL Section 1855, NYSEDA is specifically empowered to accept from any State agency the grant of any aid in any form and to comply, subject to the relevant provisions of NYSEDA's enabling legislation, with the terms and conditions of the grant of the aid. PAL Section 1855 also provides that NYSEDA may receive, acquire, sell, and dispose of any personal property,² and may "enter into any contracts and to execute all instruments necessary or convenient for the exercise of its corporate powers and the fulfillment of its corporate purposes." PAL Sections 1855(5) and (10). Finally, the statute provides NYSEDA with the authority "to do all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted by this title." PAL Section 1855(17).

Given the numerous references and express emphasis in NYSEDA's enabling statutes on the development of energy conservation and renewable energy resources, as central to NYSEDA's purpose, NYSEDA's establishment of the EERET Account and use of allowance sale revenues for the purposes stated in the EERET Account definition would clearly fall within the authority granted to NYSEDA by Title 9 of the PAL.

Any funds generated by NYSEDA by the sale of allowances would be kept and used by NYSEDA. None of the funds would come to the Department or support Department operations. However, the value of the allowances would be used for measures aimed at air pollution control. These measures would include the development and deployment of technologies that could address a number of different air pollutants that are emitted by various types of sources in New York State. These types of sources may be found in any stationary or mobile source emissions sector and may combust any type of fuel.

In light of the proposed allocation to the EERET Account, some commenters assert that the proposed CAIR NO_x Trading Program is more stringent than the underlying and corresponding federal EPA require-

ments. The Department disagrees with this perspective. The Department is making available all of the CAIR NO_x allowances that EPA budgeted for New York State (40 CFR Part 51.123(e)(2) and (q)(2)). Creating an EERET Account does not make New York's portion of CAIR any more stringent than EPA's requirements. In fact, Parts 243 and 244 do not limit NO_x emissions from any CAIR NO_x source or CAIR NO_x Ozone Season source in New York State based on the number of allowances that the Department allocates to the units that are included in that source. The Department's allocation methodologies in the proposed regulations merely determine how the allowances are distributed. The allocation methodologies do not lower any emission limit or reduce the size of the budget. Therefore, the EERET Account which will offer for sale the allowances allocated to it is not more stringent than the federal requirements.

The Department also notes that EPA acknowledges that each State may reserve a portion of its allowance budget for an auction. Proceeds from the auction would be fully retained by the State to be used as they see fit. While EPA has provided a description of some of the different allocation options open to States and outlined some of their key features, EPA has stated that the State's policy choice on allocations does not impact the environmental goals of the CAIR program. EPA allows the States to choose policies that best match their particular needs and circumstances. 'Corrected Response To Significant Public Comments On The Proposed Clean Air Interstate Rule'; Docket Number OAR-2003-0053 (April 2005) <www.epa.gov/interstateairquality/pdfs/cair-rte.pdf>.

Some commenters indicate that the proposed increase in the quantity of allowances for use in support of energy efficiency and renewable energy represents an unnecessary and significant impact on the State's fossil generation sources and ultimately upon the rate payers and the business climate in New York. The commenters also state that since the State's CAIR NO_x budget is already so small, any expansion of set-asides is unwarranted and will have deleterious impacts to the State. The Department responds that allocations to the EERET Accounts constitute a small portion (less than 0.4 percent) of the regional NO_x emissions budgets under the CAIR NO_x Ozone Season Trading Program and the CAIR NO_x Trading Program. These allocations will not reduce the regional or New York trading program budgets. The Department does not believe that expanding the EERET Account allocations will have any significant or detrimental impact on the trading programs or on the emissions of individual sources.

Some commenters state that the allocation of allowances to larger set-asides, and the future consideration of auctions as an allocation method for CAIR, diminishes rather than enhances incentives for the installation of emissions controls. They state that for the CAIR pollutants, back-end controls are available and the sale of excess allowances generated by installation of those emissions controls provides financial incentives for this equipment. The commenters argue that larger set-asides and auctions reduce the number of excess allowances that can be generated by the emissions control systems and thus reduce those incentives. Also, sources affected by these regulations derive no net asset benefit because it is very likely that they will be obliged to surrender more allowances than they have been allocated. If larger set-aside auctions reduce or eliminate the incentives for over-compliance, this will place the emphasis for pollutant reduction on the expenditure of auction revenues, not abatements produced by market forces. The commenters also state that the Department has yet to show how much of a pollution reduction can be expected by the EERET program. The Department responds that the savings associated with reduced emissions are the same regardless of whether the owner of an affected unit gets to sell an allowance that was given to them for free or if that owner saves the same amount because she does not have to purchase allowances in order to comply with the program – the incentive to control emissions is the same because the cost of an allowance is saved either way. Affected sources (as a whole) that are in the CAIR NO_x programs will continue to emit NO_x to the levels of the caps regardless of how or where reductions are achieved. It will be less expensive for certain units to purchase allowances to comply with the CAIR regulations than to reduce emissions by installing control equipment.

A commenter pointed out that the exemption for units that have accepted permit conditions to limit the unit's potential NO_x mass emissions during the control period to 25 tons or less under current Part 204 (Section 204-1.4(b)) was not included in the proposed Part 243. The Department

agrees with this comment and will include the exemption for facilities accepting enforceable limits on potential to emit in Part 243. The Department always intended to include all of the non-EGU and Portland cement kiln sources that were subject to Part 204 in the CAIR NO_x Ozone Season Trading Program as provided for under 40 CFR Part 51.123(aa). This exemption allows sources that have been exempt under Part 204 to continue that exemption under Part 243.

Some commenters suggest that instead of establishing an EERET Account, the procedures established under existing allowance allocation rules in Part 204-5.3(f), Part 237-5.3(c) and Part 238-5.3(d) should be continued. The Department's experience with the previously established EE/RE set-asides programs has been that they have been under-subscribed and have had no significant encouraging effect on the development of EE/RE projects. This experience appears to have been shared by other States. As a general matter, it appears that the under-subscription of the EE/RE set-asides is due to the fact that allowance prices have not been sufficiently high to provide an adequate incentive to undertake EE/RE projects. EE/RE projects individually account for very minor amounts of NO_x or SO₂ reductions so that numerous projects need to be aggregated for even one allowance to be awarded. This need for aggregation, often spread over multiple project owners, along with the requirement for project sponsors to engage in complicated single pollutant emissions reduction accounting procedures, imposes very significant transaction costs on top of the other substantial development costs for these projects. Furthermore, the extent that project sponsors can realistically rely on future allowance sales in order to secure initial project financing is not great. Before an EE/RE project sponsor may be awarded allowances from an EE/RE set-aside, the project must be complete and have been in operation long enough to generate operating data that would be used to demonstrate the emissions reductions (through assumed electrical power demand displacement) for which the allowances may be awarded. The long time delays and lack of certainty concerning such awards make the EE/RE set-asides have relatively little appeal for potential project sponsors.

Commenters who support allocating allowances to the EERET Account, argue that selling or distributing a mere 10 percent of allowances to support energy efficiency and renewable energy is insufficient to protect the environment and public health at the least cost to consumers. These commenters believe programs to curb air pollutant emissions should encourage investment in clean energy technologies, which they say are the long-term solution to air pollution and climate change. These commenters support providing allowances to clean energy projects or using funds from the auction of such allowances for investments in clean energy generation and energy efficiency and urge New York State to consider the impact on clean energy options when finalizing the rules for NO_x and SO₂ allocations. In particular, the commenters state, New York State must ensure clean, non-emitting energy resources can appropriately make avoided emissions claims, and New York State must ensure any funds raised via auctions are used for truly sustainable practices. Generation from renewable resources displaces power from other sources and therefore can help lower the cost of allowances sold in market transactions including auctions. The commenters believe clean generation should continue to have the opportunity to correctly make claims based on avoided emissions. The Department appreciates the comment supporting the concept of the EERET Account allocation. The Department will consider expanding the sale of allowances under the CAIR programs as a possible rule revision in the future. The Department is proposing to allocate 10 percent of the trading program budgets to the EERET Accounts from which NYSEERDA may sell or distribute the allowances to encourage the development of energy efficiency and renewable energy projects. The EERET Account allocation is a successor mechanism to the EE/RE set-aside allocations. Having gained the experience with the EE/RE set-asides, the Department thinks the EERET Account allocation will avoid the problems found with the administration of the EE/RE set-asides.

¹ On December 5, 2005, the Department released for comment a draft 6 NYCRR Part 242, CO₂ Budget Trading Program, which is currently undergoing pre-proposal development. The allocation of CO₂ allowances to a similar account under the future Part 242 will occur later and will be done through an auction format that is currently being studied and developed on a separate administrative track.

The CO₂ Budget Trading Program will differ from the CAIR NO_x cap-and-trade programs in the following significant ways: most allowances in the CO₂ Budget Trading Program will likely be auctioned; the compliance period is at least three times longer than in the CAIR programs so the initial allowance allocation under the CO₂ Budget Trading Program may take place later but still be more than three years in advance of the first allowance transfer deadline; the CO₂ Budget Trading Program is not subject to SIP deadlines for approval so auction development may take longer; and there is no history of allocation of CO₂ allowances (much less any free allocation) that might have been relied on by sources in making past business decisions.

- ² Allowances have some of the attributes of property, including transferability and the capacity to be the subject of sale and purchase agreements. Thus, an allowance would fall within the meaning of "personal property" under PAL § 1855 although the allowance lacks any attendant property "right" that would give an allowance holder an entitlement to compensation should the allowance be devalued or terminated by the government.

Insurance Department

EMERGENCY RULE MAKING

Establishment of the Industry Standard Rate

I.D. No. INS-41-07-00001-E

Filing No. 1007

Filing date: Sept. 19, 2007

Effective date: Sept. 19, 2007

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

Action taken: Amendment of Part 151 (Regulation 119) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201 and 301; and Workers' Compensation Law, section 27

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

Specific reasons underlying the finding of necessity: Chapter 6 of the Laws of 2007 established comprehensive reforms to New York's Workers' Compensation Law by: (1) increasing maximum and minimum benefits for injured workers and indexing the maximum to New York's average weekly wage; (2) dramatically reducing costs in the workers' compensation system, thus making hundreds of millions of dollars available annually to be translated into premium reductions; (3) establishing enhanced measures to combat workers' compensation fraud; (4) replacing the Special Disability Fund with enhanced protections for injured veterans; (5) preventing insurers from transferring costs to New York employers by closing the Special Disability Fund to new claims; and (6) creating a financing mechanism to allow for settlement of the Fund's existing liabilities.

The legislation amended section 27(4) of the Workers' Compensation Law to authorize the Superintendent to determine, by regulation, the "industry standard rate" for calculating simple interest to be used in calculating the present value of future benefits when the employer or insurer is required to deposit such amount into the Aggregate Trust Fund (ATF).

The legislation directs that it shall apply to all awards made on or after July 1, 2007, and that the Workers' Compensation Board (WCB) shall immediately compute the present value thereof and require payment of such amount into the aggregate trust fund.

Without the Superintendent's determination of the industry standard rate, the WCB is unable to compute the present value of amounts to be deposited into the ATF. Consequently, because the requirement applies to all awards made since July 1, 2007, 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.

Subject: Establishment of the industry standard rate for use in conjunction with payments made by workers' compensation insurers to the aggregate trust fund.

Purpose: To establish the interest rate applicable when workers' compensation insurers are required to deposit the present value of unpaid benefits for permanent partial disability cases into the aggregate trust fund.

Text of emergency rule: Part 151 is hereby retitled: "Workers' Compensation Insurance Rates."

Part 151 (Regulation No. 119) is hereby renumbered Subpart 151-1, in sequence. Subpart 151-1 shall be entitled: "Rate Filings Prior Approval."

A new Subpart 151-2, entitled "Industry Standard Rate for Aggregate Trust Fund," is added to read as follows:

Section 151-2.1 Preamble.

On March 13, 2007, legislation establishing comprehensive reform to New York's Workers' Compensation Law was signed into law, becoming chapter 6 of the laws of 2007. The legislation amended section 27(2) of the Workers' Compensation Law to mandate that, for awards made pursuant to WCL § 15(3)(w) (permanent partial disability) after July 1, 2007, every insurer writing workers' compensation insurance carriers shall deposit into the aggregate trust fund (ATF) established under the Workers' Compensation Law an amount equal to the present value of all unpaid benefits. The legislation also amends section 27(4) of the Workers' Compensation Law to mandate that the "industry standard rate" of interest, to be used in calculation of the present value of unpaid benefits, shall be determined by the superintendent of insurance by regulation.

Section 151-2.2 Industry Standard Rate.

(a) After discussions with the New York State Insurance Fund (NYSIF) (which administers the ATF), insurers, the Workers' Compensation Board, and other interested parties, the superintendent has determined the industry standard rate. Among the factors that were considered by the superintendent in making this determination were the following:

(1) the rate of return on invested assets experienced by the NYSIF in recent years;

(2) the investment performance of domestic property/casualty insurers;

(3) the rates of return on low risk investments of comparable duration to that of the ATF liabilities; and

(4) the discount rate used in calculating the minimum individual case reserves for policies of workers' compensation insurance, pursuant to section 4117(d) of the Insurance Law and section 86 of the Workers' Compensation Law.

(b) The industry standard rate shall be five percent per year.

Section 151-2.3 Effective Date

This Subpart shall apply to all awards made on or after July 1, 2007, as mandated by chapter 6 of the laws of 2007.

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 December 17, 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 promulgation of the first amendment to Part 151 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 119), derives from Sections 201 and 301 of the Insurance Law of the State of New York, and Section 27 of the Workers' Compensation Law of the State of New York. These sections establish the superintendent's authority to approve workers' compensation premium rates and related materials that impact on premium rates.

Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 27 of the Workers' Compensation Law establishes the circumstances when insurers must deposit, into the aggregate trust fund (ATF), an amount equal to the present value of all unpaid benefits resulting from a claim for death benefits, or total permanent or permanent partial disability. It also establishes the formula for calculation of the present value of unpaid future benefits, including the direction that the "industry standard rate" of interest shall be determined by the Superintendent of Insurance by regulation.

2. Legislative objectives: Chapter 6 of the laws of 2007 established comprehensive reforms to New York's Workers' Compensation Law by: (1) increasing maximum and minimum benefits for injured workers and

indexing the maximum to New York's average weekly wage; (2) dramatically reducing costs in the workers' compensation system, thus making hundreds of millions of dollars available annually to be translated into premium reductions; (3) establishing enhanced measures to combat workers' compensation fraud; (4) replacing the Special Disability Fund with enhanced protections for injured veterans; (5) preventing insurers from transferring costs to New York employers by closing the Special Disability Fund to new claims; and (6) creating a financing mechanism to allow for settlement of the Fund's existing liabilities.

The legislation amended section 27(4) of the Workers' Compensation Law to authorize the superintendent to determine, by regulation, the "industry standard rate" for calculating simple interest to be used in calculating the present value of future benefits when the employer or insurer is required to deposit such amount into the Aggregate Trust Fund (ATF).

3. Needs and benefits: Chapter 6 of the laws of 2007 added a provision to Section 27 of the Workers' Compensation Law whereby the Superintendent sets the "industry standard rate" to be used for calculating future workers compensation indemnity liabilities, when the Workers' Compensation Board (WCB) computes required contributions to the Aggregate Trust Fund (ATF). After discussions with the New York State Insurance Fund (NYSIF) (which administers the ATF), insurance carriers, the WCB, and other interested parties, the superintendent has determined that the industry standard rate shall be set at 5% per year. The superintendent's determination was based on the consideration of the following:

- A review of the rates of return on invested assets experienced by NYSIF in recent years indicates that NYSIF has realized returns that are at or near 5% per year. Prudent investment of the carrier contributions will insure that the ATF has adequate surplus to meet its obligations.

- The Department expects that NYSIF will settle a significant number of claims at an amount significantly less than the present value of the associated liabilities. The new law does not entitle insurers to recover any funds that remain after NYSIF settles, so settlement related savings will add to ATF surplus.

- A 5% industry standard rate is consistent with the investment performance of New York-domiciled property/casualty insurers. Therefore, the Department does not expect that insurers will experience a windfall when transferring liabilities to the ATF.

- A 5% industry standard rate is consistent with the rates of return on low risk investments of comparable duration to that of the ATF liabilities.

- In establishing the minimum reserves under workers' compensation policies, Section 4117(d) of the Insurance Law and Section 86 of the Workers' Compensation Law require a company's individual case reserves to be no less than the sum of the present values, at five percent interest per annum, of the determined and unpaid losses, plus the estimated unpaid loss expenses.

4. Costs: This regulation does not establish any new requirements on regulated parties. The Legislature mandated that insurers deposit awards pursuant to WCL § 15(3)(w) into the ATF, and that the superintendent determine the "industry standard rate" by regulation. The determination of the industry standard rate affects the amount of the deposit that carriers must make into the ATF.

5. Local government mandates: This 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: This regulation does not impose any new reporting requirements on regulated parties.

7. Duplication: This regulation does not duplicate any existing law or regulations.

8. Alternatives: The Legislature directed that the industry standard rate be determined by the superintendent by regulation. The only alternatives were with regard to the factors considered in determining an appropriate industry standard rate.

9. Federal standards: There are no applicable federal standards.

10. Compliance schedule: Immediate compliance is expected, as the legislation directs that it shall apply to all awards made on or after July 1, 2007.

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 workers' compensation insurers authorized 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 Depart-

ment has reviewed filed Reports on Examination and Annual Statements of workers' compensation insurers, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have less than 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

The amendment will not impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The rule applies to workers' compensation insurers, which do business in every county of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). Since the rule applies to the workers' compensation market throughout New York, not only to rural areas, the same regulation will apply to regulated entities across the state. Therefore, there is no adverse impact on rural areas as a result of this rule.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. Determination of the "industry standard rate" by the superintendent was mandated by the Legislature. It will affect the calculation of the present value of all unpaid benefits resulting from a claim for permanent partial disability, and the resulting amount that workers' compensation insurers must pay into the aggregate trust fund (ATF) in such cases. The Legislature has determined when such payments are required. This rule only establishes the "discount" rate on the amount that must be deposited into the ATF. This rule should not have any impact on jobs and employment opportunities in this state.

EMERGENCY RULE MAKING

Market Stabilization Mechanisms for Individual and Small Group Market

I.D. No. INS-41-07-00003-E

Filing No. 1011

Filing date: Sept. 21, 2007

Effective date: Sept. 21, 2007

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

Action taken: Amendment of sections 361.5 and 361.7(a), renumbering of sections 361.6-361.7 to sections 361.7-361.8 and addition of new section 361.6 (Regulation 146) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3233; and L. 1992, ch. 501, L. 1995, ch. 504

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

Specific reasons underlying the finding of necessity: The Fifth Amendment to Regulation 146 is the result of comments and suggestions received by the Insurance Department in relation to the current market stabilization pool. Regulation 146 was originally promulgated pursuant to the requirements of Chapter 501 of the Laws of 1992 and the statutory authority set forth in Section 3233 of the Insurance Law, which require the Superintendent to: promulgate regulations designed to encourage insurers to remain in or enter the small group or individual health insurance markets, and promote an insurance marketplace where premiums do not unduly fluctuate and where insurers and HMOs are reasonably protected against unexpected significant shifts in the number of persons insured who are ill or who have a history of poor health. In addition, Section 3233 of the Insurance Law specifically directs the Superintendent to create a pooling process involving insurer contributions to, or receipts from, a fund designed to share the risk of or equalize high cost claims and claims of high cost persons.

The proposed amendment is consistent with statutory intent and will modify the pooling methodology established in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5) to provide a simplified approach. The proposed amendment should increase uniformity and consistency in the methodologies used by insurers and health maintenance organizations when determining their contributions and/or distributions from the pools, and should help insurers and health maintenance organizations avoid reporting errors. Under the Fifth Amendment, the current market stabilization pool is being phased-out. Payments, collections and data reports were not required in 2005, and the new pooling methodology established by the

proposed amendment was established in 2006 and become fully operational by 2008.

Since the specified medical condition pools established in the Fourth Amendment to Regulation 146 were phased out in 2005, there is currently no pooling mechanism in place. Therefore, insurers who currently have a disproportionate number of enrollees with high cost claims are not receiving any funds to equalize or share these risks, as the Legislature intended under Section 3233 of the Insurance Law. This may cause premium rates to unduly fluctuate because there is no market stabilization process in place and insurers and health maintenance organizations may not be reasonably protected against unexpected significant shifts in the number of persons insured. The Insurance Department must implement a new pooling mechanism to ensure that health maintenance organizations and insurers are sufficiently protected. The first reporting requirement under the new pooling methodology for health maintenance organizations and insurers was November 10, 2006 and the second reporting requirement was January 31, 2007. The amendment to this regulation must continue in order to utilize the data collected during the two reporting periods, which will enable the pools to become fully operational on a prospective basis.

For the reasons stated above, this amendment to Regulation 146 must be promulgated on an emergency basis for the preservation of the general welfare.

Subject: Market stabilization mechanisms for individual and small group market.

Purpose: To create a new market stabilization process in the individual and small group market, to share among plans substantive cost variations attributable to high cost medical claims.

Text of emergency rule: The title of Section 361.5 is amended to read as follows:

Section 361.5 Pooling of variations in costs attributable to variations in specified medical conditions (SMC) beginning in 1999 through 2006.

Section 361.5 is hereby amended to add a new subdivision (k) to read as follows:

(k) Reporting requirements, payments to the pools, or collections from the pools under this section shall not be required in 2005 or 2006.

Sections 361.6 and 361.7 are hereby renumbered 361.7 and 361.8 and a new section 361.6 is added to read as follows:

361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 for individual and small group policies, other than Medicare supplement and Healthy New York policies.

(a) In each pool area a risk adjustment pool is established in connection with individual and small group health insurance policies, other than Medicare supplement insurance policies and Healthy New York health insurance policies. Each pool shall operate independently; that is, all calculations and payments described below are made for each pool independently of any other pool.

(b) The annual funding amount for all pool areas combined is as follows:

- (1) \$80,000,000 for 2007;
- (2) \$120,000,000 for 2008; and
- (3) \$160,000,000 for 2009 and each calendar year thereafter.

(c) The annual funding amount for each pool area is in proportion to the annualized premiums in that pool area. For 2007 and each calendar year thereafter, each pool participant shall provide to the superintendent annualized premium information on or before January 31. The superintendent shall advise carriers of the funding amount for each pool area within sixty days of receipt of annualized premium information from all carriers.

(d)(1) Each carrier's share of the total funding payable to or from the pools shall be determined based on the carrier's high cost claims in its areas of operation.

(2) In order to implement the phase in of the new specified medical condition pooling process, on or before November 10, 2006 each carrier shall report to the superintendent its annualized premium amount as of December 31, 2005 and its cumulative calendar year claims paid in 2005 for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. The superintendent will provide carriers with an estimate of potential pool receivables or liabilities using this 2005 data for advisory purposes only.

(3) Each following year, beginning in 2007, on or before January 31, each carrier shall report to the superintendent its annualized premium amount as of December 31 of the preceding year and its cumulative calendar year claims paid in the preceding year for individual standard-

ized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. In 2007, the superintendent provided carriers with a second estimate of potential pool receivables or liabilities using 2006 data, for advisory purposes. Payments to the pools, or collections from the pools, shall be required beginning in 2008 and shall be based upon the data from the preceding calendar year.

(4) Cumulative calendar year claims paid shall include the total of all claim payments on behalf of an insured individual from January 1 through December 31 of the preceding year, regardless of when the services were provided.

(5) Cumulative calendar year claims paid shall include payments for hospital and medical services, prescription drug payments, capitation payments, and regional covered lives assessments paid pursuant to section 2807-t of the Public Health Law or percentage surcharges paid pursuant to section 2807-j or section 2807-s of the Public Health Law. Carriers that include the covered lives assessments shall convert the family covered lives assessment into a per member assessment component in order to be included with claims expenses attributable to any one member.

(6) Cumulative calendar year claims paid shall not include amounts paid in satisfaction of the percentage surcharge requirement set forth in section 2807-j(2)(b)(i)(B) of the Public Health Law or interest paid out by a carrier pursuant to section 3224-a(c) of the Insurance Law.

(7) Each carrier's submission shall be signed by an officer of the carrier certifying that the information is accurate.

(8) If a carrier makes a submission after January 31 and the carrier is a pool payer, the carrier's payment into the pool will be increased by one percent interest per month. If a carrier makes a submission after January 31 and the carrier is a pool receiver, the carrier's distribution will be reduced by one percent per month.

(e) The superintendent shall calculate each carrier's share of the total funding payable to or from the pools pursuant to the example in subdivision (i) of this section for each pool area as follows:

(1) Identify the total claims paid by each carrier for the following types of policies: individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, other than Medicare supplement and Healthy New York insurance policies.

(2) Identify the total claims paid in excess of \$20,000 for each insured by type of policy.

(3) For each carrier for each type of policy, divide the claims paid in excess of \$20,000 by the total claims paid (the amount specified in paragraph (2) of this subdivision divided by the amount specified in paragraph (1) of this subdivision) to determine the high cost claim ratio.

(4) Calculate the average high cost claim ratio for all carriers for all types of policies combined and multiply that ratio by the total claims paid for each carrier for each type of policy (a carrier's amount specified in paragraph (1) of this subdivision multiplied by the average high cost claim amount specified in paragraph (3) of this subdivision.)

(5) Subtract the amount calculated in paragraph (4) of this subdivision from the amount in paragraph (2) of this subdivision for each carrier for each type of policy to determine the adjustment needed to equalize high cost claims and determine if the carrier is a net contributor or receiver.

(6) Sum the net contributions of all carriers who are net contributors in the pool area to determine the total net contribution.

(7) Divide the pool area funding amount by the total of paragraph (6) of this subdivision and multiply by the amount identified for each carrier for each type of policy in paragraph (5) of this subdivision to determine the carrier's net pool contribution or distribution.

(f) Billings will be done by the superintendent beginning in 2008 within thirty days of receipt of submissions from all carriers, and payments will be due from carriers within five business days from the date billed. Payments made after the due date shall include interest at a rate of one percent per month. Subsequent to the billing date, but within the calendar year, carrier data that formed the basis of the billing will be audited. In the event audits necessitate post-billing adjustments, such adjustments will be charged or credited in the next year's billing or distribution. Additional payments due from any carrier whose data errors caused it to underpay, or refunds due back from any carrier whose data errors caused it to be overpaid, shall include a one percent interest charge per month from the original due date or payment date.

(g) A carrier shall, with respect to distributions from the pools attributable to each type of policy, as determined in paragraph (7) of subdivision

(e) of this section, without reduction for contributions owed on other types of policies:

(1) refund the distributions directly to insureds based upon the type of policy that caused the payments to be received without consideration of minimum loss ratio provisions; or

(2) submit a detailed plan to the superintendent for approval:

(i) demonstrating how the distribution will be applied to reduce future premium rates for the type of policy whose insureds caused the payments to be received, or

(ii) providing a detailed explanation as to how the distribution was considered in the development of premium rates for that year.

(h) Claim Submission Form.

Claims Paid From January 1 – December 31, ()

Carrier: _____

Pool Area: _____

Total annualized premium for individual standardized direct payment health maintenance organization (HMO) policies, individual standardized direct payment point of service (POS) policies, other individual health insurance policies, and small group policies.

Cumulative Total Claims Paid Above Listed Amounts (Attachment Point)	Direct Payment HMO	Direct Payment POS	Direct Payment Other	Small Group	Total
ZERO					
\$10,000					
\$15,000					
\$20,000					
\$25,000					
\$30,000					
\$35,000					
\$40,000					
\$45,000					
\$50,000					
\$60,000					
\$70,000					
\$80,000					
\$90,000					
\$100,000					

Instructions:

* Do not include Medicare Supplement Policies or Healthy New York Policies.

** For each insured determine the cumulative claims paid from January 1 through December 31 and report the total claims paid for all insureds for each type of policy listed above.

***At each dollar level (Attachment Point), report all claims paid over that attachment point level amount from January 1 through December 31 for any insured. Cumulative total claims paid above the ZERO attachment point level would equal the total claims paid by the carrier for all insureds for the period.

(i) Chart for calculation of pool amounts.

	1	2	3	4	5	6
Albany Region Total Claims Paid	Claims Paid in Excess of \$20,000	High Cost Claim Ra- tio (Col- umn 2 Di- vided by Column 1)	Claims Paid Mul- tiple Average High Cost Claims Ratio (Col- umn 1 Multiplied by Col- umn 3 Av- erage)	Adjust- ment to Equalize High Cost Claims Minus Column 4)	Pool Amount Owed or Re- ceivable (Pre- determined Total Pool Amount Di- vided by Col- umn 5 Total Net Contribu- tions of All Net Contribu- tors Multiplied by Column 5)	

Carrier A
Dir Pay HMO
Dir Pay POS
Dir Pay Other
Small Group
Carrier A

Net
Contribution
or
Distribution
Carrier B
Dir Pay HMO
Dir Pay POS
Dir Pay Other
Small Group
Carrier B
Net
Contribution
or
Distribution
Total Net
Contributions
All Net
Contributors
Total Net
Distributions
All Net
Receivers

Section 361.6 is renumbered to be 361.7 and the opening paragraph of subdivision (a) is amended to read as follows:

361.7(a) The pools shall be administered *either directly* by the superintendent, or *in conjunction with a firm*, performing at least the following functions:

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 December 19, 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 fifth amendment to 11 NYCRR 361 is derived from Sections 201, 301, 1109, 3233 and Chapter 501 of the Laws of 1992 and Chapter 504 of the Laws of 1995.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law, as well as effectuate any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization and its subscribers.

Section 3233 authorizes the Superintendent to promulgate regulations to create a pooling process involving insurer contributions to, or receipts from, a fund designed to share the risk of or equalize high cost claims with respect to individual and small group health insurance.

Chapter 501 of the Laws of 1992 amended the insurance law and public health law to require that individual and small group health insurance be made available on an open enrollment basis; community rating of individual and small group health insurance policies; portability of health insurance coverage; continuation of hospital, surgical or medical expense insurance; and that the Superintendent promulgate regulations to assure an orderly implementation and ongoing operation of open enrollment and community rating.

Chapter 504 of the Laws of 1995 amended the insurance law and the public health law to establish standardized direct payment contracts for individual health insurance and to provide that regulations promulgated by the Superintendent shall include only reinsurance or a pooling process involving insurer or health maintenance organization contributions to, or receipts from, a fund which shall be designed to share the risk of high cost claims or the claims of high cost persons.

2. Legislative objectives: The statutory sections cited above provide a framework for the establishment of a market stabilization process in the individual and small group health insurance markets. The proposed amendment to Regulation 146 is consistent with legislative objectives in that it would effectuate the Legislature's direction in Section 3233 to establish a pooling process involving health maintenance organization and insurer contributions to, or receipts from, a fund that shall be designed to share the risk of or equalize high cost claims or claims of high cost persons, and to protect insurers and health maintenance organizations from disproportionate adverse risks of offering coverage to all applicants.

3. Needs and benefits: The proposed amendment will modify the pooling methodology established in the Fourth Amendment to Regulation 146

(11 NYCRR 361.5) to provide a simplified approach and to increase uniformity and consistency in the methodologies used by insurers and health maintenance organizations when determining their contributions and/or distributions from the pools, and should help insurers and health maintenance organizations avoid reporting errors. The proposed amendment is needed because of the widely differing methodologies used by insurers and health maintenance organizations, and the inconsistencies and resulting confusion as to how to apply the distributions and/or contributions to premium rates. This amendment also simplifies and makes more straightforward the eligibility criteria for reporting claims data to the pools, which pool participants indicated was very complicated, difficult to ascertain, and time consuming under the Fourth Amendment to Regulation 146.

This amendment is the result of comments and suggestions received by the Department from health maintenance organizations and insurers with regard to the current market stabilization pools. As a result of the comments and suggestions, the current market stabilization pools are being phased-out. Payments, collections and data reports were not required in 2005 or 2006, and the new pooling methodology will be transitioned into operation over a three year period. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This phase-in will ensure that health maintenance organizations and insurers have sufficient time to account for the impact of this amendment. In addition, modeling of the pool calculations using 2006 claims data indicates that, at the \$20,000 high cost claim threshold established in this amendment, and with consideration for estimated medical cost and health insurance claim inflation, the phase-in amounts above are the approximate amounts that the pool calculations are expected to produce over the three-year period.

Comparable to all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies in order share the risk of, or equalize, high cost claims or high cost persons. The pooling of individual and small group policies is necessary to provide meaningful distribution of high cost persons and claims across the community rated markets.

4. **Costs:** This amendment imposes no compliance costs upon state or local governments. The amendment does not impose any significant additional compliance costs to insurers or health maintenance organizations. Insurers and health maintenance organizations may have to modify their internal policies and procedures for compliance with the new pooling methodology, and if insurers or health maintenance organizations fail to comply with statutory or regulatory pooling requirements, a penalty could be imposed. In addition, similar to the previous pooling methodology, insurers and health maintenance organizations with healthier lives will have to pay money into the market stabilization pools, and those with unhealthy lives will receive money from the pools. There will be a cost to insurers and health maintenance organizations with healthier lives; however, the purpose of any market stabilization mechanism is to share risk and equalize claim costs. There should be no additional costs to the Insurance Department, as existing personnel are available to assist insurers and health maintenance organizations with the transition to the new market stabilization process.

5. **Local government mandates:** The proposed amendment imposes no new programs, services, duties or responsibilities on local government.

6. **Paperwork:** The proposed amendment imposes new reporting requirements. However, insurers and health maintenance organizations are currently reporting similar information to the Superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Therefore, this proposed amendment should not create more paperwork for the insurers and health maintenance organizations than is currently in place.

7. **Duplication:** Section 3233 directs the Superintendent of Insurance to promulgate regulations to create a pooling process to establish stabilization in the individual and small group markets. There is no duplication with federal or state laws.

8. **Alternatives:** The Insurance Department has met extensively with the Health Plan Association and the Conference of BlueCross BlueShield Plans to discuss this amendment. A suggestion was made to take payments from the Direct Payment Stop Loss Funds into consideration when determining amounts owed or received under the new pooling methodology. The Direct Payment Stop Loss Funds were established in 1999 pursuant to

Sections 4321-a and 4322-a of the Insurance Law, which establishes a separate statutory mandate from Section 3233 of the Insurance Law, which first provided for the establishment of the market stabilization pools in 1992. The Direct Payment Stop Loss Funds were created to provide additional state subsidies to the individual direct payment market, and were not meant to replace the market stabilization pools. Although the previous market stabilization pools did not take the direct payment stop loss recoveries into consideration, the Department reviewed the suggestion of taking the payments from the Direct Payment Stop Loss Funds into consideration under this proposed amendment. The Department determined that if the stop loss recoveries were taken into consideration, the standardized individual HMO policies could become payors, which would undermine the intent of Section 3233 of the Insurance Law. That statute is meant to equalize the risk of high cost persons throughout the individual and small group markets by encouraging each HMO and insurer to insure high cost persons (who are mostly found in the individual direct payment market). If direct payment policies become payors, HMOs could be discouraged from insuring high cost persons – a circumstance that would run counter to the statutory intent.

Another suggestion was made to increase the claim threshold from \$20,000 to \$100,000. The Insurance Department found that the risk sharing and market stabilization would be significantly diminished, by up to 80%, if the claim threshold were increased. If this were to occur, the risk adjustment would be so nominal that the statutory requirement for risk adjustment could not be accomplished.

Interested parties also expressed concern that when the individual and small group policies are pooled together, that the market stabilization pools could involve the small group market subsidizing the individual market. The Department has previously pooled individual and small group policies together under all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law in order to accomplish the legislative goals. Moreover, if individual and small group coverage were not pooled, there would not be appropriate risk adjustment in the individual market.

9. **Federal standards:** There are no minimum standards of the federal government for the same or similar subject areas.

10. **Compliance schedule:** The provisions of this amendment will take effect immediately. However, implementation will be gradual, with the market stabilization pools reaching full funding only after three years. Insurers and health maintenance organizations were expected to submit initial reports to the Superintendent by November 10, 2006 and January 31, 2007 for advisory purposes only, and payments under the new pooling process will begin in 2008. The Insurance Department has had several meetings with representatives of insurers and health maintenance organizations to discuss this amendment, and insurers and health maintenance organizations should be aware of the requirements established by this amendment.

Regulatory Flexibility Analysis

1. **Effect of the rule:** This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of “small business” found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees.

Some of the small businesses in New York purchase health insurance from HMOs and insurers. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies together in order share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the

pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This amendment does not apply to or affect local governments.

2. Compliance requirements: This amendment will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

3. Professional services: Small businesses or local governments should not need professional services to comply with the amendment.

4. Compliance costs: This amendment will not impose any compliance costs upon small businesses or local governments.

5. Economic and technological feasibility: Small businesses or local governments should not incur an economic or technological impact as a result of the amendment.

6. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146, and should not impose any adverse or disparate impact. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. The amendment also is being transitioned into full effect over three years in order to moderate any impact.

7. Small business and local government participation: These regulations are directed at HMOs and insurers 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 Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses with the opportunity to participate in the rulemaking process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

Rural Area Flexibility Analysis

1. Effect of the rule: This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Insurers and HMOs to which the amendment applies do business in all counties of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). This amendment may also affect small business and individuals that purchase health insurance coverage, some of which are located in rural areas across the state. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies together in order to share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In addition, persons covered under the individual standardized direct payment policies will on average likely see a decrease in their premiums. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed amendment imposes new reporting requirements for insurers and health maintenance organizations. However, insurers and health maintenance organizations are currently reporting similar information to the Superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Therefore, this proposed amendment should not create more paperwork, recordkeeping or other compliance requirements or professional services for insurers and health maintenance organizations than are currently in place.

3. Costs: As under all prior pooling methodologies, some small businesses will see a premium reduction, while others will see a nominal

increase. These small businesses may be located in rural or urban areas across the state. Individuals covered under the standardized direct payment policies will likely see a reduction in their premiums. These individuals may be located in rural or urban areas across the state.

4. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146. The impact on small businesses and individuals who purchase health insurance in the individual or small group market and who may be located in rural areas, should be comparable to the impact on small businesses or individuals who are located in urban areas. The amendment is being transitioned into full effect over the course of three years in order to mitigate any impact.

5. Rural area participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, which do businesses in every county in New York. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses or individuals who are located in rural areas with the opportunity to participate in the rulemaking process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

Job Impact Statement

This amendment to Regulation 146 will not adversely impact job or employment opportunities in New York. The proposed amendment is likely to have no measurable impact on jobs. Insurers and health maintenance organizations will need to annually report to the Superintendent their annualized premium amount and their cumulative calendar year claims paid. However, it is anticipated that such responsibilities will be handled by existing personnel because these reporting requirements are similar to the existing reporting requirements set forth in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Costs to the Insurance Department will also be minimal, as existing personnel are available to assist insurers and health maintenance organizations in implementing the new pooling methodology.

NOTICE OF ADOPTION

Liability Insurance Covering All-Terrain Vehicles

I.D. No. INS-30-07-00001-A

Filing No. 1010

Filing date: Sept. 21, 2007

Effective date: Oct. 10, 2007

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

Action taken: Amendment of Subpart 64-2 (Regulation 35-C) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 5103; and Vehicle and Traffic Law, section 2407

Subject: Liability insurance covering all-terrain vehicles.

Purpose: To clarify the reference to Regulation 68-A and the name of the endorsement referenced in section 64-2.1 of the rule.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-30-07-00001-P, Issue of July 25, 2007.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Term Life Issuance and Renewal Restrictions

I.D. No. INS-43-06-00003-RC

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

Revised action: Amendment of Part 42 (Regulation 149) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 3201, 4221 and 4511

Subject: Term life issuance and renewal restrictions; nonforfeiture values for certain life insurance policies.

Purpose: To modify the restrictions on issuance of term life insurance, bring basic policy anniversary nonforfeiture requirements into closer alignment with those of the rest of the states, provide guidance on miscellaneous nonforfeiture issues.

Expiration date: January 23, 2008.

Substance of revised rule: The present Part 42 is renumbered to be Subpart 42-1.

The use or the reference of "Part" has been change to "Subpart" throughout Subpart 42-1. References to specific areas in Subpart 42-1 have been updated to reflect that they now are in a Subpart instead of a Part.

Section 42-1.2 is the applicability section for Subpart 42-1. The beginning date of effectiveness remains unchanged. It has been revised to indicate that Subpart 42-1 will no longer be applicable to policies issued after the operative date of Subpart 42-2.

Section 42-2.1 sets forth the purpose of Subpart 42-2. Subpart 42-2 clarifies the requirements of section 4221 of the Insurance Law in regard to nonforfeiture requirements.

Section 42-2.2 is the applicability section for Subpart 42-2. This Subpart applies to all individual life policies issued on or after the operative date of Subpart 42-2, other than those subject to 4221(n-1), universal life insurance type policies, and those Subject to Part 54.7(b) of this Title, variable life products. Compliance with this subpart is mandatory as of January 1, 2009 with voluntary election of compliance allowed on a plan by plan basis.

Section 42-1.4 placed a restriction on the renewal of term insurance past age 80. Section 42-2.12 substitutes a restriction limiting renewal to the oldest age in the applicable mortality table.

Section 42-1.5 required that cash values for plans of insurance involving either non-level premiums and/or providing non-level benefit be calculated on a segmented approach. This involved breaking a product into periods where the benefits and premiums were level for that period and then apply nonforfeiture testing to each possible combination of contiguous level periods. This is not being continued in the new Subpart 42-2.

Section 42-2.3 contains the definitions for the Subpart.

Section 42-2.4 provides guidance on acceptable methods of rounding when cash values are calculated.

Section 42-2.5 deals with the minimum nonforfeiture values and policy disclosures for life insurance when two lives are insured.

Section 42-2.6 has special rules for indeterminate premium products. This section requires that the cash values be calculated on both the current premium scale and the guaranteed premium scale. The higher result at each year end is then the minimum cash value. This was also required by Subpart 42-1 and is consistent with the National Association of Insurance Commissioners (NAIC) standards.

Section 42-2.7 provides guidance as to what must appear in a policy form to satisfy the statutory requirement that the basis for calculating cash values must appear in the form.

Section 42-2.8 provides guidance on calculating cash values when the benefits during a policy year are not level.

Section 42-2.9 sets forth requirements for nonforfeiture values at times other than policy anniversaries. This section allows for an actuarial approach or use of linear interpolation between the anniversary values with an adjustment for premium paid.

Section 42-2.10 sets forth the Department's determination that the ability of an insured coverage to continue on a yearly renewable basis after the expiry of the main plan may be considered a supplemental benefit under section 4221(c)(2) of the Insurance Law.

Section 42-2.11 sets forth requirements for products that tie the death benefits to an index. These are the standards adopted by the NAIC.

Section 42-2.12 restricts the renewal of term insurance to the last age of the mortality table required for the calculation of the minimum cash values. For products based on the 1980 CSO table, the age is age 100. For products based on the 2001 CSO table, the age is age 120.

Section 42-2.13 provides guidance for calculating minimum nonforfeiture values when the death benefits are not payable in a lump sum.

Revised rule compared with proposed rule: Substantial revisions were made in sections 42-1.3, 42-1.5, 42-1.6, 42-2.2, 42-2.7, 42-2.8, 42-2.9, 42-2.11 and 42-2.14

Text of revised proposed 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

Data, views or arguments may be submitted to: Dennis Lauzon, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, e-mail: dlauzon@ins.state.ny.us

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

Revised Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of the First Amendment to Regulation 149 (11 NYCRR 42) derives from sections 201, 301, 3201, 4221, and 4511 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing the terms of a life insurance contract. Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him under the Insurance Law and to prescribe regulations interpreting the Insurance Law.

Section 3201 of the Insurance Law requires insurers to obtain approval of their policy forms prior to use in this state. Section 3201(c)(5) forbids the superintendent from approving any policy forms subject to sections 4221 or 4511 unless either a detailed statement of the method used by the insurer in calculating any cash surrender value and any paid-up nonforfeiture benefit is stated in the policy form or a statement that such method of computation has been filed with the insurance supervisory official of the state in which the policy form is delivered.

Section 4221 sets forth the nonforfeiture standards for life insurance contracts issued in this state by life insurance companies. Section 4221(l) in part indicates that "in the case of any plan of life insurance which is of such a nature that minimum values cannot be determined by the methods described in subsection (a), (c), (d), (g), (h), (i) or (k) of this section, then: . . . (3) the cash surrender values and paid-up nonforfeiture benefits provided by such plan must not be less than the minimum values and benefits required for the plan computed by a method consistent with the principles of this section, as determined by the superintendent". This amendment addresses the common areas where the superintendent is called upon to make determinations as to whether the proposed nonforfeiture values are consistent with the principals of section 4221.

Section 4511 sets forth the requirements for life insurance issued in this state by fraternal benefit societies. Section 4511(c) calls on certificates of life insurance issued by fraternal benefit societies to be subject to the requirements and exceptions of section 4221.

2. Legislative objectives:

The Insurance Law sets forth the nonforfeiture requirements on the anniversaries of life insurance. This is to ensure that the owner of the insurance, in the event of termination of the insurance, receives an equitable return of that portion of premiums. In general, mortality costs increase with age. This means for policies with level premiums, the premium exceeds the expected claims in the earlier years, with the excess being set aside to subsidize the premium in later years when the expected claims will exceed the premiums then being paid. Nonforfeiture requirements specify the minimum amount of this prefunding of future claims that the owner of the insurance is due in the event of termination of the insurance. In addition, an allowance is included in the calculation of the nonforfeiture values to reflect the insurer expenses in issuing the policy. Nonforfeiture requirements attempt to balance the treatment of terminating policyholders and continuing policyholders.

The legislature in section 4221 also balanced the equity of returning an appropriate portion of the premiums prefunding future benefits against the increase in premium that results from the additional administrative and benefits costs to provide nonforfeiture benefits. To have term insurance available at the lowest possible cost, section 4221(o)(1)(G) allows term insurance with level benefits and level premiums to be written without any nonforfeiture values, provided that the term is 30 years or less and that the policy ends before age 81. Again, in an effort to recognize that providing nonforfeiture benefits increases premiums, section 4221(o)(1)(H) allows for policies that would produce relatively modest cash values to be exempt from having to provide nonforfeiture values. The test for modest cash values is that the calculated cash values for every policy year be less than or equal to \$25 per thousand dollars of insurance in effect at the beginning of the policy year.

3. Needs and benefits:

The Insurance Law sets forth the nonforfeiture requirements for the anniversaries of life insurance. The requirements set forth in the Insurance Law assume that premiums are annually paid at the beginning of each policy year, and that any surrenders or lapses occur at the end of the year.

In practice, premium may actually be paid throughout a policy year (*i.e.* monthly), and surrenders may occur at times other than on a policy anniversary. Nonforfeiture requirements deal with the fair treatment of policyholders. Consider two whole life policies of life insurance that are basically identical, except one has an annual premium while the other has monthly premiums. Both are surrendered one month after a policy anniversary. The Department would consider it inequitable for both to receive the same amount, since the annual premium has already paid for the next 11 months of coverage.

In addition, the death benefits may not be level during each policy year, and the death benefit may be affected by the premium mode used.

This amendment addresses the issues that arise when these sorts of variations occur. By having these issues addressed in a regulation, insurance companies will have guidance as to what is considered acceptable, which, in turn, should enhance their ability to get policy forms approved more quickly.

This amendment also seeks to clarify the requirements of section 4221 in a number of areas where the Department has found problems with policy form submissions. For example, section 4221 requires the mortality table used to calculate the nonforfeiture values be stated in the policy. Some companies would merely state that the 1980 CSO table was used. However, there are a number of variations of the 1980 CSO table (*i.e.* Male, Female, Unisex) that might apply, and this amendment points out that the specific version of the mortality table must be specified. This again is an effort to provide insurance companies with guidance to enhance their ability to get policy forms approved more quickly.

The standards set forth in the regulation were developed after extensive discussions with the Life Insurance Council of New York (LICONY). LICONY is a trade group representing a significant number of the life insurance companies licensed in New York. A number of revisions and clarifications were made based on their recommendations.

The current version of the regulation requires a significant number of calculations for products that do not have level premiums and level benefits. This is commonly referred to as the “segmented approach.” The segmented approach breaks the policy up into segments for each period of time where the premiums and benefits are level. A segment could be as short as one year. The cash values are then calculated for each possible combination of contiguous segments. Then the highest result across all the possible combinations is used. This amendment will bring the New York requirements into closer alignment with the rest of the country, where the unitary approach is used. The unitary approach just looks at the policy as a whole. This will greatly reduce the number of calculations needed to be made for New York policies. This will reduce the cost of doing business in New York, by both reducing the required calculations and by not requiring special calculations just for New York.

While the most significant change to the nonforfeiture calculation was the switch from a segmented approach to the unitary approach, a number of other requirements or clarifications were also made. Effort was made to keep as many of these as close to, if not identical, to the standards adopted by the National Association of Insurance Commissioners (NAIC) as possible. The differences from the NAIC standards are generally in areas where it was felt that additional details as to the requirements were needed. Having the Department’s rules formally spelled out is in keeping with the agency’s ongoing efforts to speed up the approval process.

The amendment should have a positive impact or no impact on jobs and employment opportunities.

4. Costs:

There should be little or no cost to insurers. Some companies may make policy form submissions to take advantage of the changes.

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

5. Local government mandates:

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

6. Paperwork:

The proposed amendment allows for a twelve month period of time from January 1, 2008 to January 1, 2009 to allow insurers to come into compliance with the requirements of new Subpart 42-2. The regulation calls for an insurer to notify the Department in writing if it elects to issue a policy form under Subpart 42-2 prior to January 1, 2009. It is anticipated that most insurers will satisfy the requirement for a written election by including a sentence to that effect in their submission letters when they submit their policy forms.

Some companies will need to submit new forms along with new actuarial memorandums to the Department to comply with Subpart 42-2. Many companies already have forms that are in compliance with Subpart 42-2 but will want to submit new forms along with new actuarial memorandums to take advantage of the changes made.

7. Duplication:

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

8. Alternatives:

The standards appearing in the regulation were developed after extensive discussions with the Life Insurance Council of New York (LICONY). LICONY is a trade group representing a significant number of the life insurance companies licensed in New York. A number of revisions and clarifications were made based on LICONY’s recommendations.

The proposed amendment originally contained a fixed date for compliance with Subpart 42-2. At LICONY’s request, the amendment was revised to permit an election of an operative date by insurers in section 42-2.2 on a plan-by-plan basis.

The proposed amendment did not originally contain a maximum age for term policies. However, without a final age, the policy could not be considered term insurance; thus, a maximum age was added.

9. Federal standards:

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment on account of an individual’s age. The current regulation places non-actuarial restrictions on the renewal of term insurance past age 80, unless a stated exception is satisfied. ADEA requires that coverage be continued for employees but does allow for actuarially justified decreases in coverage. This means that while ADEA requires coverage on employees to continue at higher ages, the current regulation restricts this coverage. The amendment to the regulation places no restriction on the renewal of group life insurance and limits individual term life insurance to the highest age of the nonforfeiture mortality table. This means for individual term life insurance based on the 1980 CSO Mortality table that the policy may not be renewed past age 100 and that for policies based on the 2001 CSO Mortality table the age limit is 120.

10. Compliance schedule:

The amendment has an effective date of January 1, 2008. An insurer can elect to be in compliance with new Subpart 42-2 for new issues of a policy form starting January 1, 2008, and must be in compliance for all new issues on or after January 1, 2009. Subpart 42-1 remains in effect for new policies issued by life insurance companies and certificates issued by fraternal benefit society until Subpart 42-2 become operative.

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

Changes made to the last published rule do not require changes to the last published Regulatory Flexibility Analysis for Small Businesses and Local Government, Rural Area Flexibility Analysis, or Job Impact Statement.

Assessment of Public Comment

The only comments received were from the Life Insurance Council of New York (LICONY). LICONY is a trade organization made up primarily of life insurance companies located in New York.

A summary of LICONY’s comments and the Department’s responses follow.

Comment 1

LICONY recommended moving the mandatory date for compliance with the amendment from January 1, 2008 to January 1, 2009. The earliest date for optional election of compliance would be changed to January 1, 2008. This change was requested in order to have the mandatory compliance date match the required date for use of the 2001 Commissioners Standard Ordinary (CSO) Mortality Table.

This change was made by revising section 42-2.2(c).

Comment 2

LICONY recommended a revision to the applicability section of Subpart 42-2. This proposal was not accepted. LICONY’s proposal appeared to remove the concept of an operative date. It is through the concept of an operative date that insurers are allowed to elect to be in compliance with this Subpart as early as January 1, 2008 on a policy form by policy form basis, with mandatory compliance required by January 1, 2008 (now revised to January 1, 2009). The language proposed by LICONY also makes a distinction between policy forms approved in the past and policy forms yet to be approved. Such distinction is unnecessary, since the compliance requirements are not based on when the policy form was approved, but only when a policy was issued.

Comment 3

LICONY recommended that “and prior to January 1, 2008” be eliminated from section 42-2.2(c). LICONY indicated that the change is intended to allow companies to start using Subpart 42-2 as soon as it becomes effective. This again goes to the concept of the operative date. As currently drafted an insurer may, but is not required to, elect its own operative date, subject to the constraints that it be on or after the effective and before the mandatory date. The “and prior to January 1, 2008” merely reflects the mandatory date. With the removal of the mandatory date from this sentence, an insurer could file a written notice of election of an operative date that was after the mandatory date of January 1, 2008 (now revised to January 1, 2009). Therefore, LICONY’s recommendation was not accepted.

Comment 4

LICONY requested a simplification of the applicability of Subpart 42-1. The proposal was not accepted because it could raise issues as to whether previously issued policies are subject to Regulation 149, which had not been promulgated at the time the policies were issued. Policy forms issued for the first year after the effective date of current regulation on a previously approved policy form were not required to comply with the new nonforfeiture requirements.

Comment 5

LICONY questioned the need to define the term “modal adjusted nonforfeiture premium”. This definition appears in section 42-2.9(c)(1)(ii)(a), and is necessary to maintain the meaning of that subpart. This suggestion was not accepted.

Comment 6

LICONY noted a problem with the use of the term “gross model adjusted premium” in section 42-2.9(d)(1)(i)(c). LICONY recommended that the wording of section 42-2.9(d)(1)(i)(c) be changed from ‘the gross model adjusted premium for the policy year; less’ to ‘the adjusted premium for the policy year; less’. While LICONY’s recommendation was not adopted, the regulatory provision was reviewed and revised. The Department intended to allow the choice to the company of using the modal version of either the gross premium or the nonforfeiture premium. Section 42-2.9(d)(1)(i)(c) was redrafted to accomplish that purpose. The gross model adjusted premium was changed to the annual version of the adjusted nonforfeiture premium to make it consistent with the weighed average approach set forth in section 42-2.9(d)(2) and with the stated goal of trying to establish minimums that allow for all reasonable approaches. LICONY reviewed these changes and found them acceptable.

Comment 7

LICONY suggested that the wording of 42-2.9(d)(2)(i)(b) be revised by changing “the adjusted premium at the beginning of the policy year as calculated in accordance with Section 4221(c)(1) of the New York Insurance Law” to “the adjusted nonforfeiture premium for the policy year.” This change was adopted.

Comment 8

LICONY recommended that the phrase “gross modal premiums” be replaced with “the sum of all gross modal premiums for the policy year” in all instances where it appears in the regulation, in order to clarify this concept. The change was adopted in sections 42-2.9(d)(1)(i)(c) and 42-2.9(d)(2)(i)(b).

Comment 9

LICONY recommended that section 42-2.9(d)(1)(ii)(b) and 42-2.9(d)(2)(ii)(c) be reworded to read: “the lesser of one dollar per one thousand dollars of death benefit or ten percent of, as elected by the insurer for that policy, either the gross modal premiums or the adjusted premium due and paid for the period beyond the date of valuation.” The suggested change was adopted, but the choice of premium is tied to the election made for the refund of unearned premium under either sections 42-2.9(d)(1)(i)(c) or 42-2.9(d)(2)(i)(b).

Comment 10

LICONY pointed out that there was an error in the numbering within section 42-2.9(d). The error was corrected.

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

Market Stabilization Mechanism for Individual and Small Group Market

I.D. No. INS-41-07-00005-P

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

Proposed action: Amendment of sections 361.5 and 361.7(a), renumbering of sections 361.6-361.7 to sections 361.7-361.8 and addition of new section 361.6 (Regulation 146) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3233; and L. 1992, ch. 501, L. 1995, ch. 504

Subject: Market stabilization mechanisms for individual and small group market.

Purpose: To create a new market stabilization process in the individual and small group market, to share among plans substantive cost variations attributable to high cost medical claims.

Text of proposed rule: The title of Section 361.5 is amended to read as follows:

Section 361.5 Pooling of variations in costs attributable to variations in specified medical conditions (SMC) beginning in 1999 through 2006.

Section 361.5 is hereby amended to add a new subdivision (k) to read as follows:

(k) Reporting requirements, payments to the pools, or collections from the pools under this section shall not be required in 2005 or 2006.

Sections 361.6 and 361.7 are hereby renumbered 361.7 and 361.8 and a new section 361.6 is added to read as follows:

361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 for individual and small group policies, other than Medicare supplement and Healthy New York policies.

(a) In each pool area a risk adjustment pool is established in connection with individual and small group health insurance policies, other than Medicare supplement insurance policies and Healthy New York health insurance policies. Each pool shall operate independently; that is, all calculations and payments described below are made for each pool independently of any other pool.

(b) The annual funding amount for all pool areas combined is as follows:

(1) \$80,000,000 for 2007;

(2) \$120,000,000 for 2008; and

(3) \$160,000,000 for 2009 and each calendar year thereafter.

(c) The annual funding amount for each pool area is in proportion to the annualized premiums in that pool area. For 2007 and each calendar year thereafter, each pool participant shall provide to the superintendent annualized premium information on or before January 31. The superintendent shall advise carriers of the funding amount for each pool area within sixty days of receipt of annualized premium information from all carriers.

(d)(1) Each carrier’s share of the total funding payable to or from the pools shall be determined based on the carrier’s high cost claims in its areas of operation.

(2) In order to implement the phase in of the new specified medical condition pooling process, on or before November 10, 2006 each carrier shall report to the superintendent its annualized premium amount as of December 31, 2005 and its cumulative calendar year claims paid in 2005 for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. The superintendent will provide carriers with an estimate of potential pool receivables or liabilities using this 2005 data for advisory purposes only.

(3) Each following year, beginning in 2007, on or before January 31, each carrier shall report to the superintendent its annualized premium amount as of December 31 of the preceding year and its cumulative calendar year claims paid in the preceding year for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. In 2007, the superintendent provided carriers with a second estimate of potential pool receivables or liabilities using 2006 data, for advisory purposes. Payments to the pools, or collections from the pools, shall be required beginning in 2008 and shall be based upon the data from the preceding calendar year.

(4) Cumulative calendar year claims paid shall include the total of all claim payments on behalf of an insured individual from January 1 through December 31 of the preceding year, regardless of when the services were provided.

(5) Cumulative calendar year claims paid shall include payments for hospital and medical services, prescription drug payments, capitation payments, and regional covered lives assessments paid pursuant to section 2807-t of the Public Health Law or percentage surcharges paid pursuant to section 2807-j or section 2807-s of the Public Health Law. Carriers that

include the covered lives assessments shall convert the family covered lives assessment into a per member assessment component in order to be included with claims expenses attributable to any one member.

(6) Cumulative calendar year claims paid shall not include amounts paid in satisfaction of the percentage surcharge requirement set forth in section 2807-j(2)(b)(i)(B) of the Public Health Law or interest paid out by a carrier pursuant to section 3224-a(c) of the Insurance Law.

(7) Each carrier's submission shall be signed by an officer of the carrier certifying that the information is accurate.

(8) If a carrier makes a submission after January 31 and the carrier is a pool payer, the carrier's payment into the pool will be increased by one percent interest per month. If a carrier makes a submission after January 31 and the carrier is a pool receiver, the carrier's distribution will be reduced by one percent per month.

(e) The superintendent shall calculate each carrier's share of the total funding payable to or from the pools pursuant to the example in subdivision (i) of this section for each pool area as follows:

(1) Identify the total claims paid by each carrier for the following types of policies: individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, other than Medicare supplement and Healthy New York insurance policies.

(2) Identify the total claims paid in excess of \$20,000 for each insured by type of policy.

(3) For each carrier for each type of policy, divide the claims paid in excess of \$20,000 by the total claims paid (the amount specified in paragraph (2) of this subdivision divided by the amount specified in paragraph (1) of this subdivision) to determine the high cost claim ratio.

(4) Calculate the average high cost claim ratio for all carriers for all types of policies combined and multiply that ratio by the total claims paid for each carrier for each type of policy (a carrier's amount specified in paragraph (1) of this subdivision multiplied by the average high cost claim amount specified in paragraph (3) of this subdivision.)

(5) Subtract the amount calculated in paragraph (4) of this subdivision from the amount in paragraph (2) of this subdivision for each carrier for each type of policy to determine the adjustment needed to equalize high cost claims and determine if the carrier is a net contributor or receiver.

(6) Sum the net contributions of all carriers who are net contributors in the pool area to determine the total net contribution.

(7) Divide the pool area funding amount by the total of paragraph (6) of this subdivision and multiply by the amount identified for each carrier for each type of policy in paragraph (5) of this subdivision to determine the carrier's net pool contribution or distribution.

(f) Billings will be done by the superintendent beginning in 2008 within thirty days of receipt of submissions from all carriers, and payments will be due from carriers within five business days from the date billed. Payments made after the due date shall include interest at a rate of one percent per month. Subsequent to the billing date, but within the calendar year, carrier data that formed the basis of the billing will be audited. In the event audits necessitate post-billing adjustments, such adjustments will be charged or credited in the next year's billing or distribution. Additional payments due from any carrier whose data errors caused it to underpay, or refunds due back from any carrier whose data errors caused it to be overpaid, shall include a one percent interest charge per month from the original due date or payment date.

(g) A carrier shall, with respect to distributions from the pools attributable to each type of policy, as determined in paragraph (7) of subdivision (e) of this section, without reduction for contributions owed on other types of policies:

(1) refund the distributions directly to insureds based upon the type of policy that caused the payments to be received without consideration of minimum loss ratio provisions; or

(2) submit a detailed plan to the superintendent for approval:

(i) demonstrating how the distribution will be applied to reduce future premium rates for the type of policy whose insureds caused the payments to be received, or

(ii) providing a detailed explanation as to how the distribution was considered in the development of premium rates for that year.

(h) Claim Submission Form.

Claims Paid From January 1 – December 31, ()

Carrier: _____

Pool Area: _____

Total annualized premium for individual standardized direct payment health maintenance organization (HMO) policies, individual standardized

direct payment point of service (POS) policies, other individual health insurance policies, and small group policies.

Cumulative Total Claims Paid Above Listed Amounts (Attachment Point)	Direct Payment HMO	Direct Payment POS	Direct Payment Other	Small Group	Total
ZERO					
\$10,000					
\$15,000					
\$20,000					
\$25,000					
\$30,000					
\$35,000					
\$40,000					
\$45,000					
\$50,000					
\$60,000					
\$70,000					
\$80,000					
\$90,000					
\$100,000					

Instructions:

* Do not include Medicare Supplement Policies or Healthy New York Policies.

** For each insured determine the cumulative claims paid from January 1 through December 31 and report the total claims paid for all insureds for each type of policy listed above.

***At each dollar level (Attachment Point), report all claims paid over that attachment point level amount from January 1 through December 31 for any insured. Cumulative total claims paid above the ZERO attachment point level would equal the total claims paid by the carrier for all insureds for the period.

(i) Chart for calculation of pool amounts.

	1	2	3	4	5	6
Albany Region Total Claims Paid	Claims Paid in Excess of \$20,000	High Cost Claim Ratio (Column 2 Divided by High Cost Column 1)	Claim Ratio Multiplied by Average High Cost Claim Ratio (Column 1 Multiplied by Column 3 Average)	Adjustment to Equalize High Cost Claims (Column 2 Minus Column 4)	Total Pool Amount Determined (Column 5 Total Contributions of All Net Contributors Multiplied by Column 5)	

Carrier A
 Dir Pay HMO
 Dir Pay POS
 Dir Pay Other
 Small Group
 Carrier A
 Net
 Contribution
 or
 Distribution
 Carrier B
 Dir Pay HMO
 Dir Pay POS
 Dir Pay Other
 Small Group
 Carrier B
 Net
 Contribution
 or
 Distribution
 Total Net
 Contributions
 All Net
 Contributors

Total Net
Distributions
All Net
Receivers

Section 361.6 is renumbered to be 361.7 and the opening paragraph of subdivision (a) is amended to read as follows:

361.7(a) The pools shall be administered *either directly* by the superintendent, or *in conjunction with a firm*, performing at least the following functions:

Text of proposed 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

Data, views or arguments may be submitted to: Lisette Johnson, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-4098, e-mail: ljohnson@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the fifth amendment to 11 NYCRR 361 is derived from Sections 201, 301, 1109, 3233 and Chapter 501 of the Laws of 1992 and Chapter 504 of the Laws of 1995.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law, as well as effectuate any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization and its subscribers.

Section 3233 authorizes the Superintendent to promulgate regulations to create a pooling process involving insurer contributions to, or receipts from, a fund designed to share the risk of or equalize high cost claims with respect to individual and small group health insurance.

Chapter 501 of the Laws of 1992 amended the insurance law and public health law to require that individual and small group health insurance be made available on an open enrollment basis; community rating of individual and small group health insurance policies; portability of health insurance coverage; continuation of hospital, surgical or medical expense insurance; and that the Superintendent promulgate regulations to assure an orderly implementation and ongoing operation of open enrollment and community rating.

Chapter 504 of the Laws of 1995 amended the insurance law and the public health law to establish standardized direct payment contracts for individual health insurance and to provide that regulations promulgated by the Superintendent shall include only reinsurance or a pooling process involving insurer or health maintenance organization contributions to, or receipts from, a fund which shall be designed to share the risk of high cost claims or the claims of high cost persons.

2. Legislative objectives: The statutory sections cited above provide a framework for the establishment of a market stabilization process in the individual and small group health insurance markets. The proposed amendment to Regulation 146 is consistent with legislative objectives in that it would effectuate the Legislature's direction in Section 3233 to establish a pooling process involving health maintenance organization and insurer contributions to, or receipts from, a fund that shall be designed to share the risk of or equalize high cost claims or claims of high cost persons, and to protect insurers and health maintenance organizations from disproportionate adverse risks of offering coverage to all applicants.

3. Needs and benefits: The proposed amendment will modify the pooling methodology established in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5) to provide a simplified approach and to increase uniformity and consistency in the methodologies used by insurers and health maintenance organizations when determining their contributions and/or distributions from the pools, and should help insurers and health maintenance organizations avoid reporting errors. The proposed amendment is needed because of the widely differing methodologies used by insurers and health maintenance organizations, and the inconsistencies and resulting confusion as to how to apply the distributions and/or contributions to premium rates.

This amendment is the result of comments and suggestions received by the Department from health maintenance organizations and insurers with regard to the current market stabilization pools. As a result of the comments and suggestions, the current market stabilization pools are being phased-out. Payments, collections and data reports were not required in

2005 or 2006, and the new pooling methodology will be transitioned into operation over a three year period. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This phase-in will ensure that health maintenance organizations and insurers have sufficient time to account for the impact of this amendment.

Comparable to all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies in order share the risk of, or equalize, high cost claims or high cost persons. The pooling of individual and small group policies is necessary to provide meaningful distribution of high cost persons and claims across the community rated markets.

4. Costs: This amendment imposes no compliance costs upon state or local governments. The amendment does not impose any significant additional compliance costs to insurers or health maintenance organizations. Insurers and health maintenance organizations may have to modify their internal policies and procedures for compliance with the new pooling methodology, and if insurers or health maintenance organizations fail to comply with statutory or regulatory pooling requirements, a penalty could be imposed. In addition, similar to the previous pooling methodology, insurers and health maintenance organizations with healthier lives will have to pay money into the market stabilization pools, and those with unhealthy lives will receive money from the pools. There will be a cost to insurers and health maintenance organizations with healthier lives; however, the purpose of any market stabilization mechanism is to share risk and equalize claim costs. There should be no additional costs to the Insurance Department, as existing personnel are available to assist insurers and health maintenance organizations with the transition to the new market stabilization process.

5. Local government mandates: The proposed amendment imposes no new programs, services, duties or responsibilities on local government.

6. Paperwork: The proposed amendment imposes new reporting requirements. However, insurers and health maintenance organizations are currently reporting similar information to the Superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Therefore, this proposed amendment should not create more paperwork for the insurers and health maintenance organizations than is currently in place.

7. Duplication: Section 3233 directs the Superintendent of Insurance to promulgate regulations to create a pooling process to establish stabilization in the individual and small group markets. There is no duplication with federal or state laws.

8. Alternatives: The Insurance Department has met extensively with the Health Plan Association and the Conference of BlueCross BlueShield Plans to discuss this amendment. A suggestion was made to take payments from the Direct Payment Stop Loss Funds into consideration when determining amounts owed or received under the new pooling methodology. The Direct Payment Stop Loss Funds were established in 1999 pursuant to Sections 4321-a and 4322-a of the Insurance Law, which establishes a separate statutory mandate from Section 3233 of the Insurance Law, which first provided for the establishment of the market stabilization pools in 1992. The Direct Payment Stop Loss Funds were created to provide additional state subsidies to the individual direct payment market, and were not meant to replace the market stabilization pools. Although the previous market stabilization pools did not take the direct payment stop loss recoveries into consideration, the Department reviewed the suggestion of taking the payments from the Direct Payment Stop Loss Funds into consideration under this proposed amendment. The Department determined that if the stop loss recoveries were taken into consideration, the standardized individual HMO policies could become payors, which would undermine the intent of Section 3233 of the Insurance Law. That statute is meant to equalize the risk of high cost persons throughout the individual and small group markets by encouraging each HMO and insurer to insure high cost persons (who are mostly found in the individual direct payment market). If direct payment policies become payors, HMOs could be discouraged from insuring high cost persons – a circumstance that would run counter to the statutory intent.

Another suggestion was made to increase the claim threshold from \$20,000 to \$100,000. The Insurance Department found that the risk sharing and market stabilization would be significantly diminished, by up to

80%, if the claim threshold were increased. If this were to occur, the risk adjustment would be so nominal that the statutory requirement for risk adjustment could not be accomplished.

Interested parties also expressed concern that when the individual and small group policies are pooled together, that the market stabilization pools could involve the small group market subsidizing the individual market. The Department has previously pooled individual and small group policies together under all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law in order to accomplish the legislative goals. Moreover, if individual and small group coverage were not pooled, there would not be appropriate risk adjustment in the individual market.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The provisions of this amendment will take effect immediately. However, implementation will be gradual, with the market stabilization pools reaching full funding only after three years. Insurers and health maintenance organizations were expected to submit initial reports to the Superintendent by November 10, 2006 and January 31, 2007 for advisory purposes only, and payments under the new pooling process will begin in 2008. The Insurance Department has had several meetings with representatives of insurers and health maintenance organizations to discuss this amendment, and insurers and health maintenance organizations should be aware of the requirements established by this amendment.

Regulatory Flexibility Analysis

1. Effect of the rule: This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of "small business" found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees.

Some of the small businesses in New York purchase health insurance from HMOs and insurers. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies together in order share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This amendment does not apply to or affect local governments.

2. Compliance requirements: This amendment will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

3. Professional services: Small businesses or local governments should not need professional services to comply with the amendment.

4. Compliance costs: This amendment will not impose any compliance costs upon small businesses or local governments.

5. Economic and technological feasibility: Small businesses or local governments should not incur an economic or technological impact as a result of the amendment.

6. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146, and should not impose any adverse or disparate impact. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while

others will see a nominal increase. The amendment also is being transitioned into full effect over three years in order to moderate any impact.

7. Small business and local government participation: These regulations are directed at HMOs and insurers 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 Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses with the opportunity to participate in the rulemaking process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

Rural Area Flexibility Analysis

1. Effect of the rule: This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Insurers and HMOs to which the amendment applies do business in all counties of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). This amendment may also affect small business and individuals that purchase health insurance coverage, some of which are located in rural areas across the state. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies together in order share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In addition, persons covered under the individual standardized direct payment policies will on average likely see a decrease in their premiums. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed amendment imposes new reporting requirements for insurers and health maintenance organizations. However, insurers and health maintenance organizations are currently reporting similar information to the Superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Therefore, this proposed amendment should not create more paperwork, recordkeeping or other compliance requirements or professional services for insurers and health maintenance organizations than are currently in place.

3. Costs: As under all prior pooling methodologies, some small businesses will see a premium reduction, while others will see a nominal increase. These small businesses may be located in rural or urban areas across the state. Individuals covered under the standardized direct payment policies will likely see a reduction in their premiums. These individuals may be located in rural or urban areas across the state.

4. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146. The impact on small businesses and individuals who purchase health insurance in the individual or small group market and who may be located in rural areas, should be comparable to the impact on small businesses or individuals who are located in urban areas. The amendment is being transitioned into full effect over the course of three years in order to mitigate any impact.

5. Rural area participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, which do businesses in every county in New York. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses or individuals who are located in rural areas with the opportunity to participate in the rulemaking process. Inter-

ested parties were also consulted through direct meetings during the development of the proposed regulations.

Job Impact Statement

This amendment to Regulation 146 will not adversely impact job or employment opportunities in New York. The proposed amendment is likely to have no measurable impact on jobs. Insurers and health maintenance organizations will need to annually report to the Superintendent their annualized premium amount and their cumulative calendar year claims paid. However, it is anticipated that such responsibilities will be handled by existing personnel because these reporting requirements are similar to the existing reporting requirements set forth in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Costs to the Insurance Department will also be minimal, as existing personnel are available to assist insurers and health maintenance organizations in implementing the new pooling methodology.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Reimbursement Methodologies for Various Facilities and Services I.D. No. MRD-41-07-00019-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 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

Subject: Reimbursement methodologies for various facilities and services.

Purpose: To implement the third phase of a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees.

Public hearing(s) will be held at: 10:30 a.m., Nov. 26, 2007 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Conference Rm. B, 4th Fl., Albany, NY; and 10:30 a.m., Nov. 27, 2007 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Counsel's Office Conference Rm., 3rd Fl., Albany, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule (Full text is posted at the following State website: www.omr.state.ny.us): OMRDD has been working for several years to improve recruitment and retention of direct care staff. The proposed regulations implement the third phase of an employee health care enhancement initiative (HCE III) to support and sustain provider agencies and their staff, including direct care staff who are essential to the service delivery system, by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and to enhance the ability of providers to hire and retain direct care staff.

The 2007-2008 New York State Budget appropriates funding for the HCE III initiative. Effective January 1, 2008, the proposed regulations implement the appropriation by making HCE III funding available to agencies which operate or provide services as OMRDD authorized or funded Individualized Residential Alternatives (IRAs) and Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. Based on a survey of providers' historical data as of January 1, 2005, OMRDD determined a benchmark of health care benefits offered to employees by providers. By September 30, 2007, OMRDD notified providers eligible for HCE III funding

at the benchmark level and mailed applications and instructions to providers eligible for HCE III funding below the benchmark level. HCE III funding is determined both by the facility/program type and by status with respect to the benchmark.

Providers that only operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 3.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008. Providers that operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008.

Providers that only operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008. Providers that operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008.

Providers that operate multiple programs and services including both ones eligible for the 3.0 percent funding and ones eligible for the 1.0 percent funding at the benchmark level will receive only the 3.0 percent funding on the eligible programs and services, or, if they so elect, will receive instead 1.0 percent on all their programs and services eligible for HCE III.

The Specialty Hospital is identified by OMRDD as eligible for HCE III funding below the benchmark level and may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate in effect on January 1, 2008.

Day Treatment facilities and the Specialty Hospital will receive HCE III funds in the form of variable trend factor increases established according to the above criteria.

In all instances, providers deemed by OMRDD to be below the benchmark will need to apply to OMRDD for HCE III funding. The application includes an attestation that the funds will be used to establish or enhance employee health care benefits and/or to reduce employee out-of-pocket health care expenses and/or to offset the portion of premium increases paid by the provider which exceeds the portion of the trend factor or COLA applicable to those premium increases. Each provider's governing body will need to pass a board resolution authorizing use of the HCE III funds according to the attestation. Each provider will need to maintain on file the resolution and also records detailing the distribution of these funds.

Providers eligible for HCE III funding will also receive an amount that would have been paid if the HCE III initiative had been in effect on April 1, 2007.

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

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

Public comment will be received until: five days after the last scheduled public hearing.

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative objectives:

These proposed amendments further the legislative objectives embodied in the 2007-2008 New York State Budget and in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law by making revisions to the reimbursement methodologies for Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The proposed amendments will enhance reimbursement of providers of the referenced programs and services so as to enhance employee health care benefits and/or to help their employees defray the ever increasing costs of health care.

3. Needs and benefits:

Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of lower paid employees such as direct care staff. Among other efforts, OMRDD has implemented annual trend factor or COLA enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care and other staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations implement the third phase of an employee health care enhancement initiative (HCE III) to support and sustain provider agencies and their staff, including direct care and other staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain direct care and other staff.

The 2007-2008 New York State Budget appropriates funding for the HCE III initiative. The proposed regulations implement the appropriation by making additional funding available to providers of the referenced OMRDD authorized or funded developmental disabilities facilities or services effective January 1, 2008. OMRDD conducted a survey of providers' historical data as of January 1, 2005 to determine a benchmark of health care benefits offered to employees by providers. By September 30, 2007, OMRDD notified providers eligible for HCE III funding at the benchmark level and mailed applications and instructions to providers eligible for HCE III funding below the benchmark level. HCE III funding is determined both by the facility/program type and by status with respect to the benchmark.

Providers that only operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 3.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008. Providers that operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008.

Providers that only operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008. Providers that operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008.

Providers that operate multiple programs and services including both ones eligible for the 3.0 percent funding and ones eligible for the 1.0 percent funding at the benchmark level will receive only the 3.0 percent funding on the eligible programs and services, or, if they so elect, will

receive instead 1.0 percent funding on all their programs and services eligible for HCE III.

The Specialty Hospital is identified by OMRDD as eligible for HCE III funding below the benchmark level and may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate in effect on January 1, 2008.

Day Treatment facilities and the Specialty Hospital will receive HCE III funds in the form of variable trend factor increases established according to the above criteria.

In all instances, providers deemed by OMRDD to be below the benchmark will need to apply to OMRDD for HCE III funding. The application includes an attestation that the funds will be used to establish or enhance employee health care benefits and/or to reduce employee out-of-pocket health care expenses and/or to offset the portion of premium increases paid by the provider which exceeds the portion of the trend factor or COLA applicable to those premium increases. Each provider's governing body will need to pass a board resolution authorizing use of the HCE III funds according to the attestation. Each provider will need to maintain on file the resolution and also records detailing the distribution of these funds.

Providers eligible for HCE III funding will also receive an amount that would have been paid if the HCE III initiative had been in effect on April 1, 2007.

4. Costs:

a. Costs to the Agency and to the State and its local governments: If there is full provider participation, the amendments will result in an annual aggregate increase of approximately \$30.4 million in reimbursements to affected providers of developmental disabilities services. This approximate \$30.4 million cost in Medicaid will be evenly shared by the State (approximately \$15.2 million) and the federal (approximately \$15.2 million) governments. For affected HCBS waiver services the estimated cost will be approximately \$22.4 million; for specialty hospitals, approximately \$150,000; for community residence facilities, approximately \$300,000; for clinic treatment facilities, approximately \$714,000; for intermediate care facilities, approximately \$6.6 million; and for day treatment facilities, approximately \$274,000.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There may be some administrative costs associated with implementation and continued compliance with the amendments. However, overall, the change will have a positive fiscal impact on providers of services because the revisions are designed to provide them with additional funds to be utilized to enhance the health care benefits and/or reduce the health care expenditures of their employees.

5. Local government mandates:

There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork:

For providers which are below the benchmark there will be some paperwork associated with the preparation and forwarding of applications and attestations and the associated governing body resolutions. They will also need to maintain records documenting the distribution of the HCE III funds. In instances where the provider intends to use HCE III funds to offset premium increases not covered by yearly trend factor or COLA increases, the provider will need to document its calculation of the offset as well as the resulting expenditure of the HCE III funds.

7. Duplication:

The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives:

The proposed rule making represents what OMRDD believes to be the most effective way to provide funding increases designed to address health care costs. The proposed amendments have been developed with the participation and input of the service provider community to facilitate application of the funding directly for employee health care or where it is most needed by an agency which already provides employee health care at the benchmark level. The alternative would be to revise the current reimbursement methodologies by giving all providers a general increase in funding which would not necessarily address health care benefits in agencies which are below the benchmark. Also, without the agency application and attestation procedure and associated governing body resolutions for providers which are below the benchmark there would be no guarantee that the added funds would be applied to the intended purpose.

9. Federal standards:

The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule:

OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act so as to enable an effective date of January 1, 2008. As with similar targeted funding initiatives previously adopted by OMRDD, this agency will be available to provide guidance.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies that are providers of Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The OMRDD has determined, through a review of providers' certified cost reports, that the organizations which operate such facilities or provide such services employ fewer than 100 employees at the discrete certified or authorized sites and would therefore be classified as small businesses. OMRDD estimates that approximately 570 provider agencies could be affected by the proposed amendments.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not have any negative effects on these small business service providers. In fact, the proposed amendments to the various reimbursement methodologies have been developed to increase funding provided to these small business service providers in order to enhance their capacity to provide adequate health care benefits for their employees.

Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of lower paid employees such as direct care staff. Among other efforts, OMRDD has implemented annual trend factor or COLA enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care and other staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations implement the third phase of an employee health care enhancement (HCE III) initiative to support and sustain provider agencies and their staff, including direct care and other staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain indispensable direct care and other staff.

The 2007-2008 New York State Budget appropriates funding for the HCE III initiative. The proposed regulations implement the appropriation by making additional funding available to providers of the referenced OMRDD authorized or funded developmental disabilities facilities or services effective January 1, 2008. OMRDD conducted a survey of providers' historical data as of January 1, 2005 to determine a benchmark of health care benefits offered to employees by providers. By September 30, 2007, OMRDD notified providers eligible for HCE III funding at the benchmark level and mailed applications and instructions to providers eligible for HCE III funding below the benchmark level. HCE III funding is determined both by the facility/program type and by status with respect to the benchmark.

Providers that only operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 3.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008. Providers that operate ICF/DD and IRA facilities and provide HCBS waiver services which are identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate, fee or price in effect on January 1, 2008.

Providers that only operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding at the benchmark level will automatically receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008. Providers that operate Community Residences, Clinic Treatment facilities, and Day Treatment programs identified by OMRDD as eligible for HCE III funding below the benchmark level may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the fee in effect on January 1, 2008.

Providers that operate multiple programs and services including both ones eligible for the 3.0 percent funding and ones eligible for the 1.0 percent funding at the benchmark level will receive only the 3.0 percent funding on the eligible programs and services, or, if they so elect, will receive instead 1.0 percent funding on all their programs and services eligible for HCE III.

The Specialty Hospital is identified by OMRDD as eligible for HCE III funding below the benchmark level and may apply to OMRDD to receive an amount equaling 1.0 percent of the operating costs contained in the rate in effect on January 1, 2008.

Day Treatment facilities and the Specialty Hospital will receive HCE III funds in the form of variable trend factor increases established according to the above criteria.

In all instances, providers deemed by OMRDD to be below the benchmark will need to apply to OMRDD for HCE III funding. The application includes an attestation that the funds will be used to establish or enhance employee health care benefits and/or to reduce employee out-of-pocket health care expenses and/or to offset the portion of premium increases paid by the provider which exceeds the portion of the trend factor or COLA applicable to those premium increases. Each provider's governing body will need to pass a board resolution authorizing use of the HCE III funds according to the attestation. Each provider will also need to maintain on file the resolution and records detailing the distribution of these funds.

Providers eligible for HCE III funding will also receive an amount that would have been paid if the HCE III initiative had been in effect on April 1, 2007.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

2. Compliance requirements: For providers which are deemed by OMRDD to be below the benchmark, there will be some compliance activities associated with the submission of applications and attestations for the additional funds and the associated governing body resolution that will ensure their appropriate expenditure. The provider is also required to maintain records documenting the distribution of these funds. In some instances where the provider intends to use HCE III funds to offset premium increases not covered by yearly trend factor or COLA increases, the provider will need to document its calculation of the offset as well as the resulting expenditure of the HCE III funds.

3. Professional services: Depending on the labor situation of the individual provider, there may be some need for the advice of a labor relations professional to implement the benefit. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments.

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: As discussed in the Regulatory Impact Statement, the amendments will have only positive economic impacts.

7. Small business and local government participation: The proposed amendments continue to address an area of concern for both the providers and OMRDD. During the initial phase of this funding initiative, OMRDD surveyed all voluntary provider agencies regarding their various health insurance benefit plans and worked closely with the provider community in the development of the regulations. The funding initiative and the regulatory structure surrounding its implementation were discussed with provider representatives on OMRDD's Provider Council composed of over 40 providers and representatives of provider associations. Membership on the Provider Council is diverse and representative of agencies both large and small from various geographic locations throughout New York State. The particulars were also discussed with the Health Insurance Committee of the Provider Council including representatives of provider as-

sociations such as the NYS Association of Community and Residential Agencies, the NYS ARC, and the Cerebral Palsy Association of NYS.

The first two phases of the funding initiative which became effective January 1, 2006 and January 1, 2007 were well received by the provider community. HCE III, as implemented by the proposed amendments, merely builds upon the first two installments of the health care enhancement initiative. Therefore, providers will already be familiar with the basic concepts and requirements contained in these proposed regulations.

Rural Area Flexibility Analysis

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement the third phase of a funding initiative (HCE III) that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees. The amendments provide additional funding and will only have positive fiscal impacts for providers.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

As discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments, there will be some compliance activities associated with submission of applications and attestations for the additional funds, the associated governing body or board resolution that will ensure their appropriate expenditure, and record keeping relative to the distribution of these funds. OMRDD will provide any necessary guidance.

Finally, the amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because OMRDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OMRDD's reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement the third phase (HCE III) of a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees and enhance their ability to hire and retain indispensable direct care staff. While the amendments do provide additional funding for the stated purposes, they will not result in any changes to current staffing levels of the affected facilities and services. There will therefore be no effect on the numbers of jobs and employment opportunities in New York State.

Power Authority of the State of New York

NOTICE OF ADOPTION

Revision in Rates for the Village of Marathon

I.D. No. PAS-27-07-00007-A

Filing date: Sept. 25, 2007

Effective date: First full billing period following the date of filing this notice

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

Action taken: Revision in rates for Village of Marathon.

Statutory authority: Public Authorities Law, section 1005(5)

Subject: Rates for the sale of power and energy.

Purpose: To maintain the system's fiscal integrity; this increase in rates is not the result of a Power Authority rate increase to the village.

Text or summary was published in the notice of proposed rule making, I.D. No. PAS-27-07-00007-P, Issue of July 3, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Anne B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, e-mail: secretarys.office@nypa.gov

Assessment of Public Comment:

The agency received no public comment.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rates for Sale of Power and Energy to Governmental Customers Located in New York City

I.D. No. PAS-41-07-00006-P

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

Proposed action: Increase in rates for sale of firm power to governmental customers located in New York City.

Statutory authority: Public Authorities Law, section 1005(6)

Subject: Rates for sale of power and energy.

Purpose: To recover the authority's cost of providing firm power and energy services.

Public hearing(s) will be held at: 10:30 a.m., Nov. 15, 2007 at Power Authority of the State of New York, 501 7th Ave., 9th Fl., New York, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule: Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to revise rates for the New York City Governmental Customers ("NYC Governmental Customers") for Rate Year 2008.

The Authority proposes to increase the "Fixed Costs" component of the production rates charged to the NYC Governmental Customers. This will increase the production rates by 3.4% overall on average compared to 2007.

Written comments on the proposed increase in the Fixed Costs component will be accepted through Monday, November 26, 2007, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK

Anne B. Cahill, Corporate Secretary

123 Main Street, 15M

White Plains, New York 10601

(914) 390-8036

(914) 681-6949 (fax)

secretarys.office@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Anne B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, e-mail: secretarys.office@nypa.gov

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

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

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

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

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rates for Sale of Power and Energy to Governmental Customers in Westchester County

I.D. No. PAS-41-07-00007-P

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

Proposed action: Increase in rates for sale of firm power and related tariff changes applicable to governmental customers located in Westchester County.

Statutory authority: Public Authorities Law, section 1005(6)

Subject: Rates for sale of power and energy.

Purpose: To recover the authority's cost of providing firm power and energy services.

Public hearing(s) will be held at: 10:30 a.m., Nov. 14, 2007 at 123 Main St., Jaguar Rm., White Plains, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule: Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to revise rates to the Westchester County Governmental Customers ("Westchester Customers") for Rate Year 2008.

The Authority proposes to increase the base production rates by 18.1% on average compared to 2007 rates charged to the Westchester Customers.

Written comments on the proposed revisions will be accepted through Monday, November 26, 2007, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK

Anne B. Cahill, Corporate Secretary

123 Main Street, 15M

White Plains, New York 10601

(914) 390-8036

(914) 681-6949 (fax)

secretarys.office@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Anne B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, e-mail: secretarys.office@nypa.gov

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

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

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

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

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Implementation of a Conservation Incentive Program

I.D. No. PSC-41-07-00008-EP

Filing date: Sept. 20, 2007

Effective date: Sept. 20, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order allowing National Fuel Gas Distribution Corporation to implement a Conservation Incentive Program for the 2007-08 winter heating season.

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

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

Specific reasons underlying the finding of necessity: Immediate adoption is necessary to allow National Fuel Gas Distribution Corporation to implement a \$10.8 million program for a Gas Rates Conservation Incentive Program (CIP) for the upcoming winter heating season for economi-

cally disadvantaged customers. The CIP will provide low-income customers a timely opportunity during the remainder of this year to begin to reduce their bills. It will also assist economically disadvantaged customers to achieve greater energy efficiency and prepare them for the upcoming winter heating season. This action is necessary to preserve the general welfare.

Subject: Implementation of a Conservation Incentive Program.

Purpose: To approve a Conservation Incentive Program for the upcoming winter heating season.

Substance of emergency/proposed rule: The Public Service Commission adopted an order approving National Fuel Gas Distribution Corporation's request to implement a \$10.8 million program for a Gas Rates Conservation Incentive Program for the upcoming winter heating season. The Conservation Incentive Program will provide customers a timely opportunity during the remainder of this year to begin to reduce their bills. It will also assist economically disadvantaged customers to achieve greater energy efficiency and prepare them for the upcoming winter heating season, subject to the terms and conditions set forth in the order.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 18, 2007.

Text of rule may be obtained from: Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

Data, views or arguments may be submitted to: Jaclyn A. Brillong, 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-G-0141SA1)

NOTICE OF ADOPTION

Major Rate Filing by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-11-07-00015-A

Filing date: Sept. 25, 2007

Effective date: Sept. 25, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted, in part, the terms and conditions of a joint proposal filed by Consolidated Edison Company of New York, Inc., Department of Public Service staff, City of New York, Consumer Power Advocates, Direct Energy, New York Energy Consumers Council, Small Customer Marketer Coalition, Pace Energy Project, Association for Energy Affordability, IDT Energy, Inc., and the New York State Energy Research and Development Authority.

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

Subject: Major rate filing.

Purpose: To increase annual delivery rates over the next three years.

Substance of final rule: The Public Service Commission adopted, in part, the terms and conditions of a joint proposal filed by Consolidated Edison Company of New York, Inc., Department of Public Service Staff, City of New York, Consumer Power Advocates, Direct Energy, New York Energy Consumers Council, Small Customer Marketer Coalition, Pace Energy Project, Association for Energy Affordability, IDT Energy, Inc., and the New York State Energy Research and Development Authority concerning an increase in delivery rate increases, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-1332SA1)

NOTICE OF ADOPTION

Replenish Escrow Account by Kiamesha Artesian Spring Water Co., Inc.

I.D. No. PSC-17-07-00014-A
Filing date: Sept. 24, 2007
Effective date: Sept. 24, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order approving Kiamesha Artesian Spring Water Co., Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 3—Water, to become effective Oct. 1, 2007.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Replenishable escrow account in the amount of \$15,000.

Purpose: To approve a replenishable escrow account in the amount of \$15,000 for extraordinary expenditures, emergency maintenance and major improvements.

Substance of final rule: The Commission adopted an order approving Kiamesha Artesian Spring Water Co., Inc. to establish a replenishable escrow account in the amount of \$15,000 for extraordinary expenditures, emergency maintenance and major improvements, effective October 1, 2007, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-W-0395SA1)

NOTICE OF ADOPTION

Water Rates and Charges by Westbrook Water Corp.

I.D. No. PSC-19-07-00010-A
Filing date: Sept. 24, 2007
Effective date: Sept. 24, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order approving Westbrook Water Corp.'s request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 3—Water, to become effective Oct. 1, 2007.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To approve an increase of Westbrook Water Corp.'s annual revenues by \$8,410 or 21.2 percent.

Substance of final rule: The Commission adopted an order approving an increase of Westbrook Water Corp.'s annual revenues by \$8,410 or 21.2%, effective October 1, 2007, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-W-0460SA1)

NOTICE OF ADOPTION

Rider B—Gas Rates by Orange and Rockland Utilities, Inc.

I.D. No. PSC-21-07-00010-A
Filing date: Sept. 20, 2007
Effective date: Sept. 20, 2007

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

Action taken: The commission, on Sept. 19, 2007, approved Orange and Rockland Utilities, Inc.'s (the company) request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service P.S.C. No.4.

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

Subject: Rider B—gas rates for commercial and industrial distributed generation facilities.

Purpose: To approve the increase of the Rider B gas delivery service rates applicable to commercial and industrial customer-generators using natural gas to fuel on-site distributed generation facilities.

Substance of final rule: The Public Service Commission approved Orange and Rockland Utilities, Inc.'s (the Company) request to revise its gas tariff schedule to increase Rider B delivery service rates and authorized the Company to file further amendments to implement the increase concurrent with the compliance tariff filing implementing the rate changes associated with Rate Year Three of the Rate Plan in Case 05-G-1494.

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.
(07-G-0528SA1)

NOTICE OF ADOPTION

Uniform System of Accounts by Hancock Telephone Company

I.D. No. PSC-23-07-00021-A
Filing date: Sept. 20, 2007
Effective date: Sept. 20, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order approving the petition of Hancock Telephone Company (Hancock) to defer accounting treatment related to expenses resulting from a flood that occurred in June of 2006.

Statutory authority: Public Service Law, section 95

Subject: Uniform system of accounts—request for accounting authorization.

Purpose: To approve Hancock's deferred accounting treatment for expenses resulting from a flood that occurred in June of 2006.

Substance of final rule: The Commission adopted an order approving the petition of Hancock Telephone Company to defer \$16,675 of expenses related to the flooding in June of 2006 and to write off the deferral against the deferred liability related to the Rural Telephone Bank proceeds, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-C-0539SA1)

NOTICE OF ADOPTION

Business Incentive Rate Program by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery—Long Island

I.D. No. PSC-27-07-00011-A

Filing date: Sept. 19, 2007

Effective date: Sept. 19, 2007

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

Action taken: The commission, on Sept. 19, 2007, approved KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery—Long Island's (the company) request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service P.S.C. No. 1.

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

Subject: Business Incentive Rate Program.

Purpose: To approve the company's current Business Incentive Rate Program for an additional one year beyond the current expiration date of Sept. 30, 2007.

Substance of final rule: The Public Service Commission approved KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery – Long Island's request to extend its Business Incentive Rate program for an additional one year beyond the current expiration date of September 30, 2007.

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.
(07-G-0676SA1)

NOTICE OF ADOPTION

Weather Normalization Adjustment by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York

I.D. No. PSC-27-07-00012-A

Filing date: Sept. 19, 2007

Effective date: Sept. 19, 2007

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

Action taken: The commission, on Sept. 19, 2007, approved The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (the company) request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service P.S.C. No. 12.

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

Subject: Weather normalization adjustment.

Purpose: To allow the company to revise how it files updates to its weather normalization factors.

Substance of final rule: The Public Service Commission approved The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's tariff filing to revise the manner in which updates to the Weather Normalization Factors are filed.

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.
(07-G-0689SA1)

NOTICE OF ADOPTION

Low Income Gas Energy Efficiency Program by Niagara Mohawk Power Corporation d/b/a National Grid

I.D. No. PSC-27-07-00013-A

Filing date: Sept. 19, 2007

Effective date: Sept. 19, 2007

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

Action taken: The commission, on Aug. 22, 2007, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's petition to extend for 12 months the Low-Income Gas Customer Efficiency Program.

Statutory authority: Public Service Law, section 66

Subject: Low-Income Gas Customer Efficiency Program.

Purpose: To approve the extension of the Low-Income Gas Customer Efficiency Program for 12 months.

Substance of final rule: The Commission adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's petition to extend the Low-Income Gas Customer Efficiency Program for 12 months, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-G-0733SA1)

NOTICE OF ADOPTION

Merger and Transfer of Franchises, Works and Systems by Aqua New York, Inc., et al.

I.D. No. PSC-28-07-00013-A

Filing date: Sept. 25, 2007

Effective date: Sept. 25, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order approving a joint petition of Aqua New York, Inc., Cambridge Water Works Company, Inc., Dykeer Water Company, Inc., Waccabuc Water Works, Inc. and Wild Oaks Water Company, Inc. (the companies) for the merger and transfer of franchises, works and systems into Aqua New York, Inc.

Statutory authority: Public Service Law, sections 89-h and 108

Subject: Transfer of franchises or stocks and amendments to certificates of incorporation.

Purpose: To approve the transfer of franchises and merger of the companies into Aqua New York, Inc.

Substance of final rule: The Commission adopted an order approving a joint petition of Cambridge Water Works Company, Inc., Dykeer Water Company, Inc., Waccabuc Water Works, Inc. and Wild Oaks Water company, Inc. to authorize the merger of the "Four Subsidiaries" into Aqua New York, Inc., subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-W-0711SA1)

NOTICE OF ADOPTION

Deliverability Demand Determinants by Central Hudson Gas & Electric Corporation

I.D. No. PSC-29-07-00025-A

Filing date: Sept. 19, 2007

Effective date: Sept. 19, 2007

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

Action taken: The commission, on Sept. 19, 2007, approved Central Hudson Gas & Electric Corporation's (the company) request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service P.S.C. No. 12.

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

Subject: Deliverability demand determinants.

Purpose: To approve the propane demand determinant used to determine incremental capacity requirements applicable to Service Classification Nos. 6, 12 and 13.

Substance of final rule: The Public Service Commission approved Central Hudson Gas & Electric Corporation's (the Company) tariff filing to revise its gas tariff schedule to specify the propane service demand determinant applicable to customers taking transportation service under the Company's Retail Access Program.

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.
(07-G0766SA1)

NOTICE OF ADOPTION

Accounting for Post-Employment Benefits other than Pensions by New York State Electric & Gas Corporation

I.D. No. PSC-31-07-00011-A

Filing date: Sept. 20, 2007

Effective date: Sept. 20, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted the terms and conditions of a joint proposal submitted by New York State Electric & Gas Corporation (NYSEG), Department of Public Service staff and multiple intervenors concerning NYSEG's accounting for pensions and other post-employment benefits.

Statutory authority: Public Service Law, sections 65(1), 66(1), (4) and (9)

Subject: Accounting for post-employment benefits other than pensions by NYSEG for 1999-2006.

Purpose: To reconcile NYSEG's accounting for post-employment benefits other than pensions with commission policies and orders relating to accounting practices and rate-setting.

Substance of final rule: The Public Service Commission adopted the terms and conditions of a Joint Proposal submitted by New York State Electric & Gas Corporation (NYSEG), Department of Public Service Staff and Multiple Intervenors concerning NYSEG's accounting for pensions and other post-employment benefits, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS

employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-M-1413SA1)

NOTICE OF ADOPTION

Certificate of Incorporation by Corning Natural Gas Corporation

I.D. No. PSC-31-07-00013-A

Filing date: Sept. 21, 2007

Effective date: Sept. 21, 2007

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

Action taken: The commission, on Sept. 19, 2007, approved Corning Natural Gas Corporation's (the company) request for a restated certificate of incorporation to provide for the elimination of the pre-emptive rights of shareholders and for the purposes of filing its certificate of incorporation with the New York Secretary of State.

Statutory authority: Public Service Law, section 108

Subject: Amendment to the certificate of incorporation by Corning Natural Gas Corporation.

Purpose: To approve the amended certificate of incorporation to provide for the elimination of the pre-emptive rights of shareholders.

Substance of final rule: The Public Service Commission approved Corning Natural Gas Corporation's (the company) request for a Restated Certificate of Incorporation to provide for the elimination of the pre-emptive rights of shareholders and for the purposes of filing its Certificate of Incorporation with the New York Secretary of State, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-G-0787SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Submetering of Electricity Rehearing

I.D. No. PSC-41-07-00009-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, deny, or modify, in whole or in part, a petition for rehearing seeking reversal of the commissioner's order issued April 3, 2007 allowing the submetering of electricity at 430 E. 86th St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 5, 22, 53, 65, 65(1), 66, 66(1), (2), (3), (4), (5), (12) and (14)

Subject: A petition for rehearing.

Purpose: To grant, deny, or modify, in whole or in part, a petition for rehearing.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, a petition for rehearing seeking reversal of the Commission's order issued April 3, 2007 allowing the submetering of electricity at 430 East 86th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(06-E-1391SA2)

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

Waiver of Tariff Requirements by Niagara Mohawk Power Corporation d/b/a National Grid

I.D. No. PSC-41-07-00010-P

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

Action taken: The Public Service Commission is considering a petition from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) for waiver of two requirements of its electric service tariffs as they apply to customers of Burrstone Energy Center LLC's combined heat and power project located in Utica, NY.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 65(1) and (3), 66(1), (2), (5), (9), (10), (11) and (12)

Subject: Waiver of tariff requirements.

Purpose: To consider the waiver of two of National Grid's electric service tariff requirements as they apply to customers of Burrstone Energy Center LLC.

Substance of final rule: The Public Service Commission is considering a petition from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) for waiver of two requirements of its electric service tariffs as they apply to customers of Burrstone Energy Center LLC's combined heat and power project located in Utica, NY. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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.
(07-E-1033SA1)

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

Approval of New Types of Gas Meters and Accessories by Valley Energy Incorporated

I.D. No. PSC-41-07-00011-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 approve or reject, in whole or in part, a petition filed by Valley Energy Incorporated for approval of the TRACE direct gas meter transponder (DGT), and standalone gas meter transponder (SGT), manufactured by Elster Integrated Solutions, for use as automated meter reading devices.

Statutory authority: Public Service Law, section 67(1)

Subject: Approval of new types of gas meters and accessories.

Purpose: To permit gas utilities in New York State to use Elster TRACE DGT and SGT transponders.

Substance of proposed rule: The Public Service Commissioner will consider a request from Valley Energy Incorporated for the approval to use the

TRACE Direct Gas Meter Transponder (DGT) and Standalone Gas Meter Transponder (SGT) manufactured by Elster Integrated Solutions. According to Elster Integrated Solutions, the DGT and SGT are solid-state automated meter reading devices that can be connected directly to diaphragm meters, rotary and turbine meters, and to ancillary products used to correct the measurement of gas consumed based on temperature and pressure.

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-G-1072SA1)

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

Annual Reconciliation of Gas Expenses and Gas Cost Recoveries

I.D. No. PSC-41-07-00012-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 approve, modify, or reject, in whole or in part, the filings made by various local gas distribution companies (LDCs) and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

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

Subject: Annual reconciliation of gas expenses and gas cost recoveries.

Purpose: To consider the filings of various LDCs and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the filings by sixteen local distribution companies and two municipalities reconciling purchased gas costs and gas cost adjustment recoveries for the twelve months ended August 31, 2007.

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-G-1101SA1)

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

Adjustment of Charge by Niagara Mohawk Power Corporation

I.D. No. PSC-41-07-00013-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 approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 207—Electricity to become effective Jan. 1, 2008.

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

Subject: Rule 40—adjustment of charge pursuant to the New York Power Authority hydropower benefit reconciliation (Rule 40).

Purpose: To revise the method of reconciling Rule 40.

Substance of proposed rule: The Commission is considering Niagara Mohawk Power Corporation's (Niagara Mohawk) request to revise the method of reconciling Rule 40 - Adjustment of Charge Pursuant to New York Power Authority Hydropower Benefit Reconciliation contained in its electric tariff schedule. The Commission may approve, reject or modify, in whole or in part, Niagara Mohawk'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. 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.

(01-M-0075SA36)

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

Distributed Generation Residential by Central Hudson Gas & Electric Corporation

I.D. No. PSC-41-07-00014-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 whether to approve or reject, in whole or in part, a proposal filed by Central Hudson Gas & Electric Corporation (Central Hudson) to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12 to become effective Jan. 1, 2008.

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

Subject: Service Classification No. 16—distributed generation residential.

Purpose: To revise Central Hudson's residential distributed generation rates.

Substance of proposed rule: On September 20, 2007, Central Hudson Gas & Electric Corporation (Central Hudson) filed a proposed tariff amendment to revise its residential distributed generation rates. The revised rates are filed pursuant to Commission order issued and effective August 4, 2004 in Case 02-M-0515 and have a proposed effective date of January 1, 2008. The Commission may approve, reject or modify, in whole or in part, Central Hudson's proposed tariff revision.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(02-M-0515SA19)

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

Establishing an Electric Surcharge to Fund Energy Efficiency Programs

I.D. No. PSC-41-07-00015-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 has instituted a proceeding, in Case 07-M-0548, to explore and develop the means by which the State's electric energy consumption can be decreased by 15% from expected levels by the year 2015, and will include development of an electric and natural gas energy efficiency portfolio standard. In this proceeding, the commission is considering establishing an electric surcharge to fund energy efficiency programs.

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

Subject: The commission is considering adopting recommendations for energy efficiency programs that can be implemented quickly and cost-effectively, in order to expedite attainment of energy savings, while the planning process to develop an energy efficiency portfolio standard is underway.

Purpose: To consider whether the commission should establish an electric surcharge to fund energy efficiency programs.

Substance of proposed rule: The Public Service Commission has instituted a proceeding, in Case 07-M-0548, to explore and develop the means by which the State's electric energy consumption can be decreased by 15% from expected levels by the year 2015, and will include development of an electric and natural gas Energy Efficiency Portfolio Standard. In this proceeding, the Commission is considering establish an electric surcharge to fund energy efficiency programs. This surcharge would be applied to customer bills, and may be collected on a volumetric basis from all firm customers.

The Commission may approve, reject, or modify, in whole or in part, its proposal to establish an electric surcharge to fund energy efficiency programs, and it may also consider other related 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. 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-M-0548SA7)

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

Reallocation of System Benefit Charge Funds by New York State Energy Research and Development Authority

I.D. No. PSC-41-07-00016-P

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

Proposed action: The Public Service Commission is considering directing the New York State Energy Research and Development Authority to propose the reallocation of a portion of system benefit charge funds to the Division of Housing and Community Renewal (DHCR), as well as other entities, to fund energy efficiency programs. Additionally, or in the alternative, the commission is considering directing the allocation of funds collected from a separate volumetric electric and gas end-user surcharge to the DHCR, as well as other entities, to fund energy efficiency programs.

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

Subject: The commission is considering adopting recommendations for energy efficiency programs that can be implemented quickly and cost-

effectively, in order to expedite attainment of energy savings, while the planning process to develop an energy efficiency portfolio standard is underway.

Purpose: To consider whether the commission should authorize the reallocation of a portion of system benefit charge funds, and/or the allocation of funds collected from a separate volumetric electric and gas end-user surcharge to the DHCR, as well as other entities, to fund energy efficiency programs.

Substance of proposed rule: The New York State Energy Research and Development Authority (NYSERDA) is the Public Service Commission's (Commission) third-party administrator for funding related to the System Benefits Charge program (SBC). The Commission is considering, on its own motion, directing NYSEDA to propose the reallocation of uncommitted SBC funds to the Division of Housing and Community Renewal (DHCR), as well as other entities, to fund energy efficiency programs. Additionally, or in the alternative, the Commission is considering directing the allocation of funds collected from a separate volumetric electric and gas end-user surcharge to the DHCR, as well as other entities, to fund energy efficiency programs.

The Commission may approve, reject, or modify, in whole or in part, its proposal to direct NYSEDA to request the reallocation of funds, and it may also consider other related 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.

(07-M-0548SA8)

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

Issues of Stock, Bonds and other Forms of Indebtedness by Chaffee Water Works Company

I.D. No. PSC-41-07-00017-P

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

Proposed action: The commission is considering whether to approve, reject or modify, in whole or in part, the petition of Chaffee Water Works Company (the company) to amend the order in Case 06-W-1160 to approve an increased loan amount with the Environmental Facilities Corporation. Additionally, the company requests it be allowed to increase its annual surcharge to customers from \$12,727 to \$18,515. The commission is considering all other related matters.

Statutory authority: Public Service Law, sections 89-f and 89-c(10)

Subject: Issues of stock, bonds and other forms of indebtedness; charges.

Purpose: To allow Chaffee Water Works Company to enter into a loan agreement and increase charges.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the petition of Chaffee Water Works Company (the company) to amend the Order in Case 06-W-1160 which approved the company's loan with the Environmental Facilities Corporation for \$381,806. The company wants to borrow \$555,438 and requests that it be allowed to increase the customer surcharge from \$12,727 to \$18,515 annually in order to pay for the larger loan. General cost increases and the need for additional main installations are making the project more expensive.

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.

(07-W-0928SA2)

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

Recommendations for Energy Efficiency Programs

I.D. No. PSC-41-07-00018-P

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

Proposed action: The Public Service Commission has instituted a proceeding, in Case 07-M-0548, to explore and develop the means by which the State's electric energy consumption can be decreased by 15 percent from expected levels by the year 2015, and will include development of an electric and natural gas energy efficiency portfolio standard (EPS). In this proceeding, the commission is considering partnering with the Dormitory Authority of the State of New York (DASNY) for the imposition of a tariffed utility charge on customers who are (1) eligible to borrow from DASNY and (2) seeking to undertake a project or projects that will achieve the energy efficiency goals of the EPS. In addition, the commission may consider what actions it should undertake with respect to DASNY's proposal to request utilities to act as billing agents for repayment of DASNY financing of energy efficiency projects conducted by eligible institutions.

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

Subject: The commission is considering adopting recommendations for energy efficiency programs that can be implemented quickly and cost-effectively, in order to expedite attainment of energy savings, while the planning process to develop an energy efficiency portfolio standard is underway.

Purpose: To consider whether the commission should partner with DASNY for the imposition of a tariffed utility charge on customers who are (1) eligible to borrow from DASNY and (2) seeking to undertake a project or projects that will achieve the energy efficiency goals of the EPS, and to consider what actions the commission should undertake with respect to DASNY's proposal to request utilities to act as billing agents for repayment of DASNY financing of energy efficiency projects conducted by eligible institutions.

Substance of proposed rule: The Public Service Commission has instituted a proceeding, in Case 07-M-0548, to explore and develop the means by which the State's electric energy consumption can be decreased by 15% from expected levels by the year 2015, and will include development of an electric and natural gas Energy Efficiency Portfolio Standard (EPS). In this proceeding, the Commission is considering partnering with the Dormitory Authority of the State of New York (DASNY) for the imposition of a tariffed utility charge on customers who are (1) eligible to borrow from DASNY and (2) seeking to undertake a project or projects that will achieve the energy efficiency goals of the EPS. This proposed tariffed utility charge may be a component of any EPS surcharge adopted by the Commission, or it may be embedded in other utility charges as determined by the Commission. In addition, the Commission may consider what actions it should undertake with respect to DASNY's proposal to request utilities to act as billing agents for repayment of DASNY financing of energy efficiency projects conducted by eligible institutions.

The Commission may approve, reject, or modify, in whole or in part, its proposal to partner with DASNY for the imposition of the above-described charges, and it may also consider other related 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. (07-M-0548SA9)

Department of State

EMERGENCY RULE MAKING

Installation of Pool Alarms

I.D. No. DOS-41-07-00002-E

Filing No. 1009

Filing date: Sept. 20, 2007

Effective date: Sept. 20, 2007

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

Action taken: Repeal section 1225.2 and addition of Part 1228 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve public safety and because time is of the essence. This rule implements the provisions of paragraphs (b) and (c) of subdivision (14) of section 378 of the Executive Law, which requires that the New York State Uniform Fire Prevention and Building Code (the Uniform Code) provide that any residential or commercial swimming pool constructed or substantially modified after December 14, 2006 (except hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers) shall be equipped with an acceptable pool alarm capable of detecting a child entering the water and of giving an audible alarm. This rule also implements the amendment of subdivision (5-a) of section 378 of the Executive Law made by Chapter 438 of the Laws of 2005, which requires that the Uniform Code provide that every multiple dwelling constructed or offered for sale after August 9, 2005 shall have installed an operable carbon monoxide alarm.

The Introducer's Memorandum in Support of the bill that added paragraph (b) of subdivision (14) of section 378 of the Executive Law (Chapter 450 of the Laws of 2006) states, in pertinent part, that "drowning is the second leading cause of unintentional injury-related deaths in children between the ages of one and fourteen nationwide, and the third leading cause of injury-related deaths of children in New York. . . . (T)echnological advances have produced several different types of pool alarms designed to sound a warning if a child falls into the water. When used in conjunction with access barriers, these alarms provide greater protection against accidental pool drownings." This pool alarm provisions added by this rule are similar to the provisions added by an emergency rule which was filed on December 14, 2006 and expired on March 13, 2007, and by an emergency rule that was filed on April 5, 2007 and expired on June 21, 2007. (The exception for hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers are added by this rule pursuant to new paragraph (c) of Executive Law section 378, which was added by Chapter 75 of the Laws of 2007).

Executive Law section 378(5-a) was amended by Chapter 438 of the Laws of 2005 to require that the Uniform Code also provide for the installation of carbon monoxide alarms in multiple dwellings constructed or offered for sale after August 9, 2005. The Introducer's Memorandum in Support of Chapter 438 of the Laws of 2005 states, in pertinent part, that "(t)his legislation is aimed at preventing more unnecessary deaths due to carbon monoxide poisoning. . . . Chapter 257 of the laws of 2002 required carbon monoxide alarms be installed in one and two family dwellings and in condominiums and cooperatives This bill requires multiple dwelling units of three or more families to install carbon monoxide alarms as well." The carbon monoxide alarm provisions to be added by this rule are

similar to the provisions added by an emergency rule which was filed on December 14, 2006 and expired on March 13, 2007, and by an emergency rule that was filed on April 5, 2007 and expired on June 21, 2007. (Executive Law section 378(5-a) also requires the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002. The Uniform Code currently includes provisions [in section 1225.2 of Title 19 NYCRR] requiring the installation of carbon monoxide alarms in such occupancies. Said section 1225.2 is repealed by this rule. However, provisions requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 have been combined with the new provisions requiring the installation of carbon monoxide alarms in multiple dwellings constructed or offered for sale after August 9, 2005, and the combined carbon monoxide alarm provisions are included in a single section [section 1228.3] which is part of the new Part 1228 added by this rule.)

Adoption of this rule on an emergency basis is necessary to protect public safety, to reduce the number of accidental drownings in swimming pools, the number of deaths and injuries due to carbon monoxide poisoning, and to satisfy the requirements of Executive Law section 378 (5-a) and (14)(b)-(c). At its meeting held on September 11, 2007, the State Fire Prevention and Building Code Council determined that adopting this rule on an emergency basis is necessary to preserve the public safety, and establishing the date of filing of this rule as the effective date of this rule is necessary to protect health, safety and security.

Subject: Installation of pool alarms in residential and commercial swimming pools and the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings.

Purpose: To implement Executive Law, section 378(5-a) and (14)(b)-(c).

Substance of emergency rule: This rule repeals section 1225.2 of Title 19 NYCRR and adds a new Part 1228 to Title 19 NYCRR.

Section 1225.2 of Title 19 NYCRR requires the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives. Said section 1225.2 is repealed by this rule. However, provisions which require the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 have been combined with new provisions requiring the installation of carbon monoxide alarms in multiple dwellings, and the combined carbon monoxide alarm provisions are included in a single section (section 1228.3), which is part of new Part 1228 added by this rule.

New Part 1228 adds the following provisions to the State Uniform Fire Prevention and Building Code (the "Uniform Code"):

First, new section 1228.1 provides that Part 1228 is part of the Uniform Code. New section 1228.1 also specifies the relationship between new Part 1228 and the rule which was previously approved by the State Fire Prevention and Building Code Council (the "Code Council") and which amends that Uniform Code in its entirety (such rule being hereinafter referred to as the "Uniform Code Amendment"). Notice of Adoption of the Uniform Code Amendment will be published in the October 3, 2007 edition of the State Register, and the Uniform Code Amendment will be effective on January 1, 2008. New section 1228.1 provides that:

(1) Part 1228 is not repealed by the Uniform Code Amendment;

(2) Part 1228 will not be repealed by reason of the Uniform Code Amendment becoming effective (provided, however, that section new 1228.3, which contains the carbon monoxide alarm provisions, will be repealed when the Uniform Code Amendment becomes effective); and

(3) notwithstanding the fact that the Code Council has provided that during the transition period between adoption of the Uniform Code Amendment and the date on which the Uniform Code Amendment becomes effective, a person shall have the option of complying with the Uniform Code as it existed prior to the adoption of the Uniform Code Amendment or with the Uniform Code as it will be amended by the Uniform Code Amendment, such person must also comply with the provisions set forth in Part 1228.

Second, new section 1228.2 requires the installation of pool alarms in all commercial and residential swimming pools that are constructed, installed or substantially modified after December 14, 2006. New section 1228.2 provides that a hot tub or spa that is equipped with a safety cover that complies with ASTM F1346 (2003), and any other pool that is equipped with an automatic power safety cover that complies with ASTM F1346 (2003), need not be equipped with a pool alarm.

Third, new section 1228.3 requires the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling accommodations in condominiums and cooperatives constructed or offered for sale after July 30, 2002 and in multiple dwellings constructed or offered for sale after August 9, 2005. As indicated above, new section 1228.3 will be repealed when the Uniform Code Amendment becomes effective. The Uniform Code, as amended by the Uniform Code Amendment, includes provisions requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling accommodations in condominiums and cooperatives constructed or offered for sale after July 30, 2002 and in multiple dwellings constructed or offered for sale after August 9, 2005, and such carbon monoxide alarm provisions will apply on and after the effective date of the Uniform Code Amendment.

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 December 18, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: joseph.ball@dos.state.ny.us

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code").

Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions.

Executive Law section 378(14)(b) provides that the Uniform Code must require that residential and commercial swimming pools constructed or substantially modified after December 14, 2006 shall be equipped with an acceptable pool alarm capable of detecting a child entering the water and of giving an audible alarm.

Executive Law section 378(14)(c) provides that the Uniform Code must provide that a hot tub or spa equipped with a safety cover that complies with ASTM F1346 (2003), and any other pool equipped with an automatic power safety cover that complies with ASTM F1346 (2003), shall not be required to be equipped with a pool alarm.

Executive Law section 378(5-a), as amended by Chapter 438 of the Laws of 2005, provides that the Uniform Code must require multiple dwellings constructed or offered for sale after August 9, 2005 shall be equipped with carbon monoxide (CO) detectors.

This rule making adds provisions to the Uniform Code that (1) require the installation of pool alarms and (2) require the installation of CO alarms in multiple dwellings.

Executive Law section 378(5-a) also provides that the Uniform Code must require the installation of CO alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002. The Uniform Code currently includes provisions (in section 1225.2 of Title 19 NYCRR) requiring the installation of CO alarms in such occupancies. Said section 1225.2 is repealed by this rule. However, provisions requiring the installation of CO alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 and been combined with the new provisions requiring installation of CO alarms in multiple dwellings, and the combined CO alarm provisions are included in a single section (new section 1228.3) which is added by this rule.

2. LEGISLATIVE OBJECTIVES.

The Legislative objectives sought to be achieved by this rule are (1) reducing the number of accidental drownings in swimming pools in this State and (2) reducing the number of deaths and injuries caused by CO poisoning in this State.

3. NEEDS AND BENEFITS.

This rule requires residential and commercial swimming pools (other than hot tubs and spas equipped with safety covers that comply with ASTM F1346 (2003) and other pools equipped with automatic power safety covers that comply with ASTM F1346 (2003)) installed, constructed or substantially modified after December 14, 2006 to be equipped with approved pool alarms. By requiring the use of pool alarms in swimming pools (or, in the case of hot tubs and spas, by requiring the use of safety covers), this rule should meet the objective and provide the benefit intended by the Legislature: a reduction in the number of accidental drownings.

This rule also requires the installation of CO alarms in multiple dwellings constructed or offered for sale after August 9, 2005. CO poisoning results from displacement of oxygen in the blood supply by carboxyhaemoglobin, reducing oxygen supply to the brain. In non-fire situations, elevated CO levels may be caused by improperly installed or maintained fuel-fired appliances, motor vehicles operated in enclosed garages, or appliances intended for outdoor use being used indoors during power failures. As CO is not detectable by the senses, its presence and concentration can only be determined by instruments.

A number of different sources, including those listed in the full Regulatory Impact Statement, were reviewed to develop an estimate of the annual number of fatalities attributable to unintentional, non-fire, building source CO poisoning. Extrapolating the national data from these sources indicates that New York State (excluding New York City) could expect between 8 and 48 annual fatalities.

CO poisoning will affect the judgment and capability of persons to evacuate or take other appropriate actions well before concentrations reach fatal levels. In addition, in situations where CO poisoning does not result in death, it may cause significant injuries and long term health consequences. Extrapolating national data provided by CPSC indicates that New York State (excluding New York City) could expect approximately 400 injuries annually.

The rule provides that CO alarms shall be listed and labeled as complying with UL 2034-2002. Listing of alarm devices ensures their safety and compliance with performance standards. The sensitivity standard in UL 2034 is based on an alarm response to specified concentrations of CO (in parts per million) within specified time frames. These are based on limiting carboxyhaemoglobin saturation to 10 percent.

The rule addresses multiple dwellings constructed or offered for sale after August 9, 2005 (the date specified in the statute). While the initial benefits of installing CO alarms in the multiple dwellings specified in the statute will be limited, there will be a cumulative effect over a period of years as multiple dwellings are sold and newly constructed multiple dwellings replace older multiple dwellings.

4. COSTS.

The initial capital costs of complying with the pool alarm provisions added by this rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. In the case of a large, complex shaped pool, a more sophisticated system may be required. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm. It is anticipated that these costs will be modest. In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing the safety cover. The Department of State estimates that the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of operating and maintaining the cover. It is anticipated that these costs will be modest.

The initial costs of complying with the CO alarm provisions added by this rule include the cost of purchasing and installing the alarm. Cord or plug connected and battery operated CO alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. The annual costs of complying with the rule will include the costs of operating and maintaining the alarms. It is anticipated that these costs will be modest.

There are no costs to the Department of State for the implementation of the rule. The Department is not required to develop any additional regulations or develop any programs to implement the rule.

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs, installs or substantially modifies a swimming pool, the State or such local government, as the case may be, will be required to install a pool alarm, and if the State or any local government constructs, installs or substantially modifies a hot tub or spa, the State or such local government, as the case may be, will be required to install a safety cover. Similarly, if the State or any local government constructs a new multiple dwelling or offers an existing multi-

ple dwelling for sale, the State or such local government, as the case may be, will be required to install CO alarms.

Second, since this rule adds provisions to the Uniform Code, the authorities responsible for administering and enforcing the Uniform Code will be responsible for enforcing the provisions added by this rule, along with the other provisions of the Uniform Code. However, the need to verify the installation of required pool alarms (or, in the case of a hot tub or spa, the required safety covers) and the required CO alarms should not have a significant impact on the code enforcement process.

5. PAPERWORK.

This rule imposes no new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES.

This rule does not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows:

First, any county, city, town, village, school district, fire district or other special district that owns or operates a swimming pool that is installed, constructed or substantially modified after December 14, 2006 will be required to comply with the pool alarm provisions added by this rule. Similarly, any county, city, town, village, school district, fire district or other special district that constructs a new multiple dwelling or sells an existing multiple dwelling will be required to comply with the CO alarm provisions added by this rule.

Second, since this rule adds provisions to the Uniform Code, cities, towns, villages and counties that are responsible for administering and enforcing the Uniform Code will be responsible for administering and enforcing the requirements of the rule, along with all other provisions of the Uniform Code.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

7. DUPLICATION.

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES.

Pool alarms. While the use of personal immersion alarms may provide supplemental protection in certain situations, such devices would not protect a child who was not wearing the device when he or she entered the water. Therefore, this rule provides that an alarm device which is located on person(s) or which is dependent on device(s) located on person(s) for its proper operation will not satisfy the requirements of the new provisions.

CO alarms. This rule requires installation of CO alarms in multiple dwellings constructed or offered for sale after August 9, 2005. Consideration was given to adopting a rule requiring all multiple dwellings be required to install CO detectors retroactively. This alternative was rejected at this time as it extends beyond the specific directive of the Legislature as set forth in subdivision (5-a) of Executive Law section 378.

9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule. The U.S. Consumer Product Safety Commission does recommend installation of CO alarms.

10. COMPLIANCE SCHEDULE.

Regulated persons will be able to achieve compliance with the pool alarm provisions added by this rule in the normal course of operations, either as part of the installation or construction of a new swimming pool or the substantial modification of an existing swimming pool.

Regulated persons will be able to achieve compliance with the CO provisions added by this rule in the normal course of operations, either as part of the construction process of a new multiple dwelling, as part of routine maintenance of an existing multiple dwelling constructed after August 9, 2005, or as part of the transfer process for an existing multiple dwelling offered for sale.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

The new section 1228.2 which is added to Title 19 NYCRR by this rule will apply to any small business and any local government that owns or operates a swimming pool that is installed, constructed or substantially modified after December 14, 2006. The Department of State has not been able to estimate the number of small businesses and local governments that own or operate swimming pools, but it is believed that a majority of the non-residential swimming pools in this State are owned or operated by small businesses or local governments. Small businesses that install construct or modify swimming pools and small businesses that sell swimming pool alarms will also be affected by this rule.

The new section 1228.3 which is added to Title 19 NYCRR by this rule will apply to any small business and any local government that constructs a "multiple dwelling" (as that term is defined in subdivision (5-a) of section 378 of the Executive Law) or offers a multiple dwelling for sale. The Department of State believes that the majority of multiple dwellings in this State are owned by small businesses.

The Uniform Code currently contains provisions (in section 1225.2 of Title 19 NYCRR) requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives. Said section 1225.2 is repealed by this rule. However, provisions requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 have been combined with the new provisions requiring the installation of carbon monoxide alarms in multiple dwellings, and the combined carbon monoxide alarm provisions are included a single section (new section 1228.3) which is added by this rule.

Since this rule adds provisions to the Uniform Fire Prevention and Building Code (the "Uniform Code"), each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department of State estimate that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. COMPLIANCE REQUIREMENTS:

No reporting or recordkeeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments subject to the rule will be required to install, use and maintain swimming pool alarms and carbon monoxide alarms in accordance with the rule's provisions. In cases where the installation, construction or substantial modification of a swimming pool involves the issuance of a building permit, the local government responsible for administering and enforcing the Uniform Code will be required to consider the pool alarm requirements of this rule when reviewing plans and inspecting work. When a multiple dwelling is constructed, the local government responsible for administering and enforcing the Uniform Code will be required to consider the carbon monoxide alarm requirements of this rule when reviewing plans and inspecting work.

3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

4. COMPLIANCE COSTS:

Pool alarms. The initial capital costs of complying with the rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. In the case of large, complex shaped pools, a more sophisticated system may be required. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm, which are anticipated to be modest.

In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing the safety cover. The Department of State estimates the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of maintaining the safety cover, which are anticipated to be modest.

Any variations in the initial capital cost of complying with the rule or in the annual cost of complying with the rule are likely to be attributable to variations in the size and configuration of the swimming pools to be protected, and not to the type or size of the small businesses and local governments that own the pools. To the extent that larger businesses and larger local governments may tend to own larger swimming pools, or more than one swimming pool, the total costs of compliance would be higher for larger entities and larger local governments.

Carbon monoxide alarms. The initial capital costs of complying with the rule will include the cost of purchasing and installing the carbon monoxide alarm(s). Cord or plug connected and battery operated carbon monoxide alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. With regard to the sale of an existing multiple dwelling, regulated parties must purchase and install a carbon monoxide

alarm, with similar costs as described above. Such costs are not likely to vary for small businesses or local governments of different types and differing sizes.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

Pool alarms. It is economically and technologically feasible for regulated parties to comply with the rule. Except in the case of very large or complex shaped swimming pools, which may require a more sophisticated alarm system, this rule imposes no substantial capital expenditures. No new technology need be developed for compliance with this rule.

Carbon monoxide alarms. It is economically and technologically feasible for regulated parties to comply with the rule. No substantial capital expenditures are imposed and no new technology need be developed for compliance.

6. MINIMIZING ADVERSE IMPACT:

Pool alarms. The rule minimizes any potential adverse economic impact on regulated parties (including small businesses or local governments) by allowing several types of pool alarms on the market to be used. In the case of hot tubs and spas that fall within the Uniform Code's definition of "swimming pool," the rule minimizes any potential adverse impact by permitting providing that a hot tub or spa that is equipped with a safety cover need not be equipped with a pool alarm. Further, the rule provides that other swimming pools equipped with automatic power safety covers need not be equipped with a pool alarm.

The applicable statute (Executive Law section 378(14)(b)-(c)) requires that this rule apply to all swimming pools constructed or substantially modified after December 14, 2006 (except for hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers). The statute does not authorize the establishment of differing compliance requirements or timetables with respect to swimming pools owned or operated by small businesses or local governments. Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers are exempt from this rule, as required by Executive Law section 378(14)(c); providing other exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(14)(b)-(c) and would endanger public safety.

Carbon monoxide alarms. The rule minimizes any potential adverse economic impact on regulated parties (including small businesses or local governments) by allowing for the installation of all types of carbon monoxide alarms, including those that are permanently connected to the building wiring system, those that are connected by cord or plug to the electrical system, and those that are battery operated. The applicable statute (Executive Law section 378(5-a)) requires that this rule apply to all multiple dwellings constructed or offered for sale after August 9, 2005. The statute does not authorize the establishment of differing compliance requirements or timetables with respect to multiple dwellings owned or operated by small businesses or local governments. Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(5-a) and would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices posted on the Department's website and notices published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of Building New York. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements the provisions of paragraphs (b) and (c) of subdivision (14) of section 378 of the Executive Law, as added by Chapter 450 of the Laws of 2006 and Chapter 75 of the Laws of 2007, respectively, by adding provisions to the Uniform Fire Prevention and Building Code ("Uniform Code") requiring that a pool alarm be installed in any residential or commercial swimming pool (other than a hot tub or spa equipped with a safety cover or other pool equipped with an automatic power safety cover) that is installed, constructed or substantially modified after December 14, 2006.

This rule also implements the provisions of subdivision (5-a) of section 378 of the Executive Law, as amended by Chapter 438 of the Laws of 2005, by adding provisions to the Uniform Code requiring that carbon monoxide alarms be installed in any "multiple dwelling" (as that term is defined in subdivision (5-a) of section 378 of the Executive Law) that is constructed or offered for sale after August 9, 2005.

Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements:

Pool alarms. All residential and all commercial swimming pools that are installed, constructed or substantially modified after December 14, 2006 will be required to be equipped with an acceptable pool alarm that is capable of detecting a child entering the water and of giving an audible alarm, and such alarms will be required to be installed, used and maintained in accordance with the manufacturer's instructions. (Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers will not be required to be equipped with pool alarms.) No professional services are likely to be needed in a rural area in order to comply with such requirements.

Carbon monoxide alarms. All multiple dwellings constructed or offered for sale after August 9, 2005 will be required to be equipped with one or more carbon monoxide alarms. In the case of a multiple dwelling that contains dwelling units, at least one carbon monoxide alarm must be installed in each such dwelling unit. In the case of a multiple dwelling that contains sleeping units, at least one alarm must be installed on each floor level that contains sleeping units and, in addition, at least one alarm must be installed in each sleeping unit that contains any fuel-fired or solid-fuel burning appliance, equipment or system. Since this rule permits the use of battery operated carbon monoxide alarms, no professional services that are likely to be needed in a rural area in order to comply with such requirements.

Executive Law section 378(5-a) also provides that the Uniform Code must require the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses and dwelling units constructed or offered for sale after July 30, 2002. The Uniform Code currently contains provisions (in section 1225.2 of Title 19 NYCRR) requiring the installation of carbon monoxide alarms in such occupancies. Section 1225.2 is repealed by this rule. However, provisions requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 have been combined with the new provisions requiring the installation of carbon monoxide alarms in multiple dwellings, and the combined carbon monoxide alarm provisions are included in a single section (section 1228.3) which is part of the new Part 1228 added by this rule.

3. COMPLIANCE COSTS.

Pool alarms. The initial capital costs of complying with the rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. In the case of a large, complex shaped pool, a more sophisticated system may be required. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm, which are anticipated to be modest.

A swimming pool (other than a hot tub or spa) equipped with an automatic power safety cover will not be required to be equipped with a pool alarm. However, this rule does not require the installation of an automatic power safety cover.

In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing a safety cover. The Department of State estimates that the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of maintaining the safety cover, which are anticipated to be modest.

Any variation in initial capital costs of complying and/or annual costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the

swimming pools owned or operated by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

Carbon monoxide alarms. The initial capital costs of complying with the rule will include the cost of purchasing and installing the carbon monoxide alarm(s). Cord or plug connected and battery operated carbon monoxide alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. With regard to the sale of an existing multiple dwelling, regulated parties must purchase and install a carbon monoxide alarm, with similar costs as described above. Such costs are not likely to vary for different types of public and private entities in rural areas.

4. MINIMIZING ADVERSE IMPACT.

Pool alarms. Executive Law section 378(14)(b) makes no distinction between swimming pools located in rural areas and swimming pools located in non-rural areas. However, the economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non-rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Executive Law section 378(14)(b)-(c) requires that this rule apply to all swimming pools (other than hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers) constructed or substantially modified after the effective date of section 378(14)(b), which is December 14, 2006. The statute does not authorize the establishment of differing compliance requirements or timetables in rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(14)(b)-(c) and would endanger public safety.

Carbon monoxide alarms. Executive Law section 378(5-a) makes no distinction between multiple dwellings located in rural areas and multiple dwellings located in non-rural areas. However, the impact of this rule in rural areas will be no greater than the impact of this rule in non-rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Executive Law section 378(5-a) requires that this rule apply to all multiple dwellings constructed or offered for sale after August 9, 2005. The statute does not authorize the establishment of differing compliance requirements or timetables in rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(5-a) and would endanger public safety.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices posted on the Department's website and notices published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of Building New York. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

1. Pool alarms. The rule adds a new Part 1228 to Title 19 NYCRR. Part 1228 adds two new provisions to the Uniform Fire Prevention and Building Code ("Uniform Code"), one of which requires that residential and commercial swimming pools installed, constructed or substantially modified after December 14, 2006 be equipped with a pool alarm that is capable of detecting a child entering the water and giving an audible alarm. The pool alarms must be installed, used and maintained in conformance with the manufacturer's instructions. Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers are exempted from these pool alarm requirements. These provisions are added to satisfy the requirements of paragraphs (b) and (c) of subdivision (14) of section 378 of the Executive Law.

Pool alarms that satisfy the requirements of this rule are currently available. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. The cost of providing the appropriate surface wave sensor or subsurface disturbance sensor pool alarm(s) is considered to be modest, particularly when considered in relation to the cost of the typical swimming pool. It is anticipated that requiring pool alarms will have no significant adverse impact on jobs or employment opportunities in businesses that manufacture, install or construct the types of swimming pools that can be protected by such surface wave sensor or subsurface disturbance sensor pool alarm(s). It is also anticipated that requiring pool alarms may have a positive impact on employment opportunities in businesses that sell, install and service pool alarms.

In the case of a large, complex shaped swimming pool, a more sophisticated system may be required. At least one manufacturer produces a pool alarm system, using sonar technology, which is claimed to be suitable for pools of virtually any size or shape. The cost of such a system is estimated to be between \$5,000 and \$8,000. A sonar-based pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. In these cases, the cost of providing the appropriate pool alarm system may add between 5% and 10% to the cost of the pool to be protected. This may have some negative impact on the segment of the swimming pool industry that constructs large, complex shaped swimming pools that require the more expensive sonar pool alarm systems. However, based on information provided on the International Aquatic Foundation website (http://www.iafh2o.org/IAF_Statistics.asp), of the estimated 8,349,000 swimming pools in the United States, only 270,000, or less than 3.25%, are "commercial" swimming pools. Based on this information, it is estimated that less than 3.25% of swimming pools that will be installed, constructed or substantially modified after December 14, 2006 will be "commercial" swimming pools. It is also anticipated that many such "commercial" swimming pools will be of a size and shape that can be protected by the less expensive surface wave sensor or subsurface disturbance sensor pool alarms mentioned above and, accordingly, it is estimated that the percentage of new swimming pools that will require the more expensive sonar pool alarm systems will be much less than 3.25%. Therefore, it is anticipated that this rule will not have a substantial adverse impact on jobs and employment opportunities.

2. Carbon monoxide alarms. The new Part 1228 added by this rule also adds a provision to the Uniform Code requiring that multiple dwellings constructed or offered for sale after August 9, 2005 be equipped with carbon monoxide alarms. The carbon monoxide alarm requirements were extended to multiple dwellings to satisfy the requirements of subdivision (5-a) of section 378 of the Executive Law, as amended by Chapter 438 of the Laws of 2005.

Executive Law section 378(5-a) also provides that the Uniform Code must require the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses, and dwelling units in condominiums and cooperatives constructed after July 30, 2002. The Uniform Code currently contains provisions (in section 1225.2 of Title 19 NYCRR) requiring the installation of carbon monoxide alarms in such occupancies. Said section 1225.2 is repealed by this rule. However, provisions requiring the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses and dwelling units in condominiums and cooperatives constructed or offered for sale after July 30, 2002 have been combined with the new provisions requiring the installation of carbon monoxide alarms in multiple dwellings, and the combined carbon monoxide alarm provisions are set forth in a single section (section 1228.3) in new Part 1228 added by this rule.

For newly constructed multiple dwellings, the carbon monoxide alarms will be installed as part of the construction process. Carbon monoxide alarms must also be installed in existing multiple dwellings constructed after August 9, 2005. In existing multiple dwellings constructed on or before August 9, 2005, carbon monoxide alarms may be installed at any time after the rule takes effect, or installation may be postponed until the multiple dwelling is offered for sale. Any potential adverse economic impact on regulated parties is minimized by the provisions of the rule that allow the installation of all types of carbon monoxide alarms, including those that are permanently connected to the building wiring system, those that are connected by cord or plug to the electrical system, and those that are battery operated.

Once installed, the carbon monoxide alarms must be used and maintained in accordance with manufacturer's instructions.

The costs of purchasing, installing and maintaining the alarms is insignificant in comparison to the cost of construction of a typical new multiple dwelling and the sale price of a typical existing multiple dwelling that is offered for sale. Therefore, this rule should have no impact on jobs and employment opportunities related to the construction of new multiple dwellings or the sale of existing multiple dwellings.

Susquehanna River Basin Commission

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Actions Taken at September 12, 2007 Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of Commission Actions.

SUMMARY: At its regular business meeting on September 12, 2007 in Binghamton, New York, the Commission: 1) convened a panel session on New York State's involvement in the Chesapeake Bay Program, 2) approved a proposed rule making action to amend the consumptive use provisions of 18 CFR Part 806 relating to agricultural water use, and 3) approved a grant and four contracts. It also conducted a public hearing to approve certain water resources projects and rescind one docket approval. See the Supplementary Information section below for more details on these actions.

DATE: September 12, 2007.

ADDRESS: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238-0423; ext. 306; fax: (717) 238-2436; e-mail: rcairo@srbc.net or Deborah J. Dickey, Secretary to the Commission, telephone: (717) 238-0422, ext. 301; fax: (717) 238-2436; e-mail: ddcickey@srbc.net. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: The September 12th agenda included a panel session focusing on New York State's involvement in the Chesapeake Bay Program and the active steps that New York is taking to participate in the effort to restore the Bay, including the implementation of a tributary strategy and other measures such as sewage treatment plant improvements, improved farming practices and constructed wetlands.

In regards to the proposed rule making action to amend the agricultural consumptive use provisions of 18 CFR Part 806, notice thereof will be published in the Federal Register and in state notice publications. In addition, a public hearing will be scheduled and the public comment period will run until November 15, 2007. Comments may be submitted to Richard A. Cairo, General Counsel (e-mail: rcairo@srbc.net), Susquehanna River Basin Commission, 1721 N. Front St., Harrisburg, PA 17102, or Deborah J. Dickey, Secretary to the Commission (e-mail: ddcickey@srbc.net) at the same address.

The Commission also convened a public hearing and took the following actions:

Public Hearing – Projects Approved

1. Project Sponsor and Facility: Town of Erwin (Wells 2 and 3, and ID Park Well 1), Steuben County, N.Y. Modification of groundwater approval (Docket No. 20070602).
2. Project Sponsor: South Slope Development Corporation. Project Facility: Song Mountain Ski Resort, Town of Preble, Cortland County, N.Y. Approval for surface water withdrawal of up to 3.705 mgd, when available, from an unnamed tributary to Crooked Lake, groundwater withdrawal (Well MW-3) of 0.960 mgd as a 30-day average, and consumptive water use of up to 0.815 mgd.
3. Project Sponsor: AES Westover, LLC. Project Facility: AES Westover Generating Station, Town of Union and Village of Johnson City, Broome County, N.Y. Approval for surface water withdrawal of up to 97.300 mgd from the Susquehanna River and consumptive water use of up to 1.748 mgd.
4. Project Sponsor and Facility: Town of Cohocton (Well 3), Steuben County, N.Y. Approval of groundwater withdrawal of 0.072 mgd as a 30-day average.

5. Project Sponsor: Northampton Fuel Supply Company, Inc. Project Facility: Loomis Bank Operation, Hanover Township, Luzerne County, Pa. Modification of consumptive water use approval (Docket No. 20040904).
6. Project Sponsor: PPL Susquehanna, LLC. Project Facility: Susquehanna Steam Electric Station, Salem Township, Luzerne County, Pa. Approval for groundwater withdrawal of 0.125 mgd as a 30-day average, surface water withdrawal of up to 66.000 mgd from the Susquehanna River, modification of a consumptive water use approval of up to 48.000 mgd, and acceptance of a settlement offer from the Project Sponsor in the amount of \$500,000 to resolve a compliance issue at the Project Facility (Docket No. 19950301).
7. Project Sponsor: Bionol Clearfield LLC. Project Facility: Bionol-Clearfield, Clearfield Borough, Clearfield County, Pa. Approval for surface water withdrawal of up to 2.505 mgd from the West Branch Susquehanna River and consumptive water use of up to 2.000 mgd.
8. Project Sponsor and Facility: Walker Township Water Association (Snydertown Well 3), Walker Township, Centre County, Pa. Approval for groundwater withdrawal of 0.523 mgd as a 30-day average.
9. Project Sponsor and Facility: Bedford Township Municipal Authority (Bowman Wells 1 and 2), Bedford Township, Bedford County, Pa. Modification of groundwater withdrawal approval (Docket No. 19990502).
10. Project Sponsor and Facility: Dillsburg Area Authority (Well 7), Carroll Township, York County, Pa. Approval for groundwater withdrawal of 0.460 mgd as a 30-day average.
11. Project Sponsor: PPL Brunner Island, LLC. Project Facility: Brunner Island Steam Electric Station, East Manchester Township, York County, Pa. Approval for surface water withdrawal of up to 835.000 mgd from the Susquehanna River and consumptive water use of up to 23.100 mgd.

Public Hearing – Project Rescinded:

Project Sponsor: Northampton Fuel Supply Company, Inc. (Docket No. 20040903). Project Facility: Prospect Bank Operation, Plains Township, Luzerne County, Pa.

AUTHORITY: P.L. 91-575, 84 Stat. 1509 *et seq.*, 18 CFR Parts 806, 807, and 808.

Dated: September 19, 2007.

Thomas W. Beauduy,

Deputy Director.

SUSQUEHANNA RIVER BASIN COMMISSION

18 CFR Parts 806 and 808

Review and Approval of Projects

AGENCY: Susquehanna River Basin Commission (SRBC)

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: This document contains proposed rules that would amend project review regulations to clarify the definition of "agricultural water use" and to provide a qualified exception to the consumptive use approval requirements for agricultural water use projects. In addition, this proposed rule would make a technical correction to an error in the "Authority" citation for Part 808.

DATES: The Commission has scheduled a public hearing on the proposed rules on Wednesday, November 7, 2007, at 2:00 p.m. Comments on these proposed rules may be submitted to the SRBC on or before November 15, 2007.

The location of the public hearing is listed in the addresses section of this document. Additionally, individuals wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

ADDRESSES: Comments may be mailed to: Mr. Richard A. Cairo, Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391, or by email to rcairo@srbc.net.

The public hearing will be held in the Goddard Conference Room, Pennsylvania Department of Environmental Protection, Northcentral Regional Office, 208 West Third Street, Suite 101, Williamsport, PA 17701.

Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, 717-238-0423; fax: 717-238-2436; e-mail: rcairo@srbc.net. Also, for further information on the proposed rulemaking, visit the Commission's web site at www.srbc.net.

SUPPLEMENTARY INFORMATION:

Background and Purpose of Amendments

The SRBC adopted final rulemaking on December 5, 2006, published at 71 FR 78570, December 29, 2006 establishing: (1) the scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Pub. L. 91-575; 83 Stat. 1509 *et seq.* (the compact); (2) special standards under Section 3.4 (2) of the compact governing water withdrawals, consumptive use of water; diversions of the basin's waters, water conservation, and water use registration; and (3) procedures for hearings and enforcement actions.

The December 2006 rulemaking made extensive revisions to project review regulations that were promulgated in May 1995. Since 1995, SRBC has continued to suspend the application of its consumptive use regulation to agricultural water uses pending the implementation of a mitigation method that is more suited to agriculture's unique circumstances.

The Commission's member states have taken definitive steps to support projects that will provide storage and release of water to mitigate agricultural water use in their jurisdictions and thus satisfy the standards for consumptive use mitigation set forth in 18 CFR 806.22. The proposed rulemaking would amend 18 CFR 806.4 (a)(1) to provide an exception for agricultural water use projects from the consumptive use review and approval requirements of 18 CFR 806.4 (a)(1) and (3), unless water is diverted for use beyond lands that are at least partially in the basin, and provided the Commission makes a determination that the state-sponsored projects are sufficient to meet the consumptive use mitigation standards contained in 18 CFR 806.22.

A second amendment clarifies the definition of "agricultural water use" in 18 CFR 806.3, 806.4 and 806.6 by inserting the word "products" after the word "turf." This will clarify that the maintenance of turf grass as part of a project or facility, such as a golf course, does not constitute an agricultural water use. Only the raising of turf products for sale such as sod would constitute an agricultural water use with this clarification.

A third amendment corrects an error made as part of the December 5, 2006 rulemaking in the "Authority" citation to Part 808 by replacing the erroneous Sec. 3.5 (9) with the correct Sec. 3.4 (9).

List of Subjects in 18 CFR Part 806: Administrative practice and procedure, Water resources.

For the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR Part 806 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5 (5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 *et seq.*

2. In § 806.3, revise the definition of "agricultural water use" to read as follows:

§ 806.3 Definitions.

* * * * *

Agricultural water use. A water use associated primarily with the raising of food, fiber or forage crops, trees, flowers, shrubs, turf products, livestock and poultry. The term shall include aquaculture.

* * * * *

3. In § 806.4, revise paragraphs (a)(1) introductory text, (a)(3) introductory text and (b)(3) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) * * *

(1) Consumptive use of water. Any consumptive use project described below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in § 806.22, and, to the extent that it involves a withdrawal from groundwater or surface water, shall also be subject to the standards set forth in § 806.23. Except to the extent that they involve the diversion of the waters of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section. Provided the commission determines that low flow augmentation projects sponsored by the commission's member states provide sufficient mitigation for agricultural water use to meet the standards set forth in § 806.22, and except as otherwise provided below, agricultural water use projects shall not be subject to the requirements of this paragraph (a)(1). Notwithstanding the foregoing, an agricultural water use project involving a diversion of the waters of the basin shall be subject to such requirements unless the property, or contiguous parcels of property, upon which the agricultural water use project occurs is located at least partially within the basin.

* * * * *

(3) *Diversions.* Except with respect to agricultural water use projects not subject to the requirements of paragraph (a)(1), the projects described

below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in § 806.24. The project sponsors of out-of-basin diversions shall also comply with all applicable requirements of this part relating to consumptive uses and withdrawals.

* * * * *

(b) * * *

(3) Transfer of land used primarily for the raising of food, fiber or forage crops, trees, flowers, shrubs, turf products, livestock, or poultry, or for aquaculture, to the extent that, and for so long as, the project's water use continues to be for such agricultural water use purposes.

* * * * *

3. In § 806.6, revise paragraph (b)(3) to read as follows:

§ 806.6 Transfers of approval.

* * * * *

(b) * * *

(3) A project involving the transfer of land used primarily for the raising of food, fiber or forage crops, trees, flowers, shrubs, turf products, livestock or poultry, or for aquaculture, to the extent that, and for so long as, the project's water use continues to be for such agricultural water use purposes.

* * * * *

PART 808—HEARINGS AND ENFORCEMENT ACTIONS

Subpart A – Hearings

Subpart B – Compliance and Enforcement

5. Revise the authority citation for Part 808 to read as follows:

Authority: Secs. 3.4 (9), 3.5 (5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 *et seq.*

* * * * *

Dated: September 21, 2007.

Paul O. Swartz,

Executive Director.