

# RULE MAKING ACTIVITIES

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

AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice  
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; 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.

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## Department of Agriculture and Markets

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### NOTICE OF ADOPTION

#### Importation of Cattle

**I.D. No.** AAM-04-08-00007-A

**Filing No.** 335

**Filing date:** April 15, 2008

**Effective date:** April 30, 2008

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

**Action taken:** Repeal of section 53.3 and addition of new section 53.3 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6), 72, 74 and 76

**Subject:** Importation of cattle to a specifically approved stockyard or a recognized slaughtering establishment.

**Purpose:** To establish the conditions under which cattle may be imported into the State and moved to a specifically approved stockyard or a recognized slaughtering establishment.

**Text or summary was published** in the notice of proposed rule making, I.D. No. AAM-04-08-00007-P, Issue of January 23, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** John Huntley, DVM, State Veterinarian, Director, Divi-

sion of Animal Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3502

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

**Comment:** Comment was received indicating that the rule adds to the economic viability of Upstate New York agriculture and complements the recently announced initiative to revitalize Upstate New York.

**Department's response:** The Department agrees with this comment.

**Comment:** Comment was received indicating that the rule will provide an effective channel for out-of-state farmers wishing to sell their cattle through a New York livestock market and provides New York markets with a marketing channel for out-of-state cattle.

**Department's response:** The Department concurs with this comment.

**Comment:** Comment was received indicating that the rule establishes requirements to ensure out-of-state cattle to be healthy, disease-free and fit for sale.

**Department's response:** The Department concurs with this comment.

**Comment:** Comment was received suggesting that cattle from New Hampshire and Maine be allowed to enter New York pursuant to the proposed rule.

**Department's response:** The Department believes that at the present time the rule should be limited to the importation of cattle originating in the states bordering New York with an animal health status equivalent to New York's. This will reduce potential animal health risks and facilitate the monitoring of the animal health status of the states of origin of the cattle by both the Department and the specifically approved stockyards receiving them.

**Comment:** Comment was received indicating that the rule should generally strengthen the cattle industry and the supporting infrastructure in New York.

**Department's response:** The Department concurs with this comment.

**Comment:** Comment was received requesting that specific language be incorporated into the proposed rule mandating that veterinary costs associated with sale barn inspection of out-of-state cattle be the sole responsibility of out-of-state farms shipping to the sale barns.

**Department's response:** The Department agrees that the payment, by the out-of-state farms shipping cattle into New York pursuant to this rule, of the veterinary costs associated with such shipments is the most reasonable method for markets to employ. The Department does not, however, believe that the payment of such costs should be governed by the rule, but should be determined by the livestock markets. The rule benefits New York buyers at the livestock markets in question, as well as the markets themselves by increasing the number of consigned animals from neighboring states that are available for purchase. Monitoring and enforcement of a mandate that out-of-state consignors pay fees associated with qualifying cattle after entry into New York would be difficult and expensive. Federal regulations require that each of the livestock markets in question have an attending veterinarian. Difficulties could arise in attempting to separate any additional costs associated with issuing certificates for cattle entering New York without a certificate of veterinary inspection from the costs associated with the other services provided by the attending veterinarian. The additional paperwork that would be required would unnecessarily add to the costs of the program. The Department anticipates that market competition will limit any fee increases to market clients associated with the post-entry qualification of imported cattle.

**Comment:** Comment was received indicating that the proposed regulation may in fact increase protection of the State's cattle herd and that it is possible that lowering the barrier for entry of out-of-state cattle to auction barns will reduce the financial benefit of moving cattle illegally for some

farms and therefore increase compliance with cattle importation standards. The comment further indicated that while this is the more likely scenario, it is also possible that the proposed regulatory system could increase the risk of exposure of in-state cattle to various diseases. The comment indicated that a program review should occur following one year of implementation of the program that would, at a minimum, examine the total number of out-of-state cattle that are being moved under the new program and other qualifiers that would determine that the new regulatory system meets or exceeds the existing protection system. The comment asked that the Department commit to such a one year review.

Department's response: The Department believes that the proposed regulation will increase protection of the State's cattle herd; will reduce the financial benefit of moving cattle illegally; and will increase compliance with cattle importation standards. The Department continually reviews its regulations and will continue to do so. It will propose future revisions to the regulations that are determined to be appropriate. One of the primary objectives of the Department's Division of Animal Industry is the control and eradication of disease in livestock. State and federal veterinarians and technicians inspect the livestock markets in question and their records several times a month. The certificates of veterinary inspection issued after the cattle imported under this rule are examined in New York will be sent to the Department and will be reviewed when they are received. If there is any question as to the origin or health status of any animal it will be addressed immediately. While it may be beneficial to review the number of importations at the end of the year, any increase or decrease in the number of animals imported from neighboring states does not correlate to the protection of the health of New York State cattle. The cattle imported pursuant of this rule must originate in neighboring states that have an animal disease status equivalent to that of New York State.

Comment: Comment was received indicating that the states from which cattle would be eligible for importation under this rule are those bordering New York State: Vermont, Massachusetts, Connecticut, New Jersey and Pennsylvania.

Department's response: The Department agrees with this comment.

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

#### National Institute of Standards and Technology Handbook 44, 2008 Edition

I.D. No. AAM-18-08-00005-P

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

**Proposed action:** This is a consensus rule making to amend section 220.2 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18 and 179

**Subject:** National Institute of Standards and Technology Handbook 44, 2008 edition.

**Purpose:** To incorporate by reference.

**Text of proposed rule:** Subdivision (a) of section 220.2 of 1 NYCRR is amended to read as follows:

(a) Except as otherwise provided in this Part, the specifications, tolerances and regulations for commercial weighing and measuring devices shall be those adopted by the [91st] 92nd National Conference on Weights and Measures [2006] 2007 as published in the National Institute of Standards and Technology Handbook 44, [2007] 2008 edition. This document is available from the National Conference on Weights and Measures, 15245 Shady Grove Road, Rockville, MD 20850, or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is available for public inspection and copying in the office of the Director of Weights and Measures, Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, or in the office of the Department of State, 41 State Street, Albany, NY 12231.

**Text of proposed rule and any required statements and analyses may be obtained from:** Ross Andersen, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3146, e-mail: ross.andersen@agmkt.state.ny.us

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

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

#### Consensus Rule Making Determination

The proposed rule will amend 1 NYCRR section 220.2 to incorporate by reference the 2008 edition of National Institute of Standards and Technology Handbook 44 in place of the 2007 edition which is presently incorporated by reference.

The proposed rule is non-controversial. The 2008 edition of Handbook 44 has been adopted by or is in use in every state other than New York; the State's manufacturers of weighing and measuring devices already, therefore, conform their operations to the provisions of this document in order to sell their products in interstate commerce. Furthermore, the State's users of commercial weighing and measuring devices also already use devices that conform to the provisions of this document due to its nearly-nation-wide applicability. The proposed rule will not, therefore, have any adverse impact upon regulated businesses and is, therefore, non-controversial.

#### Job Impact Statement

The proposed rule will not have an adverse impact on jobs or on employment opportunities.

The proposed rule will incorporate by reference in 1 NYCRR section 220.2 the 2008 edition of National Institute of Standards and Technology Handbook 44 (henceforth, "Handbook 44 (2008 edition)") which contains specifications, tolerances and regulations for commercial measuring devices. The 2007 edition of Handbook 44 is presently incorporated by reference. Handbook 44 (2008 edition) differs from the 2007 edition in that it amends several security requirements for all device types that have multiple measuring elements with a single indicating element; amends requirements for metric unit abbreviations on printers; amends the testing procedures used to evaluate off-center loading performance for most small scales; and revises several requirements to support specific needs of metering systems used to fuel aircraft. Handbook 44 (2008 edition) also differs from the 2007 edition in that it includes technical requirements for automatic temperature compensating accessories for vehicle mounted metering systems. Although such accessories are not currently authorized by statute, incorporation by reference of technical requirements for such accessories will allow prospective manufacturers, sellers and users thereof to plan accordingly if and when such accessories are permitted.

Handbook 44 (2008 edition) has been adopted by or is in use in every state other than New York; the State's manufacturers and users of weighing and measuring devices already, therefore, conform their operations to the provisions of this document in order to sell their products in interstate commerce.

The proposed rule will not, therefore, have any adverse impact upon jobs or employment opportunities.

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## Department of Correctional Services

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

#### Access to Records Subject to The Personal Privacy Protection Law

I.D. No. COR-18-08-00001-P

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

**Proposed action:** This is a consensus rule making to amend sections 6.2(c) and 6.3(b) of Title 7 NYCRR.

**Statutory authority:** Public Officers Law, section 94; Correction Law, sections 29(2), 71 and 112

**Subject:** Access to records subject to The Personal Privacy Protection Law.

**Purpose:** To change the employee job title designated as deputy privacy compliance officer and custodian of bureau of personnel records.

**Text of proposed rule:** Amend sections 6.2(c) and 6.3(b) of 7NYCRR as follows:

(c) The director of [personnel] *human resources*, Building 2, State Campus, 1220 Washington Avenue, Albany, NY 12226-2050 is hereby designated as the deputy privacy compliance officer.

(b) The director of [personnel] *human resources* is the custodian of all records maintained by staff members of the bureau of personnel.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, 1220 Washington Ave., Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951, e-mail: AJAnnucci@docs.state.ny.us

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

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

**Consensus Rule Making Determination**

The Department of Correctional Services has determined that no person is likely to object the proposed text as it merely amends the employee job title that is designated as the deputy privacy compliance officer and custodian of all records maintained by the Bureau of Personnel.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

**Empire Zones Reform**

**I.D. No.** EDV-18-08-00004-E

**Filing No.** 333

**Filing date:** April 14, 2008

**Effective date:** April 14, 2008

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

**Action taken:** Amendment of Parts 10 through 14 of Title 5 NYCRR.

**Statutory authority:** General Municipal Law, art. 18-B, section 959

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

**Specific reasons underlying the finding of necessity:** The Empire Zones Program reforms as enacted by Chapter 63 of the Laws of 2005 were designed to improve the cost-effectiveness and accountability of the program for all New Yorkers. However despite these reforms, the program continues to grow at a rate that is unsustainable and benefits some companies that do not meet their job commitments. In some financial management of this and all public programs is an imperative at all times but even more important when the State is experiencing fiscal difficulties. Additional regulatory action is needed immediately to protect the integrity of the program, enhance its strategic focus, improve its cost-effectiveness, increase accountability, and mitigate the impact on the General Fund.

One area of particular concern relates to regionally significant projects. Regionally significant projects should be limited to those businesses that would have the most significant economic impact for local communities and the State by restricting eligibility to projects that export a substantial amount of their goods or service to customers outside of New York State. These “export” type of projects ensure that net new economic activity will be created in the State versus simply redistributing economic activity between different communities of the State, or providing incentives for projects where such incentives are not necessary to create or retain jobs.

To increase accountability, job creation for regionally significant projects would have to occur in a timely manner. The timeframe for achieving job targets would be reduced from five to three years. This change would make firms more accountable for job creation by reducing the incentive for companies to inflate job numbers knowing they have five years of zone benefits in which to achieve their goals.

Participation would also be limited to companies that provide a greater economic return on the State’s investment in order to improve the cost-effectiveness of the Program. A statewide standard would be adopted based on the cost-benefit factors defined in law. Specifically, there would need to be twenty dollars of economic development benefits in the form of wages and capital investments for every one dollar of tax credits a business would receive. For projects where the economic development benefits are

justified based on non-quantitative factors, there would need to be at least five dollars of such benefits for every one dollar of tax credits. In addition, the non-quantifiable terms identified in the law for strategic industry cluster or its industry cluster or its supply chain can qualify based on the non-quantifiable factors of the cost-benefit analysis.

In order to hold businesses more accountable for their commitments and realize annual savings in program costs, these regulatory changes need to be adopted immediately. With 82 empire zones statewide, 10-20 applications are being submitted to the State weekly. Once businesses are in the Program, the annual costs are borne by the State for a 10 year period. These changes are expected to immediately reduce the number of eligible applicants by about 30% in order to achieve the objectives of strategic focus, improved cost-effectiveness, greater accountability and ultimately help preserve the program during the immediate fiscal crisis and beyond.

**Subject:** Empire zones reform.

**Purpose:** To implement previous reforms and adopt changes to enhance program’s strategic focus, cost effectiveness and accountability.

**Substance of emergency rule:** The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations for the purpose of making the program more strategic, cost effective and accountable to taxpayers. The amended laws require the existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—which has not yet been completed. The existing regulations fail to address this requirement, and at the same time, contain several outdated references. The proposed regulations will correct these two items and improve the program’s administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department’s discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program’s requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and

have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality. The purpose of this is to fulfill the intent of the new statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule clarifies the new statutory requirement that certain defined "regionally significant" projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Such projects must be projects that are exporting a substantial amount of goods or services beyond the State. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 100% of the minimum jobs required to meet the definition of regionally significant project within 3 years of the date of designation of the project as regionally significant. Failure to achieve the minimum job creation requirement would trigger a decertification process.

Seventh, the emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eight, the emergency rule clarifies Chapter 63's permission for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63's requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a "cost-benefit analysis". The cost-benefit analysis is to be included in the zone develop-

ment plan by the applicant municipality. The definition included in the emergency rule establishes a minimum economic development benefit to cost ratio of 20:1 for a project to be eligible for certification. A project that does not meet the 20:1 ratio but can be justified based on non-quantifiable factors must meet a minimum ratio of 5:1. In addition, definitions for strategic industry cluster and supply chain are included in the rule.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

**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 July 12, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Thomas Regan, Department of Economic Development, 30 S. Pearl St., Albany, NY 12245, (518) 292-5120, e-mail: [tregan@empire.state.ny.us](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

##### LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner. In addition, these amendments further the Legislative goals and objectives for the Empire Zones program, particularly as they relate to regionally significant projects and the cost-benefit analysis. With these changes, the Department strives to make the Program more strategic, cost-effective and accountable to the taxpayers of the New York state.

##### NEEDS AND BENEFITS:

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived from this emergency rulemaking. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability. Third, the rule seeks to reform the Empire Zones program to make it

more cost-effective and accountable to the State’s taxpayers, particularly in light of New York’s current fiscal climate.

**COSTS:**

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain applications. This has resulted in more paperwork and additional staff time and will continue even more so as regulatory changes add additional scrutiny to the review and evaluation of projects attempting to gain eligibility into the program.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

**LOCAL GOVERNMENT MANDATES:**

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

**PAPERWORK:**

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and “grandfathered” businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

**DUPLICATION:**

The emergency rule will not duplicate or exceed any other existing Federal or State statute or regulation.

**ALTERNATIVES:**

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of “nearby” acreage, the location of “grandfathered” businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

**FEDERAL STANDARDS:**

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

**COMPLIANCE SCHEDULE:**

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

**Regulatory Flexibility Analysis**

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact,

reporting, record-keeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the emergency regulations. Because it is evident from the nature of the emergency regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Office of Mental Health

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### NOTICE OF ADOPTION

**Prior Approval Review for Quality and Appropriateness**

**I.D. No.** OMH-09-08-00001-A

**Filing No.** 331

**Filing date:** April 14, 2008

**Effective date:** April 30, 2008

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

**Action taken:** Amendment of Part 551 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.02(a), 31.04(a) and 31.05(a)

**Subject:** Prior approval review for quality and appropriateness.

**Purpose:** To eliminate the Medicaid cap to facilitate growth of new or expanded outpatient programs.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-09-08-00001-P, Issue of February 27, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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

**Mental Health Services - General Provisions - Waiver Authority**

**I.D. No.** OMH-18-08-00003-P

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

**Proposed action:** Addition of Part 501 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.01 and 31.04

**Subject:** Mental health services - general provisions - waiver authority.

**Purpose:** To establish waiver authority for the commissioner of the Office of Mental Health.

**Text of proposed rule:** 1. Pursuant to the authority granted the Commissioner in §§ 7.09(b) and 31.04(a) of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new Part 501, to read as follows:

**PART 501**

**MENTAL HEALTH SERVICES - GENERAL PROVISIONS**

**§ 501.1 Legal base.**

(a) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(b) Section 31.01 of the Mental Hygiene Law charges the Commissioner of the Office of Mental Health with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods including, but not limited to: uniform definitions of services for persons with mental disabilities; uniform financial and clinical reporting procedures; requirements for the generation and maintenance of uniform data for all individuals receiving services from any provider of services; uniform criteria for evaluating categories of need; and uniform standards for all comparable services and programs.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of Article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

**§ 501.2 Definitions. For purposes of this Title:**

(a) Commissioner means the Commissioner of the New York State Office of Mental Health.

(b) Office means the New York State Office of Mental Health.

(c) Provider of services means a provider of services, as defined in section 1.03 of the Mental Hygiene Law, which is responsible for the operation of a program or network of programs. Such entity may be an individual, partnership, association, corporation, limited liability company, or public or private agency, other than an agency of the state, which provides services for persons with mental illness.

(d) Mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.

(e) Minor means a person who has not attained the age of eighteen years.

**§ 501.3 Waiver.**

(a) A provider of services may request a waiver of a regulatory requirement within Chapter XIII of this Title, not otherwise required by law.

(b) The Commissioner may grant a waiver of a regulatory requirement requested pursuant to paragraph (a) of this section if he/she determines that:

- (1) the health and safety of clients would not be diminished;
- (2) the best interests of clients would be served; and
- (3) the benefits of waiving the requirement outweigh the public interest in meeting the requirement.

(c) In considering a request for a waiver, the Commissioner will consider such factors as the special needs of the population(s) to be served, presence or absence of feasible alternatives, consistency of the rationale

for the waiver request and the goals of the Office, and any other relevant information. The granting of waivers will be at the sole discretion of the Commissioner.

(d) A request for a waiver must be submitted in writing, must clearly cite the regulatory requirements at issue, must contain substantial documentation to support the need for the waiver, including documentation which demonstrates that it is in the best interest of the clients, and must include such other information as the Commissioner may require.

(e) Special limits, conditions or restrictions may be established by the Commissioner in granting a waiver.

(f) For providers of service licensed by the Office, a waiver shall be in effect for no longer than the duration of the operating certificate held by the facility for which such waiver is granted.

**§ 501.4 Severability**

If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part which can be given effect without the invalid provision or application, and to this end the provisions of this Part are declared to be severable.

**Text of proposed rule and any required statements and analyses may be obtained from:** Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

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

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

**Regulatory Impact Statement**

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

Subdivision (b) of Section 31.01 of the Mental Hygiene Law charges the Commissioner of the Office of Mental Health with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the power to adopt regulations setting standards of quality and adequacy of facilities and establishing procedures for the issuance, amendment and renewal of operating certificates.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and benefits: The establishment of waiver authority for the Commissioner of the Office of Mental Health will remove, on a case-by-case basis, barriers to efficient, effective and coordinated care for people with serious mental illness in New York State. It will serve to encourage innovated approaches to service delivery and, over time, will provide the Office of Mental Health with the ability to assess the need for regulatory amendments on a statewide basis.

The waiver authority granted to the Commissioner of the Office of Mental Health will ultimately allow providers sufficient flexibility to implement innovated approaches which will result in improved service delivery and outcomes for recipients of mental health services. It is important to note that the waiver process is not to be used to circumvent the regulations process. It is merely to enhance the ability of the Commissioner to, on an individual case basis, waive certain requirements if those requirements impede the development of new, innovative approaches to care.

**4. Costs:**

(a) Cost to regulated persons: This regulatory amendment will not result in any additional costs to regulated persons.

(b) Cost to State and local government: This regulatory amendment will not result in any additional costs to State and local government.

5. Paperwork: There are no new paperwork requirements associated with this amendment.

6. Local government mandates: This regulatory amendment will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

7. Duplication: There are no duplicate, overlapping or conflicting mandates which may affect this rule.

8. Alternative approaches: The only alternative to this regulatory amendment would be inaction. Since the amendment will ultimately result in an improved service delivery system and better outcomes for recipients of mental health services, that alternative was necessarily rejected.

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

10. Compliance schedule: The regulatory amendment is effective immediately.

**Regulatory Flexibility Analysis**

The proposed rule will serve to remove barriers to efficient, effective and coordinated care for individuals with serious mental illness, and will allow for improved service delivery and outcomes. Because it is evident from the nature of the proposed rule that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas. Recipients of mental health services in rural and non-rural programs will benefit from the innovated service delivery system which will be encouraged as a result of this rule.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because the proposed rule will not have any adverse impact on jobs and employment opportunities.

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## Office of Mental Retardation and Developmental Disabilities

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**NOTICE OF ADOPTION**

**Rate/Fee Setting**

**I.D. No.** MRD-08-08-00008-A

**Filing No.** 336

**Filing date:** April 15, 2008

**Effective date:** April 30, 2008

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

**Action taken:** Amendment of sections 81.10, 635-10.5, 671.7, 680.12, and 681.14 of Title 14 NYCRR.

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

**Subject:** Rate/fee setting.

**Purpose:** To revise the methodologies used to calculate rates/fees of the referenced facilities or programs.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. MRD-08-08-00008-EP, Issue of February 20, 2008.

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

**Text of 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

**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.

**Assessment of Public Comment**

The agency received no public comment.

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## Public Service Commission

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

**2006 Long Island City Network Outages**

**I.D. No.** PSC-18-08-00006-P

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

**Proposed action:** During July 2006, Consolidated Edison Company of New York, Inc. (Con Edison or company) experienced equipment failures and electric power outages in its Long Island City network service area in Queens. Case 06-E-0894 was instituted to examine all issues associated with the July 2006 equipment failures and power outages. The commission commenced a prudence investigation of Con Edison's actions and practices relating to the equipment failures and power outages and is considering the prudence of Con Edison's actions and practices and the extent, if any, to which the company should be permitted to recover costs incurred as a result of the outages.

**Statutory authority:** Public Service Law, sections 4(1), 65(1), 66(1) and (12)

**Subject:** Resolution of the prudence proceeding, initiated in connection with the 2006 Long Island City network outages, in Case 06-E-0894.

**Purpose:** To consider the prudence of Con Edison's actions and practices relating to the 2006 Long Island City network outages and the extent to which the company should be permitted to recover costs relating to those outages.

**Substance of proposed rule:** During July 2006, Consolidated Edison Company of New York, Inc. (Con Edison or Company) experienced equipment failures and electric power outages in its Long Island City network service area in Queens. Case 06-E-0894 was instituted to examine all issues associated with the July 2006 equipment failures and power outages. The Commission commenced a prudence investigation of Con Edison's actions and practices relating to the equipment failures and power outages and is considering the prudence of Con Edison's actions and practices and the extent, if any, to which the Company should be permitted to recover costs incurred as a result of the outages.

**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-0894SA6)

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

**Interconnection Agreement between Verizon New York Inc. and Comcast Phone of New York, LLC**

**I.D. No.** PSC-18-08-00007-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Comcast Phone of New York, LLC (f/k/a Carmel Telephone Services, Inc.) to revise the interconnection agreement effective on July 11, 2005.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Inter-carrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the Verizon New York Inc. and Comcast Phone of New York, LLC (f/k/a Carmel Telephone Services, Inc.) interconnection agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Comcast Phone of New York, LLC (f/k/a Carmel Telephone of New York, LLC) in December 2005. The companies subsequently have jointly filed amendments to clarify the provisions regarding their interconnection trunking agreements.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(05-C-1093SA2)

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

**Submetering of Electricity by United Development Corp.**

**I.D. No.** PSC-18-08-00008-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by United Development Corp. to submeter electricity at 3111 Saunders Settlement Rd., Sanborn, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of United Development Corp. to submeter electricity at 3111 Saunders Settlement Rd., Sanborn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by United Development Corp. to submeter electricity at 3111 Saunders Settlement Road, Sanborn, New York.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. 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.

(08-E-0390SA1)

**Department of State**

**EMERGENCY  
RULE MAKING**

**Temporary Swimming Pool Enclosures**

**I.D. No.** DOS-18-08-00002-E

**Filing No.** 329

**Filing date:** April 11, 2008

**Effective date:** April 11, 2008

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

**Action taken:** Addition of section 1228.4 to Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 377 and 378; and L. 2007, ch. 234, section 3

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

**Specific reasons underlying the finding of necessity:** This rule is adopted on an emergency basis to preserve public safety and because time is of the essence. Executive Law sections 378(14)(c) and 378(16), as added by chapter 234 of the Laws of 2007, provide that the State Uniform Fire Prevention and Building Code (the uniform code) must (1) include standards for temporary swimming pool enclosures used during the construction or installation of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person, and (2) require that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in ground swimming pool, whichever is later. Section 3 of chapter 234 of the Laws of 2007 provides that the regulations necessary to implement the new requirements must be adopted prior to the effective date of chapter 234. The effective date of chapter 234 was Jan. 14, 2008. A prior emergency rule similar to this rule was filed on Jan. 14, 2008 and became effective on that date. The prior emergency rule has expired. Adoption of this rule on an emergency basis is necessary to reduce the number of accidental drownings in swimming pools, and to continue to satisfy the mandate of section 3 of chapter 234 of the Laws of 2007.

**Subject:** Temporary swimming pool enclosures.

**Purpose:** To replace such temporary enclosures with permanent enclosures during the period of construction.

**Text of emergency rule:** Part 1228 of Title 19 NYCRR is amended by adding a new section 1228.4 to read as follows:

*Section 1228.4. Temporary swimming pool enclosures.*

(a) *Purpose.* This section is intended to implement the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. (The provisions of Executive Law section 378(14)(c), as added by Chapter 75 of the Laws of 2007, as well as the provisions of Executive Law section 378(14)(b), are implemented by section 1228.2 (Pool alarms) of this Part.)

(b) *Definition.* For the purposes of this section, the following words and terms shall have the following meanings:

(1) The word "approved" means approved by the code enforcement official responsible for enforcement and administration of the Uniform Code as complying with and satisfying the purposes of this section.

(2) The term "complying permanent enclosure" means an enclosure which surrounds a swimming pool and which complies with (i) all provisions of the Uniform Code (other than the provisions of subdivision (c) of this section) applicable to swimming pool enclosures, (ii) the provisions of any and all other New York State codes or regulations applicable to swimming pool enclosures, and (iii) any and all local laws applicable to swimming pool enclosures and in effect in the location where the swimming pool shall have been installed or constructed.

(3) The term "swimming pool" means any structure, basin, chamber or tank which is intended for swimming, diving, recreational bathing or wading and which contains, is designed to contain, or is capable of containing water more than 24 inches (610 mm) deep at any point. This includes in-ground, above-ground and on-ground pools; indoor pools; hot tubs; spas; and fixed-in-place wading pools.

(c) *Temporary enclosures.* During the installation or construction of a swimming pool, such swimming pool shall be enclosed by a temporary enclosure which shall sufficiently prevent any access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person. Such temporary enclosure may consist of a temporary fence, a permanent fence, the wall of a permanent structure, any other structure, or any combination of the foregoing, provided all portions of the temporary enclosure shall be not less than four (4) feet high, and provided further that all components of the temporary enclosure shall have been approved as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and as sufficiently providing for the safety of all such persons. Such temporary enclosure shall remain in place throughout the period of installation or construction of the swimming pool, and thereafter until the installation or construction of a complying permanent enclosure shall have been completed.

(d) *Permanent enclosures.* A temporary swimming pool enclosure described in subdivision (c) of this section shall be replaced by a complying permanent enclosure. The installation or construction of the complying permanent enclosure must be completed within ninety days after the later of

(1) the date of issuance of the building permit for the installation or construction of the swimming pool or

(2) the date of commencement of the installation or construction of the swimming pool; provided, however, that if swimming pool is installed or constructed without the issuance of a building permit, the installation or construction of the complying permanent enclosure must be completed within ninety days after the date of commencement of the installation or construction of the swimming pool. Nothing in this subdivision shall be construed as permitting the installation or construction of a swimming pool without the issuance of a building permit if such a building permit is required by any statute, rule, regulation, local law or ordinance relating to the administration and enforcement of the Uniform Code with respect to such swimming pool.

(e) *Extensions.* Upon application of the owner of a swimming pool, the governmental entity responsible for administration and enforcement of the Uniform Code with respect to such swimming pool may extend the time period provided in subdivision (d) of this section for completion of the installation or construction of the complying permanent enclosure for good cause, including, but not limited to, adverse weather conditions delaying construction.

(f) *Exceptions.* An above-ground hot tub or spa equipped with a safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346 (2003), entitled "Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs," published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section, provided that such safety cover is in place during the period of installation or construction of such hot tub or spa. The temporary removal of a safety cover as required to facilitate the installation or construction of a hot tub or spa during periods when at least one person engaged in the installation or construction of the hot tub or spa is present shall not invalidate the exception provided in this subdivision.

**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 July 9, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Raymond Andrews, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, e-mail: Raymond.Andrews@dos.state.ny.us

#### **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(16), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code include standards for temporary swimming pool enclosures used during the installation or construction of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or

construction of such swimming pool and shall sufficiently provide for the safety of any such person. Executive Law section 378(14)(c), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code provide that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in-ground swimming pool, whichever is later. Executive Law section 378(14)(c) also provides that a local building department may issue a waiver to allow an extension of such ninety day time period for good cause, including but not limited to adverse weather conditions delaying construction.

##### 2. LEGISLATIVE OBJECTIVES:

In the memorandum accompanying the bill which became Chapter 234 of the Laws of 2007, the Legislature stated as justification for the bill:

"According to a 2004 study by the National SAFE KIDS Campaign, drowning is the second leading cause of injury-related death among children ages 1 to 14. In 2001, 859 children under age 14 died from drowning, and in 2002, an estimated 2,700 children under age 14 were treated in hospital emergency rooms for near-drowning. Drowning can occur in only one inch of water. A child loses consciousness after two minutes of being submerged, and permanent brain damage occurs after only four to six minutes.

"The health effects of near-drowning can also be severe, including permanent neurological disability, and psychological and emotional impacts. The financial impacts on the child's family are also significant, with costs of \$75,000 for initial treatment, \$180,000 per year for long-term care, and a lifetime cost of over \$4.5 million per child. Of all drownings reviewed by SAFE KIDS, 39 percent occurred in pools.

"Studies have shown that proper fencing could reduce the number of deaths caused by drowning and near-drownings that involve children by 50 to 90 percent.

"In one tragic incident on May 1, 2005, Matthew Lenz, age 2 1/2 of Craryville in Columbia County, lost his life after wandering onto a neighbor's property with an in-ground swimming pool that had no fence. Had the pool been properly secured by fencing, as required by the State Residential Code section AG 105, Matthew's life may have been spared.

"At present, New York's residential codes pertaining to pool enclosures comply and surpass federal code. On occasion however, fencing is not erected at all, or some pool owners rely on temporary fencing for an inordinate amount of time. While municipal building departments are charged with the responsibility of inspecting pool enclosures, they are reliant on pool owners to seek building permits and, at times, never notified that a pool has been installed.

"Neither current statute nor rules and regulations pertaining to swimming pool enclosures address the length of time a temporary fence may be in place.

"The Legislative objective to sought to be achieved by this rule is a reduction in the number of accidental drownings in swimming pools in this State.

##### 3. NEEDS AND BENEFITS:

This rule making amends the Uniform Code by adding a new provision (19 NYCRR section 1228.4) which requires that a swimming pool be enclosed by a temporary enclosure during the installation or construction of the pool; requires that such temporary enclosure sufficiently prevent access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person; and requires that such temporary enclosure be replaced by a permanent enclosure that complies with the requirements of existing laws and regulations within 90 days of issuance of the building permit or commencement of installation or construction of the pool. By requiring the use of such temporary enclosures during installation/construction, and by requiring the replacement of such temporary enclosures with permanent enclosures within the stated time period, this rule should provide the benefit intended by the Legislature: a reduction in the number of accidental drownings.

##### 4. COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive and available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be

fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more.

Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool construction or installation activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction/installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

There are no costs to the Department of State for the implementation of the rule. The Department of State is not required to develop any additional regulations or develop any programs to implement the rule.

There are no costs to New York State or local governments for the implementation of the rule; provided, however, that if the State or any local government installs or constructs a swimming pool, it will be required to install the temporary enclosure as required by this rule, and to replace such temporary enclosure with a permanent enclosure within the time period specified by this rule. In addition, since this rule adds provisions to the Uniform Code, in a situation where the State or a local government is responsible for administration and enforcement of the Uniform Code with respect to the installation or construction of a swimming pool, the State or such local government will be required to consider the requirements added by this rule in reviewing plans and performing inspections; however, it is anticipated that this will not have a significant impact on the review and/or inspection 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 installs or constructs a swimming pool will be required to comply with this rule. Second, cities, towns and villages (and sometimes counties) are charged by Executive Law section 381 with the responsibility of administering and enforcing the Uniform Code; since this rule adds provisions to the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code.

#### 7. DUPLICATION:

The rule does not duplicate any existing Federal or State requirement.

#### 8. ALTERNATIVES:

This rule provides an exemption from the temporary enclosure requirement for above-ground spas and hot tubs equipped with a safety cover. The alternative of not providing such an exemption was considered, but rejected, because hot tubs and spas equipped with a safety cover are exempt from the permanent enclosure requirements, and it would be illogical to require such hot tubs and spas to be enclosed with a temporary enclosure during the installation/construction period when they are not required to be enclosed with a permanent enclosure after installation/construction is complete. The alternative of providing an exemption for in-ground hot tubs and spas was considered and rejected, since there would be an unprotected and uncovered hole in the ground during the installation/construction of such a hot tub or spa, and a temporary enclosure would provide a measure of protection against children and others falling into the hole during the installation/construction period. No other significant alternatives to this rule were considered, since other alternatives would not provide the safety protections contemplated by Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

#### 9. FEDERAL STANDARDS:

There are no standards of the Federal Government which address the subject matter of the rule.

#### 10. COMPLIANCE SCHEDULE:

Regulated persons will be able to achieve compliance with the rule in the normal course of the installation or construction of a swimming pool.

### **Regulatory Flexibility Analysis**

#### 1. EFFECT OF RULE:

This rule will apply to any small business and any local government that installs or constructs a swimming pool. The State Fire Prevention and Building Code Council (the Code Council) and the Department of State are

unable to estimate the number of small businesses and local governments that own or operate swimming pools; however, 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 or construct swimming pools for others will also be affected by this rule.

Since this rule adds a 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 State Fire Prevention and Building Code Council (the Code Council) and 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 record keeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments that install or construct swimming pools will be required to erect a temporary enclosure around the pool during the installation/construction period, and to replace the temporary enclosure with a permanent enclosure (as required by existing laws and regulations) within 90 days after issuance of the building permit or commencement of installation or construction. Local governments that enforce the Uniform Code will be required to consider the requirements of this rule when reviewing plans for installation or construction of a pool by any person or entity, public or private, and when inspecting work.

#### 3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

#### 4. COMPLIANCE COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive and available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation/construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction/installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days after issuance of the building permit or commencement of installation of the pool, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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:

The rule minimizes any potential adverse economic impact on regulated parties (including small businesses or local governments) by allowing use of any type of temporary enclosure (provided that it is at least 4 feet high and approved by the code enforcement official as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person); by permitting all or any part of the permanent enclosure (as required by existing laws and regulations) to be used as all or part of the temporary enclosure, thereby permitting regulated parties to minimize the amount of temporary enclosure components required during construction; and by providing an exemption from the temporary enclosure requirements for above-ground hot tubs and spas equipped with a safety cover.

This rule implements Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. Those statutes do not authorize the establishment of differing compliance requirements or time-tables with respect to swimming pools owned or operated by small businesses or local governments.

Except for the exemption for above-ground hot tubs and spas equipped with a safety cover, providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

On December 6, 2007, the Department of State notified code enforcement officials throughout the State and other interested parties of the new requirements to be imposed by this rule by means of a notice 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 currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State's website. The notice invited interested parties to provide comments.

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

##### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, by adding a provision to the Uniform Fire Prevention and Building Code ("Uniform Code") requiring that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and requiring that such temporary enclosure be replaced with a permanent enclosure within 90 days. 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; AND PROFESSIONAL SERVICES.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements: swimming pools will be required to be enclosed by temporary enclosures during the period of installation or construction of the pool, and such temporary enclosures will be required to be replaced with a permanent enclosure as required by existing laws and regulations within 90 days after issuance of the building permit or commencement of installation or construction. No professional services are likely to be needed in a rural area in order to comply with such requirements.

##### 3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive and available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation/construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction/installation period. Any variation in such costs 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.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

##### 4. MINIMIZING ADVERSE IMPACT.

Executive Law sections 378(14)(c) and 378(16) make 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 sections 378(14)(c) and 378(16) do not authorize the establishment of differing compliance requirements or timetables in rural areas.

The rule provides exemptions from the temporary enclosure requirements for above-ground hot tubs and spas equipped with safety covers

because such hot tubs and spas are exempt from permanent enclosure requirements. Providing additional exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

#### 5. RURAL AREA PARTICIPATION.

On December 6, 2007, the Department of State notified code enforcement officials throughout the State, including those in rural areas, and other interested parties of the new requirements to be imposed by this rule by means of a notice 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 currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State's website. The notice invited interested parties to provide comments.

#### **Job Impact Statement**

The Department of State and the State Fire Prevention and Building Code Council have 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.

The rule adds a requirement to the Uniform Fire Prevention and Building Code ("Uniform Code") that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and that such temporary enclosure be replaced with a permanent enclosure (as required by existing laws and regulations) within 90 days. This provision is added to the Uniform Code pursuant to the requirements of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

Regulated parties may comply with this rule by installing a temporary enclosure during installation or construction of the pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive and available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be permitted to use components of the permanent enclosure that will be required by existing laws and regulations after installation or construction is complete to be used as the temporary enclosure during the installation/construction period. This would permit regulated parties to minimize the cost of the temporary enclosure by constructing as much of the permanent enclosure as can be installed without restricting pool installation/construction activities, and enclosing only the remaining portion of the pool area with a temporary enclosure.

It is anticipated that the cost of providing the temporary enclosures required by this rule will be insignificant when compared to the overall cost constructing or installing a swimming pool. Accordingly, it is anticipated that this rule will have no significant impact on the number of pools installed or constructed in this State, and that this rule will not have a "substantial adverse impact on jobs and employment opportunities."

## NOTICE OF ADOPTION

### Uniform Standards of Professional Appraisal Practice

**I.D. No.** DOS-08-08-00005-A

**Filing No.** 334

**Filing date:** April 15, 2008

**Effective date:** April 30, 2008

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

**Action taken:** Amendment of section 1106.1 of Title 19 NYCRR.

**Statutory authority:** Executive Law, section 160-d(1)(d)

**Subject:** Uniform standards of professional appraisal practice.

**Purpose:** To adopt the 2008-2009 edition of the Uniform Standards of Professional Appraisal Practice.

**Text or summary was published** in the notice of proposed rule making, I.D. No. DOS-08-08-00005-P, Issue of February 20, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** Whitney A. Clark, Division of Licensing Services, Alfred E. Smith State Office Bldg., 80 S. Swan St., P.O. Box 22001, Albany, NY 12231, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.