

# 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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### EMERGENCY RULE MAKING

#### Various Trees and Plants of the Prunus Species

**I.D. No.** AAM-05-08-00002-E  
**Filing No.** 23  
**Filing date:** Jan. 10, 2008  
**Effective date:** Jan. 10, 2008

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

**Action taken:** Addition of Part 140 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

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

**Specific reasons underlying the finding of necessity:** This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the produc-

tive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox quarantine in that portion of Niagara County. The plum pox virus has since been detected in four (4) other locations in Niagara County as well as one location in Orleans County. This rule establishes the plum pox virus quarantine in Orleans County and contains the necessary extensions of that quarantine in Niagara County.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that failure to immediately establish a quarantine to regulate the intrastate movement of stone fruit could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the agricultural resources of the State, but could also result in a federal quarantine or exterior quarantines imposed by other states. Such quarantines would cause economic hardship for New York's stone fruit growers, since such quarantines may be broader than that which we propose and may vary in requirements and prohibitions from state to state. The consequent loss of business would harm industries which are important to New York State's economy and as such, would harm the general welfare. Accordingly, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

**Subject:** Various trees and plants of the Prunus species.

**Purpose:** To establish a plum pox virus quarantine in New York State for purposes of helping to prevent the further spread of this viral infection of plants within the State.

**Text of emergency rule:**

*PART 140 CONTROL OF THE PLUM POX VIRUS (POTYVIRUS  
DIDERON STRAIN)*

*Section 140.1 Definitions.*

*For the purpose of this Part, the following words, names and terms shall be construed, respectively, to mean:*

(a) *Certificate* means a certificate issued or authorized to be issued by the Commissioner, certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) *Commissioner* means the Commissioner of Agriculture and Markets of the State of New York and any officer or employee of the New York State Department of Agriculture and Markets or the United States Department of Agriculture duly delegated pursuant to section 17 of the Agriculture and Markets Law.

(c) *Compliance agreement* means an agreement approved by the Commissioner and executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(d) *Infection* means the presence of plum pox virus.

(e) *Inspector* means an inspector of the New York State Department of Agriculture and Markets, or representatives of the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), when authorized to act in that capacity.

(f) *Limited permit* means a permit issued by the Commissioner for the planting of regulated articles in the nursery stock regulated area for the restricted movement of regulated articles from a regulated area to a specified destination for specified processing, handling or utilization.

(g) *Moved and movement* means shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved from the regulated area.

(h) *Nursery dealer* means any person, firm, partnership, association or corporation which or who is not a nursery grower or an original producer of nursery stock in the State and which or who buys, or acquires, or receives on consignment nursery stock for the purpose of reselling, transporting, or otherwise disposing of same.

(i) *Nursery grower* means the owner or operator of the grounds or premises, private or public, on or which nursery stock is propagated, grown or cultivated for the purpose of distribution or selling the same as a business. The term nursery grower shall not include persons engaged in the part-time production of plant products not sold in the regular channels of business.

(j) *Nursery stock* means all trees, shrubs, plants and vines and parts thereof.

(k) *Nursery stock regulated area* means any area so designated by this Part, which is within 11.5 kilometers of any location where plum pox virus has been detected within the preceding three years.

(l) *Plum pox virus* means the plum pox potyvirus *Dideron* strain, which is a pathogen affecting susceptible *Prunus* species.

(m) *Quarantined area* means the area designated as quarantined by this Part.

(n) *Regulated area* means an area designated as regulated pursuant to this Part due to the presence of plum pox virus in that area.

(o) *Regulated articles* means plant and plant materials, including trees, seedlings, root stock, budwood, branches, twigs and leaves of the following varieties of the *Prunus* species:

(1) *Fruit-bearing and ornamental varieties of Prunus americana* (American plum and wild plum); *Prunus armeniaca* (apricot); *Prunus cerasifera* (Myrobalan plum/cherry plum); *Prunus domestica* (European plum); *Prunus dulcis* (sweet almond); *Prunus peresica* var. *persica* (peach and flowering peach); *Prunus persica* var. *nucipersica* (nectarine); and *Prunus salicina* (Japanese plum).

(2) *Ornamental varieties of Prunus cerasifera* (purple leaf plum); *Prunus x cistena* (purple leaf sand cherry); *Prunus glandulosa* (flowering almond); *Prunus persica* (flowering peach and purple leaf peach); *Prunus pumila* (sand cherry); *Prunus spinosa* (black thorn and sloe); *Prunus serrulata* (Japanese flowering cherry and Kwanzan cherry); *Prunus tomentosa* (Nanking cherry and Hansens bush cherry); and *Prunus triloba* (flowering plum).

(3) For the purposes of this Part, the following varieties of the *Prunus* species are not regulated articles: *Prunus avium*; *Prunus cerasus*; *Prunus Effuse*; *Prunus laurocerasus*; *Prunus mahaleb*; *Prunus padus*; *Prunus sargentii*; *Prunus serotina*; *Prunus serrula*; *Prunus subhirtella*; *Prunus yedoensis*; and *Prunus virginiana*.

(4) For the purposes of this Part, seeds and fruit that is free of leaves of all varieties of the *Prunus* species are not regulated articles.

(o) *State* means the State of New York.

#### Section 140.2 Quarantined area

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by Hartland Road, which extends south to its intersection with Ditch Road; extends west on Ditch Road to its

intersection with Hosmer Road; extends south on Hosmer Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south on Orangeport Road to its intersection with Slayton-Settlement Road; extends west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); extends south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; extends northwest on Stone Road to its intersection with Sunset Drive; extends south on Sunset Drive to its intersection with Shunpike Road; extends west on Shunpike to its intersection with Route 93 (Townline Road); extends south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); extends south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; extends southwest on Beach Ridge Road to its intersection with Townline Road; extends south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.

(b) That area of Orleans County which is bordered on the north by Lake Ontario and bordered on the west by County Line Road; extends south on County Line Road to its intersection with Johnson Road; extends east on Johnson Road to its intersection with Salt Works Road; extends south on Salt Works Road to its intersection with the Orleans/Genesee County border; extends east along the Orleans/Genesee County border to its intersection with Route 98 (Quaker Hill Road); extends north on Route 98 (Quaker Hill Road) to its intersection with East Barre Road; extends east on East Barre Road to its intersection with Culver Road; extends north on Culver Road to its intersection with East Lee Road; extends east on East Lee Road to its intersection with Rich's Corners Road; extends north on Rich's Corners Road to its intersection with Route 31 (Telegraph Road) and Keitel Road; extends north on Keitel Road to its intersection with Zig Zag Road; extends north on Zig Zag Road to its intersection with Lattin Road; extends north on Lattin Road to its intersection with Route 104 (Ridge Road West); extends west on Route 104 (Ridge Road West) to its intersection with Sawyer Road; extends north on Sawyer Road to its intersection with Roosevelt Highway; extends west on Roosevelt Highway to its intersection with Oak Orchard Road; extends north on Oak Orchard Road to its intersection with Point Breeze Road; extends north on Point Breeze Road to its intersection with Lake Ontario.

#### Section 140.3 Regulated area

The following areas within the quarantined area are regulated areas:

(a) That area bordered on the east by Porter Center Road; bordered on the south by Balmer Road which terminates on Creek Road; bordered on the west by Creek Road, Blairville Road and the Robert Moses Parkway; and bordered on the north by Lake Ontario in the Town of Porter in the County of Niagara, State of New York.

(b) That area bordered on the north by Lake Ontario; bordered on the west by Maple Road; extends south on Maple Road to its intersection with Wilson-Burt Road; extends east on Wilson-Burt Road to its intersection with Beebe Road; extends south on Beebe Road to its intersection with Ide Road; extends east on Ide Road to its intersection with Route 78 (Lockport-Olcott Road); extends north on Route 78 (Lockport-Olcott Road) to its intersection with Lake Ontario, in the Towns of Burt, Newfane, and Wilson in the County of Niagara, State of New York.

(c) That area bordered on the east by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; extends east on Langdon Road to its intersection with Dickersonville Road; extends north on Dickersonville Road to its intersection with Schoolhouse Road; extends east on Schoolhouse Road to its intersection with Ransomville Road; extends south on Ransomville Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Simmons Road; extends south on Simmons Road to its intersection with Albright Road; extends east on Albright Road to its intersection with Townline Road; extends south on Townline Road to its intersection with Lower Mountain Road; extends west on Lower Mountain Road to its intersection with Meyers Hill Road; extends south on Meyers Hill Road to its intersection with Upper Mountain Road; extends west on Upper Mountain Road to its intersection with Indian Hill Road; extends northeast on Indian Hill Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Porter Center Road, in the Town of Lewiston, in the County of Niagara, State of New York.

(d) That area bordered on the south by the Erie Canal at its intersection with Culvert Road extending north on Culvert Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to

its intersection with Kenyonville Road; extends south on Kenyonville Road to its intersection with Eagle Harbor- Knowlesville Road; extends east on Eagle Harbor- Knowlesville Road to its intersection with the Erie Canal; following west along the Erie Canal to its intersection with Culvert Road, in the Town of Ridgeway, in the County of Orleans, State of New York.

*Section 140.4 Nursery stock regulated area*

The nursery stock regulated area shall consist of the quarantined area set forth in section 140.2 of this Part, exclusive of the regulated areas set forth in section 140.3 of this Part.

*Section 140.5 Conditions governing the propagation of regulated articles.*

Regulated articles originating from or growing within the regulated area or the nursery stock regulated area shall not be used as a source of propagated material (either root stock, scion or seed).

*Section 140.6 Conditions governing the intrastate movement of regulated articles.*

(a) *Prohibited movement.*

(1) The movement of any regulated article within the regulated area is prohibited.

(2) The intrastate movement of any regulated article from the regulated area to any point outside the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(3) The intrastate movement of any regulated article from any point outside the regulated area to the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(4) The intrastate movement of any article infected with or suspected of having been exposed to the plum pox virus is prohibited, except as provided in Section 140.12 of this Part.

(5) The handling of regulated articles by nursery dealers or nursery growers within the nursery stock regulated area is prohibited, except pursuant to a compliance agreement.

(6) The digging or moving of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(7) The planting and over-wintering of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(b) *Regulated movement.*

Regulated articles may be moved through the regulated area if the regulated articles originated outside the regulated area and:

(1) the point of origin of the regulated articles is on the waybill or bill of lading; and

(2) a certificate accompanies the regulated articles; and

(3) the vehicle moving the regulated articles does not stop within the regulated area except for refueling; and

(4) the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or a vehicle completely covered by canvas, plastic or closely woven cloth to prevent access by aphids or other vectors of plum pox virus.

*Section 140.7 Records*

Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area shall compile, maintain and make available for inspection, for a period of two years, records of inventory and sales of regulated articles on a form or forms prescribed by the Commissioner.

*Section 140.8 Conditions governing the issuance of certificates and permits.*

(a) Certificates may be issued for the intrastate movement of regulated articles under one or more of the following conditions:

(1) when they have been tested and found apparently free from infection; or

(2) when they have been grown, produced, manufactured, stored, or handled in such a manner that, in the judgment of the inspector, no infection would be transmitted thereby, provided, that subsequent to certification, the regulated articles will be loaded, handled, and shipped under such protection and safeguards against reinfection as are required by the inspector.

(b) Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization. Persons shipping, transporting, or receiving such articles may be required to enter into compliance agreements to maintain such sanitation safeguards against the establishment and spread of infection and to comply with such conditions as to the maintenance of identity, handling, processing, or subsequent movement of regulated products and the cleaning of cars, trucks and other vehicles used in the transportation of

such articles, as may be required by the inspector. Failure to comply with conditions of the agreement will result in cancellation of a limited permit.

(c) Certificates or limited permits issued under these regulations may be withdrawn or canceled by the Commissioner and further certification refused whenever in his or her judgment the further use of such certificates or limited permits may result in the spread of the plum pox virus.

*Section 140.9 Inspection and disposition of shipments.*

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the regulated area, which contains, or which the inspector has probable cause to believe may contain, regulated articles or other articles infected with the plum pox virus, may be examined by an inspector at any time or place. When regulated articles are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he or she deems necessary to eliminate the danger of the spread of the plum pox virus. If found to be infected, such articles or regulated articles shall be freed of infection without cost to the State except that for inspection and supervision.

*Section 140.10 Assembly of regulated articles for inspection.*

(a) Persons intending to move intrastate any of the articles covered by these regulations shall make application for certification as far in advance as possible, and will be required to prepare and assemble articles at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments verified. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The New York State Department of Agriculture and Markets or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS) shall not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

*Section 140.11 Marking requirements.*

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate or limited permit, issued in compliance with these regulations: provided, that:

(a) for lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for car lot freight or express shipment, either in containers or in bulk, a certificate need be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) for movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

*Section 140.12 Shipments for experimental and scientific purposes.*

Regulated articles may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed by the New York State Department of Agriculture and Markets. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the New York State Department of Agriculture and Markets showing compliance with such conditions.

**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 April 8, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. Mungari, Director, Division of Plant Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087.

**Regulatory Impact Statement**

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The proposed rule establishing a quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

3. Needs and benefits:

This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of plants within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the flowers. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which are not infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for the plum pox virus. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox quarantine in that portion of Niagara County. The plum pox virus has since been detected in four (4) other locations in Niagara County as well as one location in Orleans County.

This rule establishes the plum pox virus quarantine in Orleans County and contains the necessary extensions of that quarantine in Niagara County. The amendments create two (2) separate and non-contiguous quarantined areas; one quarantined area is in Niagara County, and the other is in Orleans County.

Within the quarantined area in Niagara County, there are three (3) regulated areas and one nursery stock regulated area. The first regulated area extends 1.5 to 2 kilometers from one point where the plum pox virus was detected in 2006. The second regulated area extends 1.5 to 2 kilometers from the point where the plum pox virus was recently detected this year. The third regulated area extends 1.5 to 2 kilometers from each of the three (3) points where the plum pox virus was recently detected this year as well as from one point where the virus was detected in 2006. The nursery stock regulated area extends 11.5 kilometers from the regulated areas in Niagara County where the plum pox virus was detected.

Within the quarantined area in Orleans County, there is one regulated area and one nursery stock regulated area. The regulated area extends 1.5 to 2 kilometers from the point in Orleans County where the plum pox virus was recently detected. The nursery stock regulated area extends 11.5 kilometers from the regulated area in Orleans County where the plum pox virus was detected.

The amendments prohibit the movement of any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles i.e., plants and trees of any Prunus species susceptible to plum pox virus, are restricted under the amendments, and the extent of those restrictions depends on whether the regulated articles are in the regulated areas or the nursery stock regulated areas.

In the regulated areas, the amendments prohibit the following: the movement of regulated articles within the regulated areas; the intrastate movement of regulated articles from the regulated areas to any point outside the regulated areas, except pursuant to a limited permit, authorizing such movement; and the intrastate movement of regulated articles from any point outside the regulated areas to the regulated areas, except pursuant to a limited permit, authorizing such movement.

The amendments also regulate the movement of regulated articles through the regulated areas. Under the amendments, regulated articles may be moved through the regulated areas if the regulated articles originate outside the regulated areas and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate accompanies the regulated articles; the vehicle moving the regulated articles does not stop except for refueling; and the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

In the nursery stock regulated areas, the amendments prohibit the following: the handling of regulated articles by nursery dealers or nursery growers, except pursuant to a compliance agreement; the digging or moving of regulated articles by nursery dealers and nursery growers; and the planting and over-wintering of regulated articles by nursery dealers and nursery growers.

Under the amendments, certificates may be issued when the regulated articles have been inspected and found to be free of infection or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles. Limited permits may be issued for the movement of noncertified articles to specified destinations for specified purposes. The amendments provide that persons shipping, transporting, or receiving such articles may be required to enter into written compliance agreements. These agreements would allow the shipment of articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that the plum pox virus is not spread. Under the amendments, certificates and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infection.

The amendments are necessary, since although the virus has only been found in seven locations in Niagara County and Orleans County, the failure to immediately establish this quarantine could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

4. Costs:

(a) Costs to the State government:

Regulated articles in the regulated areas that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicated upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the regulated areas and nursery stock regulated areas that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

(b) Costs to local government: none.

(c) Costs to private regulated parties:

Regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas and nursery stock regulated areas.

(d) Costs to the regulatory agency:

It is anticipated that regulatory oversight and enforcement of the quarantine would require the hiring of two inspectors at an annual cost to the Department of \$150,900. This cost includes salary, fringe benefits, travel costs, computer hardware and support and cell phones for the persons hired.

5. Local government mandate:

None.

6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the nursery stock regulated areas would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

7. Duplication:

None.

8. Alternatives:

None. The failure of the State to establish a quarantine could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated areas. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. This rule does not exceed any minimum standards for the same or similar subject areas, since it restricts the intra-state, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the rule immediately.

### **Regulatory Flexibility Analysis**

1. Effect on small business.

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are approximately 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. Most of these entities are small businesses.

Although it is not anticipated that local governments would be involved in the handling or movement of regulated articles within the quarantined areas, in the event that they do, they would be subject to the same requirements and restrictions as are other regulated parties.

2. Compliance requirements.

All regulated parties in the nursery stock regulated areas, which includes approximately 35 stone fruit growers and 50 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated areas would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the regulated areas, which include approximately 29 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Professional services.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule: Regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

Local governments moving regulated articles to or through the regulated areas would incur similar costs.

5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated areas. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated areas, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

### **Rural Area Flexibility Analysis**

1. Type and estimated numbers of rural areas:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. Many of these entities are located in rural areas of New York State.

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

All regulated parties in the nursery stock regulated areas, which includes approximately 35 stone fruit growers and 50 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated areas would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

All regulated parties in the regulated areas, which include approximately 29 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Costs:

Regulated parties handling regulated articles in the nursery stock regulated areas pursuant to compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated areas. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

5. Rural area participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the Untied States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

#### **Job Impact Statement**

The establishment of a plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. A further spread of this plant infection would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the spread of the plum pox virus, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

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## Department of Civil Service

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-05-08-00003-P

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

**Proposed action:** Amendment of Appendix 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by increasing the number of positions of Confidential Assistant from 12 to 22.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

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

#### **Consolidated Regulatory Impact Statement**

1. Statutory Authority: The New York State Civil Service Commission is authorized to promulgate rules for the jurisdictional classification of offices within the classified service of the State by Section 6 of the Civil Service Law. In so doing, it is guided by the requirements of Sections 41, 42 and 43 of this same law.

2. Legislative Objectives: These rule changes are in accord with the statutory authority delegated to the Civil Service Commission to prescribe rules for the jurisdictional classification of the offices and positions in the classified service of the State.

3. Needs and Benefits: Article V, Section 6, of the New York State Constitution requires that, wherever practicable, appointments and promotions in the civil service of the State, including all its civil divisions, are to be made according to merit and fitness. It also requires that competitive examinations be used, as far as practicable, as a basis for establishing this eligibility. This requirement is intended to provide protection for those individuals appointed or seeking appointment to civil service positions while, at the same time, protecting the public by securing for it the services of employees with greater merit and ability. However, as the language suggests, the framers of the Constitution realized it would not always be possible, nor indeed feasible, to fill every position through the competitive process. This point was also recognized by the Legislature for, when it enacted the Civil Service Law to implement this constitutional mandate, it provided basic guidelines for determining which positions were to be outside of the competitive class. These guidelines are contained in Section 41, which provides for the exempt class; 42, the non-competitive class and 43, the labor class. Thus, there are four jurisdictional classes within the classified service of the civil service and any movement between them is termed a jurisdictional reclassification.

The Legislature further established a Civil Service Department to administer this Law and a Civil Service Commission to serve primarily as an appellant body. The Commission has also been given rulemaking responsibility in such areas as the jurisdictional classification of offices within the classified service of the State (Civil Service Law Section 6). In exercising this rule-making responsibility, the Commission has chosen to provide appendices to its rules, known as Rules for the Classified Service, to list those positions in the classified service which are in the exempt class (Appendix 1), non-competitive class (Appendix 2), and labor class (Appendix 3).

In effect, all positions, upon creation at least, are, by constitutional mandate, a part of the competitive class and remain so until removed by the Civil Service Commission, through an amendment of its rules upon showing of impracticability in accordance with the guidelines provided by the Legislature. The guidelines are as follows. The exempt class is to include those positions specifically placed there by the Legislature, together with all other subordinate positions for which there is no requirement that the person appointed pass a civil service examination. Instead, appointments rest in the discretion of the person who, by law, has determined the position's qualifications and whether the persons to be appointed possess those qualifications. The non-competitive class is to be comprised of those positions which are not in the exempt or labor classes and for which the Civil Service Commission has found it impracticable to determine an applicant's merit and fitness through a competitive examination. The qualifications of those candidates selected are to be determined by an examination which is sufficient to insure selection of proper and competent employees. The labor class is to be made up of all unskilled laborers in the service of the State and its civil divisions, except those which can be examined for competitively.

4. Costs: The removal of a position from one jurisdictional class and placement in another is descriptive of the proper placement of the position in question in the classified service, and has no appreciable economic impact for the State or local governments.

5. Local Government Mandates: These amendments have no impact on local governments. They pertain only to the jurisdictional classification of positions in the State service.

6. Paperwork: There are no new reporting requirements imposed on applicants by these rules.

7. Duplication: These rules are not duplicative of State or Federal requirements.

8. Alternatives: Within the statutory constraints of the New York State Civil Service Commission, it is not believed there is a viable alternative to the jurisdictional classification chosen.

9. Federal Standards: There are no parallel Federal standards and, therefore, this is not applicable.

10. Compliance Schedule: No action is required by the subject State agencies and, therefore, no estimated time period is required.

**Consolidated Regulatory Flexibility Analysis**

The proposal does not affect or impact upon small businesses or local governments, as defined by Section 102(8) of the State Administrative Procedure Act, and, therefore, a regulatory flexibility analysis for small businesses is not required by Section 202-b of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on small businesses or local governments.

**Consolidated Rural Area Flexibility Analysis**

The proposal does not affect or impact upon rural areas as defined by Section 102(13) of the State Administrative Procedure Act and Section 481(7) of the Executive Law, and, therefore, a rural area flexibility analysis is not required by Section 202-bb of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on rural areas.

**Consolidated Job Impact Statement**

The proposal has no impact on jobs and employment opportunities. This proposal only affects the jurisdictional classification of positions in the Classified Civil Service.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00004-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Executive Department.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Division of Housing and Community Renewal," by adding thereto the positions of Legislative Liaison (2).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00005-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Health.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class in the Department of Health, by increasing the number of positions of Health Program Director 3 from 12 to 13.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00006-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Executive Director, Office of National and Community Service.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00007-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by increasing the number of positions of Assistant Attorney General from 627 to 633.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00008-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Health.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health under the subheading "Office of the Medicaid Inspector General," by adding thereto the position of Legislative Liaison.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00009-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Mental Hygiene.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene under the subheading "Office of Mental Retardation and Developmental Disabilities," by increasing the number of positions of Deputy Commissioner from 2 to 3.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00010-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Affirmative Action Administrator 4 (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00011-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the non-competitive class in the Department of Mental Hygiene.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by increasing the number of positions of Advocacy Specialist 2 from 3 to 10 and by adding thereto the positions of Advocacy Specialist 3 (2).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00012-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Health.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health, by increasing the number of positions of Special Assistant from 14 to 15.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00013-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the non-competitive class in the Department of Economic Development.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Economic Development, by deleting therefrom the positions of Economic Development Program Specialist 2 (1) (Until first vacated after November 19, 1991) and Secondary Materials Marketing Specialist 2 (6) (Until 8/1/92).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00014-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the non-competitive class in the Education Department.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Education Department, by deleting therefrom the positions of Education of the Disadvantaged Program Aide.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00015-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for the Prevention of Domestic Violence," by increasing the number of positions of Domestic Violence Program Specialist from 10 to 11.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00016-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by adding thereto the position of Building Restoration Specialist (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00017-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the non-competitive class in the Executive Department.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Commission on Quality of Care and Advocacy for Persons with Disabilities," by adding thereto the positions of Quality Care Facility Review Specialist Assistant (3).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00018-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and classify a position in the non-competitive class in the Department of Agriculture and Markets.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Agriculture and Markets, by deleting therefrom the position of Migrant Labor Programs Coordinator (1) and by adding thereto the position of Migrant Labor Programs Coordinator (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

**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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

**Department of Correctional  
Services**

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

**Central Monitoring Case Designation Status**

**I.D. No.** COR-05-08-00001-P

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

**Proposed action:** Repeal of Part 1000 and addition of new Part 1000 to Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Central monitoring case designation status.

**Purpose:** To expeditiously promulgate central monitoring case review, identification and appeal procedures as necessary and in the best interest of the public safety.

**Text of proposed rule:** Part 1000 is hereby REPEALED and the following is promulgated as the new Part 1000.

§ 1000.1 Purpose

To ensure that any inmate identified as a Central Monitoring Case (CMC) is reviewed and approved by Central Office staff prior to transfer to another facility or assignment to any program of temporary release or in connection with consideration for release pursuant to Articles 24 and 26 of the New York State Correction Law.

§ 1000.2 Description

Certain inmates, because of the nature of their crime, status or behavior, require special evaluation and tracking of their movement through the correctional system. The (CMC) process is a comprehensive internal management system that provides a discretionary means for the Department to identify certain inmates for special evaluation and tracking purposes based upon a standardized set of criteria and identification procedures.

§ 1000.3 Procedure

(a) The Department shall adopt internal procedures for the classification, tracking and movement of inmates designated as Central Monitoring Cases. Such procedures shall describe:

(1) the classification process, which shall include:

- (i) identification of qualifying inmates,
- (ii) designation criteria,
- (iii) referral for designation,
- (iv) designation, and
- (v) review procedures;

(2) a mechanism by which an inmate who is classified CMC may appeal such classification;

(3) criteria and procedures for inmate transfer and movement;

(4) temporary release, earned eligibility, and merit time evaluations.

(b) The Department shall publish the aforementioned internal procedures as Directive 0701, "Central Monitoring Cases."

§ 1000.4 Policy

In accordance with Correction Law § 112, the Commissioner reserves the right to expeditiously revise and/or amend CMC procedures as deemed necessary in the best interests of public safety, and the safe, secure, and orderly operation of all department correctional facilities.

**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, 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.

**Regulatory Impact Statement**

Statutory Authority

Section 112 of Correction Law grants the Commissioner of DOCS the superintendence, management and control of the correctional facilities and inmates confined therein and to promulgate rules and regulations for this purpose.

Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to promulgate such rules and regulations that will provide for the safe, secure and orderly operation of correctional facilities and to help ensure public safety.

Needs and Benefits

This proposed rule making will provide the department with the means to expeditiously revise or amend Central Monitoring Case procedures as deemed necessary and in the best interests of the public safety. This is needed to ensure that inmates who are identified as Central Monitoring Cases are reviewed and approved by Central Office staff prior to transfer to another facility, including those facilities that offer programs for Temporary Release or for transfer in connection with possible release from DOCS custody, pursuant to Articles 24 and 26 of Correction Law. The proposed rule will have no impact on the inmate population as it relates only to a classification scheme that is necessary to ensure the safe, secure and orderly operation of correctional facilities and to properly allocate security resources. The proposed rule making will also create parity between the rule and DOCS Directives.

Costs

a. To agency, the state and local governments: None

b. Cost to private regulated parties: None. The proposed amendment does not apply to private parties.

c. This cost analysis is based upon the fact that this proposal merely simplifies the text of the rule and allows the commissioner to revise internal management procedures as necessary.

Local Government Mandates

There are no new mandates imposed upon local governments by this proposal. It does not apply to local governments.

Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

Alternatives

Several alternatives have been considered. Leaving the existing rule unchanged was considered, however, this is not acceptable as it would require DOCS to continue a regulation that is out of parity with existing procedures. A line by line revision to the rule was considered, but, due to the complexity of the existing rule, this is unacceptable as it would require an onerous and lengthy revision to the rule and would do nothing to reduce the complexity of the rule. The only alternative left for consideration was a repeal of the existing rule and promulgation of a new, simpler rule.

Federal Standards

There are no minimum standards of the Federal government for this or a similar subject area.

Compliance Schedule

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely clarifies the authority of the Commissioner to promulgate internal management procedures with regard to the designation of inmates as Central Monitoring Cases for the purpose of tracking the movement of inmates so designated throughout the correctional system.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on rural areas. This proposal merely clarifies the authority of the Commissioner to promulgate internal management procedures with regard to the designation of inmates as Central Monitoring Cases, for the purpose of tracking the movement of inmates so designated throughout the correctional system.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely clarifies the authority of the Commissioner to promulgate internal management procedures with regard to the designation of inmates as Central Monitoring Cases, for the purpose of tracking the movement of inmates so designated throughout the correctional system.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

**Empire Zones Reform**

**I.D. No.** EDV-05-08-00020-E

**Filing No.** 26

**Filing date:** Jan. 14, 2008

**Effective date:** Jan. 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 and section 959

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

**Specific reasons underlying the finding of necessity:** The reforms enacted in ch. 63 L. 2005 require the reconfiguration of the existing Empire Zones by Jan. 1, 2006. Immediate guidance to the affected parties is required.

**Subject:** Empire zones reform.

**Purpose:** To conform regulations to existing statute and recent statutory amendments and clarify and improve administrative procedures.

**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. 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”—to the Department of Economic Development by January 1, 2006. The existing regulations are affected by this requirement, but at the same time the zones need immediate guidance which requires amending the existing regulations in an accelerated fashion. At the same time, the existing regulations contain several outdated references, and the Department has also taken the opportunity to improve its 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 programs 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 tracks 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. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 25% of the minimum jobs required to meet the definition of regionally significant project within 2 years of the date of designation of the project as regionally significant, 50% of the minimum jobs within 3 years, 75% of the minimum jobs within 4 years, and 100% of the minimum jobs within 5 years. Failure to achieve a milestone 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.

Eighth, 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 development plan by the applicant municipality. The definition included in the emergency rule lays out the basic formula for calculating the benefits received to the costs incurred.

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 April 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 of 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.

##### **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.

##### **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 results in more paperwork and additional staff time over

the course of the next twelve months as the program is reconfigured. However, over time staff and paperwork costs will be minimized because the statutory changes have clarified eligibility for the program and the revised regulations have made procedures for processing applications easier to understand.

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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## Education Department

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

#### **Analysis of Average Interest Rates**

**I.D. No.** EDU-05-08-00022-P

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

**Proposed action:** Amendment of section 175.41 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided) and 3602(6)(e)(1)

**Subject:** Analysis of average interest rates applied to capital debt incurred by New York City for school purposes.

**Purpose:** To conform the commissioner's regulation to changes to statute and provide an appropriate methodology for computation of the true cost of debt issued by New York City for the purpose of financing school construction.

**Text of proposed rule:** Section 175.41 of the Regulations of the Commissioner of Education is amended, effective May 8, 2008, to read as follows:

§ 175.41 Analysis of average interest rates applied to capital debt incurred by the City of New York for school purposes, or by the New York city transitional finance authority for school purposes if no such capital debt is incurred by the City of New York, for use in the apportionment of building aid to the city school district of the City of New York.

(a) Definitions. For the purpose of this section the following definitions shall apply:

(1) Obligation shall mean any amortized debt incurred by the City of New York for the funding of capital expenditures for school purposes of the city and its departments, agencies or subdivisions, including but not limited to the city school district of the City of New York and the School Construction Authority of the City of New York. In the event that no amortized debt is incurred by the City of New York for the funding of capital expenditures for school purposes, obligation shall mean any amortized debt incurred by the New York City transitional finance authority for

the funding of capital expenditures for school purposes of the city and its departments, agencies or subdivisions, including but not limited to the City School District of the City of New York and the School Construction Authority of the City of New York.

(2) Total principal for school purposes shall mean that portion of the original proceeds received by the City of New York from the sale of an obligation that is expended for school purposes.

(3) Term shall mean the number of years represented by the amortization of an obligation, expressed to the nearest whole number of years.

(4) Total net [interest shall mean the interest expenditures required to be paid by the City of New York pursuant to the schedule of amortization of an obligation after any premiums or any accrued interest received by the city at the time of the sale of the obligation has been deducted] proceeds shall mean the sum of the total principal for school purposes less costs of issuance (including underwriters discount and bond insurance), less original issue discount, plus original issue premium attributable to such total principal for school purposes. Bond insurance, original issue discount and original issue premium shall be allocated to such principal on the basis of actual cost for that portion of principal. Costs of issuance, including underwriters discount, but not bond insurance, shall be allocated pro-rata on the basis of the ratio of proceeds (adjusted for original issue discount and premium only) attributable to school purposes to total proceeds (adjusted for original issue discount and premium only) in the bond series.

(5) [Average principal shall mean an amount equal to one half the total principal, rounded to the nearest whole dollar.

(6) Average interest [shall mean an amount equal to the quotient of the total net interest divided by the term, rounded to the nearest whole dollar] rate shall be determined by doubling the semi-annual interest rate, compounded semi-annually, necessary to discount the debt service payments (including interest, principal and mandatory redemptions) from the payment dates to the dated date such that the sum of such discounted payments equal the total net proceeds.

(i) When a particular maturity of bonds has more than one interest rate, the principal amount allocated to school purposes shall be allocated pro-rata based on the ratio of principal amount of an interest rate in a maturity to the total principal amount of the maturity.

(ii) When there are proceeds of more than one series of bonds in a calculation period, then the average interest rate shall be determined by doubling the semi-annual interest, compounded semi-annually, necessary to discount the debt service payments (including interest, principal and mandatory redemptions) from the payment dates to the dated date of the series of bonds with the earliest dated date such that the sum of such discounted payments equals the sum of the net proceeds discounted to the dated date of the series of bonds with the earliest dated date.

(iii) The interest rate for adjustable rate bonds shall be determined by taking the municipal swap index selected by the commissioner (or if such index is no longer available, using comparable data) averaged over the last 10 years, plus the costs of credit facilities, remarketing fees, broker-dealers fees and auction agent fees, as applicable, that are in effect at the time of the issuance of the bonds.

(iv) If there is an interest rate swap associated with the adjustable rate bonds that creates a synthetic fixed rate, then the interest rate shall be determined by the sum of the fixed swap rate plus the cost of credit facilities, remarketing fees, broker-dealers fees and auction agent fees, as applicable, that are in effect at the time of the issuance of the bonds.

(b) The analysis of the actual average interest rate and of the estimated average interest rate which must be submitted by the Comptroller of the City of New York to the commissioner by September 1st of the current year pursuant to [section 3602(6)(e)(3)] sections 3602(6)(e)(1)(c) and 3602(6)(e)(2)(a)(ii) of the Education Law shall [consist of] include such data as is prescribed by the commissioner, including but not limited to the following:

(1) A listing of all obligations incurred by the City of New York for the period from July 1st of the prior calendar year to June 30th of the current calendar year. Such listing shall include for each obligation listed and for that portion of each obligation listed that is for school purposes:

(i) the total principal;

(ii) the term;

(iii) the total net [interest] proceeds;

(iv) the average [principal] interest rate; [and]

(v) the [average] total interest;

(vi) if the bonds are floating-rate bonds or attached to swap(s), include the swap rate, the cost of credit facilities, remarketing fees, broker-dealers fees and auction agent fees, as applicable;

(vii) costs of issuance, including breakout of underwriters discount and bond insurance; and

(viii) original issues premiums and discounts.

(2) A statement certifying that the data provided pursuant to paragraph (1) of this subdivision reasonably reflects anticipated obligations to be incurred by the City of New York for the period from July 1st of the current calendar year to June 30th of the next calendar year, or, in the alternative, a listing of all anticipated obligations to be incurred by the City of New York for such period that shall include for each obligation listed and for that portion of each obligation listed that is for school purposes:

- (i) the total principal;
- (ii) the term;
- (iii) the total net [interest] proceeds;
- (iv) the average [principal] interest rate; [and]
- (v) the [average] total interest.

(vi) if the bonds are floating-rate bonds or attached to swap(s), include the swap rate, the cost of credit facilities, remarketing fees, broker-dealers fees and auction agent fees, as applicable;

(vii) costs of issuance, including breakout of underwriters discount and bond insurance; and

(viii) original issue premiums and discounts.

(c) Upon review and approval of the listing provided by the Comptroller of the City of New York pursuant to paragraph (b)(1) of this section, the commissioner shall determine the actual average interest rate applied to all [capital debt] obligations incurred by the City of New York during the base year, as required by [sections 3601-a(6)(e)(2) and] section 3602(6)(e)(2) of the Education Law [ , by dividing the sum of the average principal for all such obligation]. *The actual average interest shall be determined using the methodology described in paragraph (a)(5) of this section.* Such actual average interest rate shall be expressed as a decimal [to five places] rounded to the nearest eighth of [one-one hundredth] one percent.

(d) Upon review and approval of the statement of the Comptroller of the City of New York certifying that the data provided pursuant to paragraph (b)(1) of this section reasonably reflects anticipated obligations to be incurred by the City of New York for the period from July 1st of the current calendar year to June 30th of the next calendar year, the commissioner shall certify that the actual average interest rate applied to all [capital debt] obligations incurred by the City of New York during the base year shall be the estimated average interest rate applied to all [capital debt] obligations to be incurred by the City of New York during the current year, or, in the alternative, upon review and approval of the listing provided by the Comptroller of the City of New York pursuant to paragraph (b)(2) of this section, the commissioner shall determine the estimated average interest rate applied to all [capital debt] obligations to be incurred by the City of New York during the current year [by dividing the sum of the average interest for all obligations included on such listing by the sum of the average principal for all such obligations]. *The estimated average interest shall be determined using the methodology described in paragraph (a)(5) of this section.* Such estimated average interest rate shall be expressed as a decimal [to five places] rounded to the nearest eighth of [one-one hundredth] one percent.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

**This action was not under consideration at the time this agency's regulatory agenda was submitted.**

**Regulatory Impact Statement**

**STATUTORY AUTHORITY:**

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

Section 3602(6)(e)(1) of the Education Law authorizes the Commissioner to prescribe to the Comptroller of the City of New York the content and format of an analysis of average interest rates applied to capital debt incurred by the City of New York for school purposes, for use in apportioning building aid to City School District of the City of New York.

**LEGISLATIVE OBJECTIVES:**

The proposed amendment, consistent with the authority conferred by the above statutes, conforms the current Commissioner's regulation to subsequent statutory changes and provides an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction.

**NEEDS AND BENEFITS:**

This regulation updates the regulatory provision for computing the average interest rate used to apportion building aid to New York City.

Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with statute, and are necessary at this time so that New York City can plan its capital expenditures and issue debt to fund them.

**COSTS:**

- (a) Costs to State government: none.
- (b) Costs to local government: none.
- (c) Costs to private regulated parties: none.
- (d) Cost to the State Education Department for implementation and continued administration of the proposed amendment: none.

Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with statute. The proposed amendment does not impose any compliance requirements or costs beyond those inherent in the statute.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment will not impose any additional program, service, duty or responsibility on local governments. Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with changes in statute. The proposed amendment does not impose any compliance requirements or costs beyond those inherent in the statute.

**PAPERWORK:**

The proposed amendment will conform the Commissioner's Regulations to changes in statute and will not impose any additional paperwork or other reporting requirements.

**DUPLICATION:**

The proposed amendment will not duplicate any other State or federal statute or regulation.

**ALTERNATIVES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to changes in statute. There were no significant alternatives and none were considered.

**FEDERAL STANDARDS:**

The proposed amendment relates solely to the apportionment of building aid to the City School District of the City of New York to which there are no applicable federal standards.

**COMPLIANCE SCHEDULE:**

It is anticipated that compliance can be achieved by the effective date. The proposed amendment conforms to the Commissioner's Regulations to existing statutory provisions.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed amendment relates to the apportionment of building aid to the City School District of the City of New York and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local government:**

**EFFECT OF RULE:**

The proposed rule applies to the City School District of the City of New York.

**COMPLIANCE REQUIREMENTS:**

The proposed amendment will conform to the Commissioner's Regulations to changes in statute and will not impose any additional paperwork, reporting or other compliance requirements.

This regulation updates the regulatory provision for computing the average interest rate used to apportion building aid to New York City.

Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with statute, and are necessary at this time so that New York City can plan its capital expenditures and issue debt to fund them.

**PROFESSIONAL SERVICES:**

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

**COMPLIANCE COSTS:**

Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with statute. The proposed amendment does not impose any additional costs beyond those inherent in the statute.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment will conform to the Commissioner's Regulations to changes in statute and will not impose any additional paperwork, reporting or other compliance requirements, or additional costs.

Section 3 of Part A-3 of Chapter 58 of the Laws of 2006 amended Education Law § 3602(6)(e)(1)(c) regarding the computation of the interest rate used to determine New York City's building aid allocation, but section 175.41 of the Regulations of the Commissioner, which prescribes the methodology for computing New York City's interest rate has not been updated to reflect the statutory change. In addition, over time, State legislation has been amended to authorize New York City to use a variety of

financing mechanisms that do not follow the traditional pattern of substantially level debt service payments. As a result, the current regulation is neither reflective of the statute nor an appropriate methodology for computation of the true interest cost of debt issued by New York City for the purpose of financing school construction. These changes are designed to update the regulations to align with statute, and are necessary at this time so that New York City can plan its capital expenditures and issue debt to fund them.

**SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

A copy of the proposed amendment has been provided to the New York City School District and the New York City Office of Management and Budget for review and comment.

**Rural Area Flexibility Analysis**

The proposed amendment relates to the apportionment of building aid to the City School District of the City of New York and does not apply to any school districts located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on public or private entities in rural areas. Because it is evident from the nature of the proposed rule that it does not affect rural areas, no further measures were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The proposed amendment relates to the apportionment of building aid to the City School District of the City of New York and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

**Setting of Body Gripping Traps on Land**

**I.D. No.** ENV-22-07-00010-A

**Filing No.** 24

**Filing date:** Jan. 11, 2008

**Effective date:** Jan. 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 6.3 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

**Subject:** Setting of body gripping traps on land.

**Purpose:** To prevent the capture of dogs in body gripping traps on land.

**Text of final rule:** See Appendix in the back of this issue of the Register.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 6.3(a)(14).

**Revised rule making(s) were previously published in the State Register on** October 3, 2007.

**Text of rule and any required statements and analyses may be obtained from:** Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, e-mail: grbatcbe@gw.dec.state.ny.us

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

**Revised Regulatory Impact Statement**

1. Statutory Authority

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental

Conservation (Department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the Department to regulate the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink ("furbearers"). This proposed regulation addresses restrictions on the use of certain sizes of body gripping traps, traps which are used primarily to take fisher and raccoon.

## 2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to authorize the Department to establish the methods by which furbearers may be taken by trapping.

## 3. Needs and Benefits

The Department proposes to establish a new trapping regulation that is intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons.

The proposed regulation would address the manner in which body gripping traps, measuring five and one-half inches or more in the open position, are set on land with the aid of baits, lures, or other attractants. Body-gripping traps are to be measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law (ECL), which reads in part as follows:

The dimension of the body gripping trap shall be ascertained when the trap is set in the extreme cocked position and shall be the maximum distance between pairs of contacting body gripping surfaces except for rectangular devices which shall be the maximum perpendicular distance between pairs of contacting body gripping surfaces.

The Department has included diagrams in the proposed regulation to clearly demonstrate how body-gripping traps are measured. For further clarity, the Department has also included diagrams in the proposed regulations that illustrate leg-gripping traps ("foothold traps") and how they are measured pursuant to ECL 11-1101 (6)(a).

For traps of this size set on land, the Department is proposing that certain precautions must be taken to avoid capturing a dog in body-gripping traps. The Department proposes that these traps must be set in compliance with one of three options: (1) set four feet above the ground; or (2) set within one of three different types of enclosures which have restricted openings and other features designed to prevent a dog from entering and triggering the trap; or (3) set within an enclosure which is fastened to a tree or post in a vertical position, has only one opening which faces the ground, and is set so that the opening is no more than six inches from the ground. The Department further proposes to restrict the setting of body-gripping traps that are set without the use of baits, lures, or other attractants in so called "blind run sets." In these cases, trappers would not be allowed to use body-gripping traps more than six inches in size, and when using smaller traps (six inches or less), they must be set close to the ground, below the typical level of a domestic dog.

The Department also proposes to restrict the setting of body-gripping traps on public lands within one hundred feet of "trails," which are defined as designated, marked, and maintained paths or ways designed for recreational, non-motorized traffic. This prohibition would not apply to the Department's Wildlife Management Areas. The Department selected the one-hundred foot distance because there is an existing restriction in the Environmental Conservation Law that prohibits the setting of traps within one-hundred feet of homes, and a person walking a dog could reasonably be expected to be capable of controlling a dog with voice and visual commands within a distance of about one-hundred feet. The purpose of this restriction is to provide further protection to dogs being walked along trails. These restrictions would not effect traps set in water on public lands along trails, and it would not effect the setting of leg-gripping traps because the purpose of this rule making is to reduce or eliminate the killing of dogs captured in body-gripping traps. However, while monitoring the implementation of the proposed regulation, the Department will also closely monitor and evaluate any incidents involving the capture of dogs in leg-gripping traps within one hundred feet of trails on public lands. Wildlife Management Areas are excluded from this prohibition because these are areas primarily managed for the benefit of hunters and trappers.

The traps that will be impacted by this rule are mainly used to target raccoons and fisher. Raccoons and fisher are smaller than most dogs and are well adapted for crawling into small holes to find food or shelter or both. These species are natural cavity dwellers. Dogs, on the other hand, are generally not well adapted for climbing into small holes.

The proposed regulations require that body-gripping traps used in conjunction with baits, lures, or other attractants be set within a container designed to exclude dogs. The Department proposes that traps be set at least four inches from the opening of an enclosure with a six inch or

smaller opening; and that traps be set at least eighteen inches from the opening of an enclosure with ten inch or smaller openings. Traps placed in enclosures made of natural materials would be allowed if they are set at least eight inches from an entrance hole, and the entrance hole does not exceed six inches measured vertically. A trap that is set in an enclosure affixed to a tree or post must have its only opening positioned no more than 6 inches from the ground.

Collectively, these choices of design options provide flexibility for trappers while greatly reducing the chance that a dog may be captured, injured, or killed in body-gripping traps. Department staff believe that such requirements will make these traps very selective to catching raccoons and fisher, and relatively inaccessible to dogs. Similar techniques have been used in other states with effectiveness.

Traps adapted pursuant to the proposed requirements should remain effective for capturing raccoons and fisher because these species readily enter small holes to seek shelter or food or both. For this reason, the modified trap sets are not expected to significantly reduce the ability of trappers to catch these species. However, the proposed rule will increase the selectivity of trapping and reduce or eliminate the capture of most dogs. A very small dog, however, may still be vulnerable to capture, injury, or death.

If a trapper opts to comply with the proposed regulation by placing the trap at least four feet above the ground, dogs will be at very low risk of capture because the traps will be out of reach of most dogs. Raccoons and fisher, however, are well adapted to climbing, and traps will remain effective in catching these species if they are placed four feet or more above ground. The Environmental Conservation law prohibits the suspension of animals caught in traps, and trappers will need to use techniques that will prevent the suspension in the air of any animal caught above the ground in a body-gripping trap.

The proposed regulation is needed to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the proposed regulation should not negatively affect the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

## 4. Costs

Trappers will be required to purchase or construct an enclosure made of wood, metal, plastic, or wire that will be used in the setting of certain body gripping traps. Alternatively, they may fashion an enclosure from natural materials, such as rocks or logs. Additionally, they may choose to set their traps at least four feet above the ground. For trappers who decide to use an enclosure, the Department estimates that trappers will need to spend approximately five (5) dollars in materials to comply with the regulation. In some cases, the expense will be lower because suitable buckets, wire, and lumber may be used to construct the container and are available at very low expense or salvageable as scrap.

## 5. Local Government Mandates

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

## 6. Paperwork

The proposed rules do not impose additional reporting requirements upon the regulated public (trappers).

## 7. Duplication

There are no other local, state or federal regulations concerning the taking of fisher and raccoons.

## 8. Alternatives

An alternative to making the proposed changes is to leave the trapping regulations unchanged. However, this would mean that dogs would continue to be vulnerable to capture, injury, or death in traps set for the capture of furbearers.

## 9. Federal Standards

There are no federal government standards for the taking of fisher and raccoons.

## 10. Compliance Schedule

Trappers will be required to comply with the new rule as soon as it takes effect.

## **Regulatory Flexibility Analysis**

The purpose of this proposed rulemaking is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. Trappers will not be allowed to set body-gripping traps on public lands within one hundred feet of designated and marked trails, except on

Department of Environmental Conservation Wildlife Management Areas. The proposed regulations apply statewide.

The proposed regulations do not apply directly to local governments or small businesses. Therefore, the Department has determined that this rulemaking will not impose an adverse economic impact on small businesses or local governments since it will not affect these entities.

Fisher trappers must report their take to the Department to lawfully possess a trapped fisher. The proposed rulemaking does not affect this requirement. All other reporting or recordkeeping requirements associated with trapping are administered by the Department. Therefore, the Department has determined that this rulemaking will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

Based on the above, the Department has concluded that a regulatory flexibility analysis is not required.

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

##### 1. Types and estimated numbers of rural areas:

The proposed regulation would apply statewide, and would affect trapping in all rural areas of New York.

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

The purpose of this rulemaking is to amend the trapping regulations for body gripping traps. It will apply to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. They will also be prohibited from setting body-gripping traps on public lands within one hundred feet of designated and marked trails, except on Department of Environmental Conservation Wildlife Management Areas.

No professional services are needed for trappers to comply with the new regulations. Fisher trappers are currently required to report the harvest of fisher to the Department. The proposed rulemaking does not affect this requirement. All other reporting or recordkeeping requirements associated with fisher trapping are administered by the Department. There are no reporting requirements for raccoon trappers.

##### 3. Costs:

The cost of equipping a single trap with a dog resistant container is estimated to be \$5 or less in material expenditures. Trappers will be required to purchase or construct suitable boxes, buckets, or wire cages for setting body gripping traps. Alternatively, they may choose to set their traps at least four feet above the ground. For trappers who decide to enclose their traps in a container, the Department estimates that the average trapper will need to spend a total of \$85 (\$5 per trap X an average of 17 traps of the type affected by the proposed regulation) in materials to comply with the regulation. The Department estimates that trappers will spend an additional \$15 on annual maintenance costs. In some cases, the expense will be nearly zero because suitable buckets, wire, and lumber are available at very low expense or salvageable as scrap.

##### 4. Minimizing adverse impact:

The proposed regulations will primarily affect the trapping of fisher and raccoons. They are intended to prevent the capture, injury, or killing of dogs in body-gripping traps. Under the terms of the proposed regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog-resistant container, as specified in the proposed regulations.

The Department has proposed regulations that should protect dogs without reducing trapper effectiveness in trapping raccoon and fisher. These requirements are not expected to significantly change the number of trappers or the frequency of trapping in rural areas.

##### 5. Rural area participation:

Prior to proposing this regulation, the Department conducted seminars in all areas of the State to teach trappers about techniques to avoid catching dogs, and incorporated these techniques in the Department's mandatory trapper education curricula. The Department also published information on methods to avoid catching dogs. This publication was sent to all licensed trappers in the State of New York on two separate occasions. The Department has proposed this regulation because it is essential that all trappers use techniques to avoid the capture and killing of dogs in body-gripping traps.

#### **Job Impact Statement**

The purpose of this proposed rulemaking is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies state-

wide to traps set on land which have an opening that measures five and one-half inches or larger.

Due to the size of the trap involved, this regulation will primarily affect the trapping of fisher and raccoons. Under the terms of the proposed regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog resistant container, as specified in the proposed regulations. The proposal also prohibits the setting of body-gripping traps on lands within one hundred feet of designated and marked trails, except on Department of Environmental Conservation Wildlife Management Areas.

The proposed rulemaking is not expected to significantly change the number of participants (trappers), the frequency of participation in the regulated activities, or trapping success by each trapper. The proposed regulations do not prohibit trapping activity, so long as each trap complies with the measures designed to protect dogs. Effective methods for capturing fisher and raccoons will remain available to trappers under the proposed regulations, while the likelihood of injuring or killing a dog will be reduced, if not eliminated. For these reasons, the Department anticipates that this rulemaking will have no negative impacts on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

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

The Department published a revised rulemaking in the State Register on October 3, 2007 and invited public comment. A description of the comments received, along with the Department's responses to the comments, are set forth below. Among the comments received were over 3,900 electronic letters with identical content. The Department has indicated parenthetically below if a comment came from one of these letters.

Comment: The regulations are understandable and necessary.

Response: The Department appreciates this support.

Comment: The regulation should not be adopted at all.

Response: This regulation is necessary to sustain and improve trapping, and to avoid the capture or killing of dogs in traps.

Comment: Traps should be at least five feet off the ground, not four feet.

Response: The Department previously considered a five foot restriction, but changed the original proposal to four feet based on prior public comment. This prior public input related primarily to the ability of trappers to reach overhead to set a trap safely and securely. The final language of the regulation retains the four feet restriction for that reason.

Comment: The trigger of body-gripping traps should be spread 1.0" to 1.5" and be no closer than 2.0" from either side of the trap for a quicker "spring" time.

Response: The Department's proposal did not address the manner in which the triggers are set in body-gripping traps. The Department does not believe that this technical specification would effect the selectivity of body-gripping traps in terms of catching dogs.

Comment: Dog owners should be more responsible for their pets, and there should be statewide education for dog owners regarding the risks of having pets run at large.

Response: The Department agrees that pet owners also bear responsibility to keep their dogs safe. In some communities, current laws require dogs to be leashed, and the Environmental Conservation Law restricts dogs from running "at large" on lands inhabited by deer. The Department will confer with the New York State Department of Agriculture and Markets concerning effective communication tools for informing pet owners of their legal responsibilities at the local level. Moreover, the Department will increase its efforts to raise awareness about the existing restrictions on dogs running at large on lands inhabited by deer.

Comment: The proposed regulations will harm wildlife management in New York State.

Response: The intent of the proposed regulation is to reduce or eliminate the capture or killing of dogs in body-gripping traps, while maintaining the effectiveness of these traps for capturing furbearing animals, primarily raccoons and fisher. The Department will closely monitor trapper experiences with the new methods for setting these traps to gauge whether these objectives are being met.

Comment: Foothold traps ("leg-gripping traps") should also be included in the "buffer zone" along trails. (This comment was included in the letter referenced above that was duplicated in over 3,900 separate emails.)

Response: The purpose of the Department's proposal is to reduce the capture and killing of dogs in body-gripping traps. The Department has not attempted to address other trap types in this specific rulemaking. The

Department will monitor any incidents of dogs caught in foothold traps near trails in an effort to determine if any further actions are appropriate.

Comment: There should be no trapping involving traps set off the ground at all. (This comment was included in the letter referenced above that was duplicated in over 3,900 separate emails.)

Response: The proposed regulation allows a trap to be set a minimum of four feet off the ground. The Environmental Conservation Law contains a prohibition on setting a trap so that an animal caught in the trap is suspended. This prohibition does not conflict with the proposed regulation. Trappers must set their traps in a manner that prevents animals from being suspended in the air. Trappers currently use a so-called "running pole set" for capturing several species of furbearers, including raccoon and fisher. The existing prohibition on suspending animals requires that traps used in running pole sets be securely fastened to a limb or tree so that the trap, as well as any animal caught in the trap, are held firmly in place and supported by the limb or tree. The Department's proposal does not change this restriction.

Comment: The one-hundred foot "buffer zone" adjacent to trails is excessive, and should be fifty feet, or twenty-five feet, or not at all. The one-hundred foot restriction will result in the loss of a great deal of trapping opportunity on state lands.

Response: The Department has revised the text of the final rule to exclude the Department's Wildlife Management Areas from the prohibition against setting body-gripping traps near trails. Wildlife Management Areas are established and managed primarily for hunting and trapping programs. Moreover, there are relatively few trail systems on Wildlife Management Areas compared to other categories of public lands, and the primary users of these state lands are hunters and trappers. Where the restriction still applies, the Department believes that the one-hundred foot restriction is appropriate, but will evaluate this distance following implementation of the new regulation.

Comment: There is no need for the eight inch notches in the cubby box or natural cubbies.

Response: The purpose of the eight inch notch is to provide sufficient space for the springs of the body-gripping trap to freely open without confinement, thereby allowing the trap frame to rotate easily upon its axis. This greatly reduces the movement of the trap from the stationary position, which reduces the chance that a dog may be caught. The Department considers the requirement for eight inch slots to be an essential component of the regulation, and it has been retained.

Comment: "160s" and "220s" should be allowed in natural rock face walls with the use of bait if it meets the edge of a body of water and the trap is recessed at least four inches.

Response: At this time, there is insufficient evidence that this design will enhance the selectivity of body-gripping traps. However, the Department will continue to evaluate the efficacy of this new regulation, both in terms of the reduction or elimination of the capture or killing of dogs, and the ability of these traps to continue to catch raccoons and fisher.

Comment: The regulation should only apply to state lands.

Response: Most trapping in New York occurs on private lands. Because there several ways by which a dog could encounter a trap on private lands, it is imperative that the new regulations be in place on a statewide basis, not only privately held lands, to reduce or eliminate the capture or killing of dogs in traps.

Comment: Cable restraints should be allowed as a means to encourage non-lethal trap use.

Response: Cable restraints are currently prohibited for use in New York, except under special permit. In order to allow the use of cable restraints by licensed trappers during the trapping season, it would be necessary to amend the Environmental Conservation Law.

Comment: "160s" should not be allowed in "blind trail" sets; they are just as dangerous as "220s."

Response: The regulation requires that 160-sized body-gripping traps (traps that measure six inches or less) be set so that they are no more than eight inches above the ground. The Department believes that this is consistent with the objective of reducing or eliminating the capture or killing of dogs in these traps. However, the Department will carefully monitor this aspect of the regulation.

Comment: Larger (220-sized) body-gripping traps should also be allowed in "blind trail" sets just as smaller (160-sized) body-gripping traps are allowed, as long as all traps set in this manner are no more than eight inches off the ground. The Department should do so to benefit farmers, especially within State Certified Agricultural Districts.

Response: The Department will evaluate this aspect of the regulation to determine whether all traps set in this fashion should be prohibited, or

whether larger traps should also be allowed when set close to the ground. However, the final regulation does not include a change which would allow the larger traps to be set in blind trail sets. These larger traps have been shown to be lethal to dogs that get caught in them, and such a change could be inconsistent with the Department's objective of preventing the killing of dogs in these trap types.

Comment: The types of trails affected by the new regulation needs to be clear.

Response: The Department agrees and will work with local and regional land managers to develop appropriate signs to inform trappers about the restrictions, and to explain how this aspect of the regulation will be implemented (e.g., how to measure one-hundred feet from the trail).

Comment: The Department should closely evaluate any future incidents of dogs being caught in body-gripping traps.

Response: The Department agrees and will carefully investigate any future incidents to analyze the causative factors contributing to these accidents.

Comment: The Department should enhance its trapper education programs to make sure that both resident and non-resident trappers have the most current information about responsible and up-to-date trapping methods.

Response: The Department agrees that education of trappers is a key component of responsible trapping, and will work closely with the New York State Trappers Association and other interested stakeholders to develop effective strategies for educating trappers in best practices for trapping.

Comment: The new regulation will impede the ability of farmers to control problem raccoons on their lands.

Response: The new regulations apply to trapping during the trapping seasons. They do not apply to the taking of raccoons that are causing damage to agricultural interests. The Environmental Conservation Law (Section 11-0523) specifically allows the taking of raccoons that are "injuring private property." This authority is separate from normal trapping activities that take place under license during the trapping season.

The regulations do apply, however, to trappers setting traps on farms during the regular trapping season, except if for the sole purpose of removing a raccoon injuring property. Since most agricultural damage occurs prior to the start of the trapping season, the Department does not believe that the new regulation will have a negative effect on the State's agricultural interests.

Comments: The regulation should allow the setting of small body-gripping traps (smaller than 5.5") along trails.

Response: The Department has amended the final regulation to specifically exclude Wildlife Management Areas from the restriction on setting traps near trails. The Department will also evaluate the use of smaller body-gripping traps along trails to determine whether it might be appropriate to allow their use in other areas.

Comment: The Department should clearly define body-gripping traps.

Response: The Department has proposed regulations that include diagrams showing how body-gripping traps are measured. These diagrams were included to give trappers a better understanding of exactly what equipment and activities are allowed or prohibited. The Department believes the diagrams are more effective than a definition or description.

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## Office of Mental Health

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### NOTICE OF ADOPTION

#### **Comprehensive Outpatient Programs**

**I.D. No.** OMH-46-07-00001-A

**Filing No.** 27

**Filing date:** Jan. 14, 2008

**Effective date:** Jan. 30, 2008

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

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

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a); Social Services Law, sections 364(3) and 364-a

**Subject:** Comprehensive outpatient programs.

**Purpose:** To equalize Comprehensive Outpatient Program (COPS) and Non-COPS Funding.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-46-07-00001-P, Issue of November 14, 2007.

**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.

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## Public Service Commission

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

#### Interconnection Agreement between Verizon New York Inc. and Manhattan Telecommunications Corporation

I.D. No. PSC-05-08-00023-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 Manhattan Telecommunications Corporation to revise the interconnection agreement effective on Oct. 5, 2007.

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

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

**Purpose:** To amend the Verizon New York Inc. and Manhattan Telecommunications Corporation interconnection agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Manhattan Telecommunications Corporation in August 2000. The companies subsequently have jointly filed amendments to clarify the provisions regarding intercarrier compensation.

**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.

(00-C-1371SA4)

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

#### Interconnection Agreement between Time Warner Telecom Holdings, Inc. and Pac-West Telecomm

I.D. No. PSC-05-08-00024-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Time Warner Telecom Holdings, Inc. and Pac-West Telecomm for approval of a mutual traffic exchange agreement executed on Nov. 1, 2007.

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

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Time Warner Telecom Holdings, Inc. and Pac-West Telecomm have reached a negotiated agreement whereby Time Warner Telecom Holdings, Inc. and Pac-West Telecomm will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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

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

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

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

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

(07-C-1510SA1)

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

#### Revision of Reliability Rules by the New York State Reliability Council

I.D. No. PSC-05-08-00025-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 adopt in whole or in part proposed changes to Reliability Rules I-R3 and I-R5 and the associated measurements I-M2, I-M4, and I-M6; Reliability Rule B-R4; Reliability Rules D-R3, I-R2 and the glossary and the associated measurement D-M1; Reliability Rule E-R10 and the associated measurement E-M9; and modification to measurements G-M1.2 and G-M1.10 of the New York State Reliability Council.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2)

**Subject:** Adoption by the Public Service Commission of a proposed change to Reliability Rules I-R3 and I-R5 and the associated measurements I-M2, I-M4, and I-M6; Reliability Rule B-R4; Reliability Rules D-R3, I-R2 and the glossary and the associated measurement D-M1; Reliability Rule E-R10 and the associated measurement E-M9; and modification to measurements G-M1.2 and G-M1.10 of the New York State Reliability Council.

**Purpose:** To consider adopting in whole or in part Reliability Rules I-R3 and I-R5 and the associated measurements I-M2, I-M4, and I-M6; Reliability Rule B-R4; Reliability Rules D-R3, I-R2 and the glossary and the associated measurement D-M1; Reliability Rule E-R10 and the associated measurement E-M9; and modification to measurements G-M1.2 and G-M1.10 of the New York State Reliability Council.

**Substance of proposed rule:** The Public Service Commission is considering whether to adopt in whole or in part revisions made by the New York State Reliability Council (NYSRC) to Version 21 of its reliability rules. Version 20, which was adopted by the NYSRC Executive committee on July 13, 2007, and Version 21, which was adopted by the NYSRC on December 14, 2007, contain several changes intended to bring the Reliability Rules in conformance with the criteria of the Northeast Power Coordinating Council (NPCC) and current practice of the New York Independent System Operator, Inc. (NYISO). The revisions involve: 1) loss of gas generator gas supply, which directly affects rules I-R3 and I-R5 and the associated measurements I-M2, I-M4, and I-M6; 2) Extreme Contingency Assessment, which would align the reliability rule with NPCC-18 "Procedure for testing and analysis of Extreme Contingencies and directly affects rule B-R4; 3) resources eligible for Operating Reserves, which would align the Reliability Rules with NPCC A-6 and directly affects rule D-M1; 4) system restoration rules, which relate to system changes and review of those changes on restoration and directly relate to rule G-M1.2

and G-M1.10; and 5) exceptions to the reliability rules, which would require the NYISO to perform a yearly review of the exception list and directly relates to rule E-R10 and measurement E-M9.

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

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

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

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

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

(05-E-1180SA7)

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

**Method for Cost Allocation and Cost Recovery for Non-Transmission Regulatory Backstop Projects Conducted by Jurisdictional Entities**

**I.D. No.** PSC-05-08-00026-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 (PSC) has instituted a proceeding, in case 07-E-1507, to explore and develop a long-range electricity infrastructure planning process. As part of this effort, the PSC is considering adoption of a method for cost allocation and cost recovery for non-transmission regulatory backstop projects conducted by jurisdictional entities, triggered for implementation by the New York Independent System Operator, Inc. (NYISO), that is compatible with the method used by the NYISO for transmission projects.

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

**Subject:** Method for cost allocation and cost recovery for non-transmission regulatory backstop projects conducted by jurisdictional entities.

**Purpose:** To consider whether the PSC should adopt a method for cost allocation and cost recovery for non-transmission regulatory backstop projects conducted by jurisdictional entities.

**Substance of proposed rule:** The Public Service Commission (PSC) has instituted Case 07-E-1507 to explore and develop a long-range electricity infrastructure planning process. As part of this effort, the Commission is considering adoption of a method for cost allocation and cost recovery for non-transmission regulatory backstop projects conducted by jurisdictional entities, triggered for implementation by the New York Independent System Operator, Inc. (NYISO), that is compatible with the method used by the NYISO for transmission projects as set forth in its Federal Energy Regulatory Commission tariff.

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

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

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

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

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

(07-E-1507SA1)

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

**Transfer of Property between National Fuel Gas Distribution Corporation and International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 4**

**I.D. No.** PSC-05-08-00027-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, a filing made by National Fuel Gas Distribution Corporation to sell a building and property located at 2484 Seneca St., West Seneca, NY to International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 4.

**Statutory authority:** Public Service Law, section 70

**Subject:** Approval of the transfer of property.

**Purpose:** To consider a filing of National Fuel Gas Distribution Corporation to sell a building and property to International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 4.

**Substance of proposed rule:** The Commission is considering whether to approve, reject, or modify a filing by National Fuel Gas Distribution Corporation for Approval of the Transfer of Facilities Under Section 70 of the Public Service Law, to sell a building and property located at 2484 Seneca Street, West Seneca, NY to International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 4.

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

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

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

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

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

(07-G-1491SA1)

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

**Rider C — Residential Distributed Generation Rates by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-05-08-00028-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service — P.S.C. No. 4 to become effective May 1, 2008.

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

**Subject:** Rider C — residential distributed generation rates.

**Purpose:** To revise Orange and Rockland's residential distributed generation rates.

**Substance of proposed rule:** On January 9, 2008, Orange and Rockland Utilities, Inc. (Orange and Rockland) filed proposed tariff amendments to revise its residential distributed generation rates. The proposed rates would reflect the increase in gas delivery rates and certain other related rate changes included in Orange and Rockland's three-year rate plan approved by the Commission in Case 05-G-1494. The Commission may approve, reject or modify, in whole or in part, Orange and Rockland's proposed tariff revisions.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:**

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(02-M-0515SA20)

## Department of State

### ERRATUM

A Notice of Emergency Adoption and Proposed Rule Making, I.D. No. DOS-02-08-00001-EP, pertaining to Installation of Pool Alarms and Carbon Monoxide Alarms, published in the January 9, 2008 issue of the *State Register* contained an incorrect public comment period. The correct public comment period for this rule making is 60 days after publication of the notice.

The Department of State apologizes for any confusion this may have caused.

### EMERGENCY RULE MAKING

#### Temporary Swimming Pool Enclosures

**I.D. No.** DOS-05-08-00019-E

**Filing No.** 25

**Filing date:** Jan. 14, 2008

**Effective date:** Jan. 14, 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; 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. Chapter 234 became law on July 18, 2007, and the effective date of Chapter 234 is January 14, 2008. Adoption of this rule on an emergency basis is necessary to reduce the number of accidental drownings in swimming pools, and to satisfy the mandate of section 3 of Chapter 234 of the Laws of 2007.

**Subject:** Temporary swimming pool enclosures.

**Purpose:** To reduce the number of accidental drownings in swimming pools.

**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 April 10, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Raymond Andrews, Department of State, 41 State St., 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.

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."

**State University of New York**

**NOTICE OF ADOPTION**

**State Basic Financial Assistance**

**I.D. No.** SUN-42-07-00011-A  
**Filing No.** 30  
**Filing date:** Jan. 15, 2008  
**Effective date:** Jan. 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 602.8(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 355(1)(c) and 6304(1)(b); and L. 2007, ch. 53

**Subject:** State basic financial assistance for operating expenses of community colleges under the program of the State University of New York and the City University of New York.

**Purpose:** To modify existing limitation formula for basic State financial assistance for operating expenses of community colleges of the State University of New York and the City University of New York in order to conform to the provisions of the Education Law and the 2007-2008 budget bill.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SUN-42-07-00011-P, Issue of October 17, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Dona S. Bulluck, State University of New York, Office of University Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: Dona.Bulluck@suny.edu

**Assessment of Public Comment**

The agency received no public comment.

**Department of Taxation and Finance**

**NOTICE OF ADOPTION**

**Packages Containing Fewer than 20 Cigarettes**

**I.D. No.** TAF-48-07-00006-A  
**Filing No.** 31  
**Filing date:** Jan. 15, 2008  
**Effective date:** Jan. 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 74.2 and 82.2 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First and 475 (not subdivided)

**Subject:** Packages containing fewer than 20 cigarettes.

**Purpose:** To delete obsolete references to the 75 cent cigarette tax stamp and packages of 10 cigarettes.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-48-07-00006-P, Issue of November 28, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax\_regulations@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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

**Treatment of Certain Allocations in Partnership Agreements Designed Principally to Avoid or Evade Personal Income Tax**

**I.D. No.** TAF-05-08-00021-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 3-13.5(a)(1); repeal section 117.5; and add section 117.5 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 697(a) and 1096(a)

**Subject:** Treatment of certain allocations in partnership agreements designed principally to avoid or evade personal income tax.

**Purpose:** To update the provisions to conform to Internal Revenue Code section 704(b) and continue consistency with Federal statutes.

**Text of proposed rule:** Section 1. The ending unnumbered paragraph of paragraph (1) of subdivision (a) of section 3-13.5 of the Business Corporation Franchise Tax regulations is amended to read as follows:

The term "corporate group" means the corporate limited partner itself or, if it is a member of an affiliated group, the corporate limited partner and all other members of such affiliated group. The term "affiliated group" shall have the same meaning as provided in section [3-13.2(c)(1)] 3-13.2(d)(1) of this Subpart.

Section 2. Section 117.5 of the Personal Income Tax regulations is REPEALED and a new section 117.5 is added to read as follows:

Section 117.5 New York State personal income tax avoidance or evasion. (Tax Law, section 617(c))

(a) If a partnership agreement provides for an allocation of any item of partnership income, gain, loss or deduction to a partner but the allocation does not have substantial economic effect in accordance with section 704(b) of the Internal Revenue Code, the allocation shall be disregarded for Federal income tax purposes. In such a case, a partner's distributive share of such item is determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances). This treatment and distribution of the item is reflected in each partner's Federal adjusted gross income and therefore in each partner's New York adjusted gross income, even if no New York State personal income tax avoidance or evasion may be involved.

(b) An allocation of an item, amount or activity, even if recognized for Federal income tax purposes, will not be recognized where it has as a principal purpose the avoidance or evasion of New York State personal income tax. Where an allocation is not recognized, the partner's distributive share shall be determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances).

(c) The determination of whether a principal purpose of an allocation of an item, amount or activity is the avoidance or evasion of New York State personal income tax depends on all the surrounding facts and circumstances. Among the relevant circumstances to be considered are the following:

(1) whether the partnership or a partner individually has a business purpose for the allocation;

(2) whether the allocation has substantial economic effect, that is, whether the allocation may actually affect the dollar amount of the partners' shares of the total partnership income or loss independently of the New York State personal income tax consequences;

(3) whether the related items of partnership income, gain, loss or deduction from the same source are subject to the same allocation;

(4) whether the allocation was made without recognition of normal business factors and only after the amount of the allocated item could reasonably be estimated;

(5) the duration of the allocation; and

(6) the overall New York State personal income tax consequences of the allocation.

**Text of proposed rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax\_regulations@tax.state.ny.us

**Data, views or arguments may be submitted to:** William Ryan, Director, Department of Taxation and Finance, Taxpayer Guidance Division, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: tax\_regulations@tax.state.ny.us

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

**Consensus Rule Making Determination**

The Department of Taxation and Finance has determined that no person is likely to object to the adoption of this rule as written because these amendments merely repeal outdated regulatory provisions and add new provisions to update the provisions relating to treatment of an allocation of partnership income which has as a principal purpose the avoidance or evasion of personal income tax to reflect current federal provisions under Internal Revenue Code section 704(b), and continue the consistency of the New York personal income tax rules with federal treatment of certain allocations contained in partnership agreements. The new rule is not substantially different from the existing regulations and the amendments largely reflect current administrative policy regarding existing statutes.

In addition, the update to personal income tax regulations section 117.5 is consistent with language incorporated in amendments to the Business Corporation Franchise Tax regulations concerning corporate partners (20 NYCRR section 3-13.3(a)(3)), and provides uniformity between corporate and individual partners.

The rule also makes a technical correction to section 3-13.5(a)(1) to correct a cross-reference. This editorial change is not controversial in nature.

**Job Impact Statement**

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no adverse impact on jobs or employment opportunities. The amendments update the personal income tax regulations to reflect the current federal provisions of Internal Revenue Code section 704(b), and continue the consistency of New York personal income tax rules with federal treatment of certain allocations contained in partnership agreements that do not have substantial economic effect. The update to the personal income tax regulations was prompted by amendments to section 3-13.3(a)(3) of the Business Corporation Franchise Tax regulations concerning corporate partners, which incorporated the current federal provisions. The rule also provides for uniformity between corporate and individual partners. The new rule is not substantially different from the existing regulations and the amendments largely reflect current administrative policy regarding existing statutes.

The rule also makes a technical correction to section 3-13.5(a)(1) to correct a cross-reference.

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## Office of Temporary and Disability Assistance

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### ERRATUM

A Notice of Proposed Rule Making, I.D. No. TDA-02-08-00002-P, pertaining to Recertification of Public Assistance Recipients, published in the January 9, 2008 issue of the *State Register* contained a misprint in the text of the rule. Two apostrophes were inadvertently left out of two words. The corrected text follows:

Subdivision (b) of section 351.21 is amended to read as follows:

(b) All variable factors of need and eligibility shall be reconsidered, reevaluated and verified at least once in every:

(1) three months, in cases of [Aid to Dependent Children] *Family Assistance (FA)* when eligibility is based on the unemployment of a parent; and

(2) six months, in cases of [Aid to Dependent Children] *FA* when eligibility is not based on the unemployment of a parent and in cases of [Home Relief] *Safety Net Assistance (SNA)*.

Subdivision (c) of section 351.21 is amended to read as follows:

(c) *Unless the social services district has an Office approved alternative recertification requirement, [The social services] the district [shall] must use the State-prescribed form in the recertification process and [shall] must require:*

(1) a face-to-face interview with the recipient for each recertification; and

(2) a face-to-face interview by the end of the third calendar month following the month of acceptance for all new and reopened [ADC] *FA* and [HR] *SNA* cases.

Paragraph (5) of subdivision (f) of section 351.21 is amended to read as follows:

(5) Special categorical requirements. There shall be review of factors of categorical eligibility which are subject to change, such as further impairment, recovery or improvement in the condition of an incapacitated parent, return of an absent parent, termination of eligibility of children because of age or leaving school, and obtaining employment. In review of a [Home Relief] *SNA* case, entitlement to assistance under a federally aided category shall be considered.

Subdivision (a) of section 351.22 is amended to read as follows:

(a) In all programs of public assistance, there shall be face-to-face recertification interviews, and contacts as needed in excess of the minimum required by [department] *Office* regulations shall be made in cases where there is indication of change in need or resources.

Subdivision (b) of section 351.22 is amended to read as follows:

(b) Failure to appear at the face-to-face interviews *or comply with an Office approved alternative recertification requirement*. If a recipient fails to appear *or comply with an Office approved alternative recertification requirement*, without good cause, the social services official [shall] *must* send a 10-day notice of proposed discontinuance of assistance on a form required by the [department] *Office*.

(1) If the recipient does not respond within this 10-day period, the case shall be closed as of the end of the 10-day notice period. Any request for assistance made after a case is closed [shall] *must* be considered a new application.

(2) If the recipient appears for a face-to-face interview during the 10-day notice period, an interview [shall] *must* be arranged. If it is determined that [he] *the recipient* is eligible for continued assistance, the 10-day notice of proposed discontinuance [shall] *must* be nullified.

Paragraph (3) of subdivision (b) of section 351.22 is added to read as follows:

(3) *If the recipient complies with an Office approved alternative recertification requirement during the 10-day notice period, the recipient's eligibility information must be reviewed. If it is determined that the recipient is eligible for continued assistance, the 10-day notice of proposed discontinuance must be nullified.*

Paragraph (1) of subdivision (c) of section 351.22 is amended to read as follows:

(1) Social services districts which use eligibility mailout questionnaires must develop plans outlining the eligibility mailout process which is to be used, consistent with the provisions of paragraph (2) of this subdivision. Such plans must be submitted to and approved by this [department] *Office* before a social services district's mailout process can be implemented. Concurrently with the submission of the plan, or anytime thereafter, a social services district may request, and the [department] *Office* may approve, a waiver of the provisions set forth in subparagraphs (i) and (ii) of paragraph (2) of this subdivision. The [department] *Office* may rescind the approval of any eligibility mailout plan or suspend such process when circumstances make such action appropriate.

Subdivision (f) of section 351.22 is amended to read as follows:

(f) When a social services district verifies ineligibility or a change which results in a decrease in need, it shall immediately initiate action to reduce the grant for the appropriate payment month and to notify the recipient of the proposed change in his assistance grant in accordance with [department] *Office* regulations. When the verified data indicates an increase in need, action shall be taken immediately to increase the grant for the next payment period possible under the existing payment procedure. An appropriate entry shall be made in the case record of any such change in grant, and the basis for it. Such reduction or increase in grant involves a reauthorization for a continuing grant in a different amount, while a discontinued grant may involve the following action:

The Department of State apologizes for any confusion this may have caused.

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## Department of Transportation

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### NOTICE OF WITHDRAWAL

#### Preferred Vehicle Configuration Definition and Type 9 Permit Requirements

**I.D. No.** TRN-48-07-00001-W

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

**Action taken:** Notice of proposed rule making, I.D. No. TRN-48-07-00001-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on November 28, 2007.

**Subject:** Preferred vehicle configuration definition and type 9 permit requirements.

**Reason(s) for withdrawal of the proposed rule:** Objection received to the proposed consensus rule.