

RULE MAKING ACTIVITIES

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

- AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice.
- E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

NYS DNA Databank

I.D. No. CJS-39-08-00006-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 repeal section 6192.1(v) and amend section 6192.5 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(17) and 995-c(1)

Subject: NYS DNA Databank.

Purpose: Delete reference to an obsolete technology policy.

Text of proposed rule: 1. Subdivision (v) of section 6192.1 of Title 9 NYCRR is REPEALED.

2. Section 6192.5 of Title 9 NYCRR is amended to read as follows: 6192.5 Security features preventing unauthorized access. The server on which the DNA databank resides shall be located in a secure area to prevent unauthorized physical access in accordance with CODIS requirements. All forensic DNA laboratories which use or contribute data to the DNA databank shall choose CODIS compatible software and hardware designs which prevent unauthorized access to DNA records. Each participating laboratory must have a written information systems plan which specifies the architecture of the laboratory's computer hardware and the structure of security comprising the access control component of the computer software employed. The information systems plan must demonstrate that an electronic audit trail is maintained for activi-

ties related to the entering or editing of DNA records. In addition, the information systems plan shall conform with all [appropriate portions of Technology Policy 97-1] *applicable information security rules, regulations, and policies*. The division, in consultation with forensic DNA laboratory directors, shall develop model documents to assist forensic DNA laboratories in complying with the requirements of this Part. A final information systems plan shall be submitted by the laboratory for review and approval by the division prior to the laboratory gaining access as a participant in the DNA databank. The division shall determine the acceptability of each laboratory information systems plan. The NYS standards must be designed and applied in such a way as to allow compliant participating forensic DNA laboratories to participate in the Federal CODIS program.

Text of proposed rule and any required statements and analyses may be obtained from: Mark Bonacquist, Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, (518) 457-8413.

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

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

Consensus Rule Making Determination

Technology Policy #97-1 was archived by the Office for Technology effective July 6, 2004 and is no longer valid. This proposal deletes references to this obsolete policy. Given that the proposal merely deletes regulatory provisions that are no longer applicable, the Division expects that no person is likely to object to the adoption of this rule as written.

Job Impact Statement

Technology Policy #97-1 was archived by the Office for Technology effective July 6, 2004 and is no longer valid. This proposal deletes references to this obsolete policy. As such, it is apparent from the nature and purpose of the proposal that it will have no impact on jobs and employment opportunities.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Firewood Restrictions to Protect Forests from Invasive Species

I.D. No. ENV-39-08-00002-E

Filing No. 854

Filing Date: 2008-09-05

Effective Date: 2008-09-05

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

Action taken: Addition of section 192.5 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m), 9-0105(1), (3) and 9-1303

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

Specific reasons underlying the finding of necessity: Protecting New York State's forests from invasive insects and diseases carried on firewood and introduced into non-infested forests and urban communities killing millions of trees, degrading water quality and ecosystems, and endanger-

ing public safety from diseased and hazardous trees that are weakened and liable to fall down. The need for emergency regulations is heightened by the need to prevent the transportation of potentially pest-infested firewood by campers during the height of camping season in New York State, commencing Memorial Day weekend.

Subject: Firewood restrictions to protect forests from invasive species.

Purpose: To prohibit importation of untreated firewood into New York State and restrict transport of untreated firewood within the State.

Text of emergency rule: A new section 192.5 is added to 6 NYCRR Part 192 to read as follows:

§ 192.5 Firewood Restrictions to Protect Forests from Invasive Species.

(a) Definitions. For the purposes of this section, these terms shall be defined as follows:

(1) "Department" shall mean the New York State Department of Environmental Conservation.

(2) "Dealer" shall mean any person or business, other than a firewood producer, that sells firewood.

(3) "Firewood" shall mean any kindling, logs, chunkwood, boards, timbers or other wood of any tree species cut and split, or not split, into a form and size appropriate for use as fuel.

(4) "Firewood producer" shall mean any person or business who processes kindling, logs, chunkwood, boards, timbers or other wood of any tree species into firewood for sale.

(5) "New York-Approved Treated Firewood / Pest-Free" shall mean a labeling standard for firewood that may be used by a firewood producer who complies with the provisions of subdivision (d) of this section.

(6) "New York-Sourced Firewood" shall mean a labeling standard for firewood used by a New York firewood producer who complies with the provisions of subdivision (e) of this section.

(7) "Person" shall mean an individual, organization, corporation or partnership, other than the department, public authority, county, town, village, city, municipal agency or public corporation.

(8) "Phytosanitary certificate" or "plant health certificate" shall mean an official document issued by a state or country from which firewood is being exported which certifies that the firewood meets the phytosanitary regulations of New York State.

(9) "Self-issued Certificate of Source" shall mean certification, on a form prescribed by the department, that is signed by a person who desires to move firewood, for personal use, from one location to another, within New York in compliance with the provisions of subdivision (f) of this section.

(10) "Source" shall mean the village, town or city, which the firewood producer declares as the source of the firewood. All trees or logs that are processed into firewood that is declared to be from the named source shall have been grown within 50 miles of the named source, prior to being obtained by the firewood producer.

(11) "Untreated Firewood" shall mean any firewood that has not been treated in accordance with the provisions of subdivision (d) of this section.

(12) "50 miles" shall mean a 50 mile linear distance determined by using the scale-bar on a New York State road map, atlas or gazetteer, from the point identified as the stated source of the firewood in question.

(b) Prohibition on Transport of Untreated Firewood into New York State.

No person shall transport, by any means, Untreated Firewood into New York State, for sale or use within the State from any location outside the State.

(c) Restrictions on Transport, Sale and/or Possession of Untreated Firewood within New York State.

(1) No person shall transport, sell or possess Untreated Firewood within the State unless its source is identified according to the criteria set forth in either subdivision (e) or (f) of this section.

(2) No person shall move Untreated Firewood produced, from trees that are grown in New York State, more than 50 miles from the source of the firewood.

(3) Dealers of New York-Sourced Firewood shall provide copies of the firewood source documentation, provided by the firewood producer, to all purchasers.

(4) Firewood producers shall maintain records of log or wood purchases or procurement to verify the sources of their firewood. Such records shall be made available for inspection by the department upon request.

(d) Standards for Treatment and Labeling.

(1) Firewood may be labeled "New York-Approved Treated Firewood / Pest Free" if accompanied by a Firewood producer's certification that it was heat treated to achieve a minimum wood core temperature of 71°C for a minimum of 75 minutes. Such treatment may employ kiln-drying or other treatments approved by the department that achieve this specification through use of steam, hot water, dry heat or other methods.

(2) A Firewood producer's certification shall indicate the producer's name, legal address and the village, town or city of the business on a label, bill of sale or lading, purchase receipt or invoice accompanying such firewood.

(3) Producers of "New York-Approved Treated Firewood / Pest-Free" firewood shall maintain, for at least one year from the date of treatment, records that document the treatment method and the volume of firewood treated, and shall also allow department officials to inspect such records and the facilities used to treat firewood upon request.

(4) Phytosanitary certificates from an out-of-state firewood producer's State Department of Agriculture or the United States Department of Agriculture Animal Plant Health Inspection Service (USDA APHIS) may be used to verify the treatment method and volumes of treated firewood that is produced out-of-state.

(e) "New York-Sourced Firewood" requirements.

(1) The "New York-Sourced Firewood" designation may be applied only to Untreated Firewood that has its source wholly within New York State, and is transported not more than 50 miles from the firewood producer's declared source of the firewood.

(2) Dealers of "New York-Sourced Firewood" shall provide to customers the name of the producer of the firewood, the producer's legal address and the source of the firewood, as provided by the firewood producer, on a label, bill of sale or lading, purchase receipt or invoice, attached to or accompanying such firewood they sell.

(f) Self-issued Certificate of Source.

(1) Persons who cut and transport Untreated Firewood for personal use must complete and possess a Self-Issued Certificate of Source from the department in accordance with this section.

(2) A Self-Issued Certificate of Source must specify the source of the firewood being cut and transported.

(3) Self-Issued Certificate of Source forms shall be available on the department's website, www.dec.ny.gov, and at the department's regional offices.

(4) No person who cuts and/or transports firewood for personal use shall move such firewood more than 50 miles from its source unless it is treated in accordance with subdivision (d) of this section.

(5) Persons who cut firewood on their own property, for their own use on that same property, are exempt from the requirements of 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 December 3, 2008.

Text of rule and any required statements and analyses may be obtained from: Bruce Williamson, Chief, Bureau of Private Land Services, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4253, (518) 402-9425, email: firewood@gw.dec.state.ny.us

Summary of Regulatory Impact Statement

Statutory authority:

Environmental Conservation Law (ECL) section 1-0101 (3) (b) directs the Department of Environmental Conservation ("Department") to guarantee "that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 1-0101 (3) (d) directs the Department to preserve the unique qualities of the Adirondack Forest Preserve. ECL section 3-0301 (1) (b) gives the Department the responsibility to "promote and coordinate management of... land resources to assure their protection... in promulgating any rule or regulation." ECL section 3-0301 (1) (d) authorizes the Department to "provide for the care, custody and control" of forest preserve lands; ECL section 9-0105(1) authorizes the Department to "exercise care, custody and control of the several preserves, parks and other state lands described" in ECL Article 9; ECL section 3-0301 (2) (m) authorizes the Department to adopt rules and regulations "as may be necessary, convenient or desirable to effectuate the purposes of the ECL" and ECL section 9-0105 (3) authorizes DEC to "make necessary rules and regulations to secure proper enforcement of ECL Article 9."

ECL section 9-1303 grants the following authority for the purpose of control and preventing the spread of forest insects and forest tree diseases: to conduct necessary investigations to discover better methods of control or prevention of the spread of forest insects and forest tree diseases; to enter upon any lands for the purpose of determining if such property is infested with forest insects or forest tree diseases; to establish quarantine districts in the State; to prohibit the movement of materials which may be harboring forest insects or forest tree diseases in any of their different forms; to poison forest areas in or near sections infested by insect pests or forest tree diseases; to establish zones for preventing the spread of forest insect and disease pests; and to make rules and regulations to prevent the spread of or to control forest insects and forest tree diseases, their pupae, eggs and caterpillars, and plants or trees infested by them.

Legislative objectives:

The proposal directly supports the legislative intent underlying the Department's authority to protect forests, by regulating the importation and movement of a wood product that has been demonstrated to be a primary carrier for numerous destructive, invasive, and exotic forest pests. The United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) and State agencies have identified a connection between the movement of infested firewood with new infestations and expansions of infested areas for Emerald ash borer in Michigan, Illinois, Indiana, and West Virginia. In the absence of a confirmed, specific pest infestation, the federal government does not have the authority to prevent the movement of potentially-infested wood materials. This is akin to closing the barn door after the horses have left. The New York State Legislature clearly intended the Department to be pro-active in protecting our forest resources, which is the intent of this regulation.

Needs and benefits:

Firewood has the potential to spread many destructive, invasive, exotic pests, both known and, as yet, unknown. Confirmed threats to New York State include: Emerald ash borer, *Sirex noctilio* (European wood wasp), Asian long-horned beetle, European gypsy moth, Asian gypsy moth, and a number of other wood boring or defoliating insects, plus decay and wood-stain fungi as well as the pathogens that cause Dutch elm disease, oak wilt, and sudden oak death. Firewood product is often stored and unused for long periods of time, and is handled by persons generally not trained to identify signs of invasive pests. Once established in new areas, invasive forest pests can quickly kill trees in forests, parks, communities and campgrounds. For example, USDA APHIS estimates that over 30 million ash trees have already been killed by the Emerald ash borer in Michigan with additional millions of trees dead or dying in the Indiana, Illinois, Ohio, Pennsylvania, Maryland, West Virginia and Ontario, Canada. In urban settings, this presents liability concerns and may require significant expenditures (in the millions of dollars) for removal of dead trees. For example, it will cost the City of Ann Arbor, Michigan (population 99,000) over \$4.3 million dollars to remove over 10,000 dead and dying ash trees (7,500 street trees alone) that pose safety hazards to residents and property, and expose the city to potential liability costs.

Ecological costs could include the loss of entire tree species. There are an estimated 750 million ash trees in New York State (excluding the Adirondack and Catskill Forest Preserves) and ash constitutes 7% of all trees in our forests.

Similarly, the Asian longhorned beetle, an invasive insect has already been found in New York City and on Long Island, and could wreak havoc across upstate New York forests and communities because most maple species are among its preferred hosts.

The proposed rule is needed to reduce the risk of introduction and spread of invasive insects and diseases of trees by preventing untreated firewood from entering New York State and restricting the movement, sale and possession, within the State, of untreated firewood that originates in New York State.

The Department intends to hold a series of public meetings around the State to inform interested and affected stakeholders of the need for firewood regulations. These meetings will include information about how producers, dealers and consumers of firewood will be affected, along with the actions necessary for their compliance with these regulations. Department staff has and will continue to discuss this regulation with individual stakeholders. In addition, the development of this regulation has been based in part on firewood surveys last summer at DEC and private campgrounds. Also, the Department and the Office of Parks, Recreation and Historic Preservation (OPRHP) have developed "Don't Move Firewood" information on their public websites. As part of its outreach strategy, the Department developed communication materials (bookmarks, fact sheets, and signs) that were distributed statewide to numerous outlets such as the New York State Thruway rest stops, the New York State Fair, county fairs, and private campground associations.

Costs:

The proposed regulation will impose additional costs to out-of-state producers, or large scale, in-state producers shipping firewood farther than 50 miles. The cost to comply with treatment requirements for firewood may be passed on to consumers. Equipment investment of up to \$250,000 may be required for a business to acquire all the necessary equipment from scratch, although most already have much of the necessary equipment, or could acquire second-hand equipment. Other compliance requirements that would increase costs for producers include increased documentation and record-keeping on firewood, monitoring equipment and personnel time to comply with the product labeling standard. Labeling, if not already done, could be a positive investment, as it would increase marketability of the product to consumers.

The regulation may also increase markets and demand for treated or local, "New York-Sourced" firewood. Ultimately, the Department anticipates no change in the overall amount of firewood consumed, but a redistribution of the firewood supply.

The proposed regulation would increase costs and demands on Department staff due to the following:

- increasing public outreach;
- increasing communication with campers and other firewood users;
- increasing outreach to firewood producers and vendors;
- supplying firewood at campgrounds;
- enforcing this regulation; and
- disposal of confiscated material.

Many of these same costs would also be incurred by OPRHP, and to a lesser extent, New York State Department of Agriculture and Markets (NYSDAM).

Local government mandates:

The proposed regulation does not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district or other special district.

Paperwork:

Producers would be required to document treatment of firewood, or document sources of firewood or logs converted to firewood. Firewood dealers, both wholesale and retail, would be required to provide documentation of treatment or local source of firewood to customers, which could be accomplished by labeling or on an invoice or receipt.

Duplication:

Some firewood producers may also receive certification from USDA APHIS to move firewood into or out of federally quarantined areas for certain forest pests. APHIS certification may require heat treatment of the product consistent with the proposed State regulation and would be accepted as meeting the State's requirements.

Alternatives:

The Department could continue its public awareness campaign without implementing regulations. This alternative would prevent enforcement against inappropriate firewood movement, and compromise the Department's ability to responsibly manage State owned lands.

Or the Department could prohibit out-of-state firewood, or "non-local wood" from being brought into State campgrounds, or onto public lands. Some other States, localities, or federal agency units (certain National Forests, managed by the U.S. Forest Service, or National Parks, managed by the National Park Service) have taken this limited approach. However, this approach does not adequately protect all of the State's forests, since our State campgrounds and lands only comprise a partial percentage of the State forests.

Another alternative could utilize voluntary agreements between the Department and the firewood producer/vendor for "New York-Sourced wood", and focus on the point of sale. This differs from the proposed regulation because it fails to address the subsequent movement or possession of firewood by the buyer. If the subsequent movement and possession of untreated firewood is not regulated, there would be no protection of our forest resources from the unintentional and unknowing human-assisted movement of forest pests within the State. Also, it would not address the significant risk presented by the movement of wood into New York State from other States. The Department is equally concerned about the movement of pests harbored on firewood from Long Island to the Catskills or Buffalo to the Adirondacks.

Federal standards:

USDA APHIS' authority to impose quarantine restrictions concerning treatment and movement of firewood (a commodity) are only imposed in direct conjunction with a specific pest species regulatory action. The Department is being proactive and recognizes that a wide variety of invasive, exotic forest pests and diseases may be transported to new areas on many different species of wood used as firewood.

The heat treating standard the Department is requiring for imported firewood is consistent with USDA APHIS Emerald ash borer quarantine standards and international trade standards for firewood and solid wood packaging materials.

Compliance schedule:

Regulated parties can comply immediately with the regulation by altering their distribution patterns for firewood. To be in compliance, in state producers, dealers and consumers of firewood only need to restrict their sourcing, distribution and movement of firewood to refocus on readily available local markets. In most cases, this will not entail any change in current practices, since most firewood is already obtained, processed and sold locally. Firewood is a low value product, and the high and increasing cost of gas and diesel fuel make long distance commercial movement of this product uneconomical.

Many out-of-state producers already heat-treat their firewood as a marketing strategy, and have most of the necessary facilities and equipment to meet New York State's import requirements. Minimal time would be required for them to comply with the additional monitoring requirements, and time and temperature requirement for the treating process. The Department is not proposing to recall existing dealer stocks of firewood from the marketplace and anticipate that there will be a period of time

(perhaps 1-2 months, or more) when some firewood will continue to be sold that does not meet the new labeling and treating standards. Our intention is to focus on awareness and education during this initial period, rather than strict enforcement.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will impose additional costs to out-of-state producers, who would be required to heat-treat firewood which they plan to export to New York State, and those in-state firewood producers who choose to distribute their firewood beyond 50 miles and must therefore heat-treat it. Equipment investment of up to \$250,000 may be required for a business looking to acquire new heat-treatment equipment, although many large producers already own much of the necessary equipment (kilns, controls, racks, etc.) or could acquire used equipment. Other compliance requirements that would increase costs to heat-treated wood producers that may be passed on to consumers include increased documentation and record-keeping on firewood, monitoring equipment and personnel time to maintain records and compliance with the product labeling standard, although compliance with labeling requirements would be minimal if compliance information is added to an existing label or invoice. Source labeling could be an added expense for all firewood producers, in-state and out-of-state, if not already being done. Labeling, however, could be a positive investment, as it could increase marketability of the product to consumers and serve as advertising.

Regulation may also increase markets and demand for treated or "New York-Sourced Firewood", as users change their behavior patterns in firewood use in response to the Department's increased outreach education promoting the new regulations and the "don't move firewood" and "use local firewood" messages. Ultimately, the Department anticipates no changes in overall amount of firewood use, but, rather, a re-distribution or change in the pattern of consumption. The Department expects that as a result of the rulemaking, firewood produced in a given area, will be bought, sold and used within that area. Long distance movement of untreated firewood will be discontinued. Due to the ready availability of firewood in most parts of the state where firewood is used, this should have minimal impact on the consumers or producers.

Many firewood dealers are "small businesses." This rule does not make special provisions for "small businesses," because pest infestations are unrelated to business size. However, this rule should have little impact on their sales because most of their firewood is sold locally and locally sold firewood need not be treated before sale.

2. Compliance requirements: This rule will impact long distance operators the most. These operators will be required to undertake a wide ranging number of acts to gain producer certification in order to comply with the proposed regulation. These acts will require new reporting and recordkeeping activities (where none or very little is currently required), as well as building new infrastructure and the purchasing of new equipment. In addition, this segment of the industry will be required to comply and coordinate with state regulators on a regular basis where no such contact previously existed.

Local operators will be required to initiate new, but relatively minor recordkeeping activities that include product origin-labeling or other types of documentation that indicate firewood is "New York"-sourced.

3. Professional services: Long distance operators will likely require professional services in order to build new infrastructure and to purchase and install a heat source (e.g. boiler, direct heat) and temperature/time monitoring equipment.

4. Compliance costs: Long distance operators will face substantial initial capital costs in order to continue transporting firewood over 50 miles. Start-up costs if new equipment must be purchased would approximate 250,000 dollars. In addition, other costs will likely be incurred initially due to a change in normal business activities.

It is not possible for the Department to fairly and accurately estimate the annual cost of continuing compliance for long distance operators since little information is available regarding time and energy consumption needs for treating firewood according to the time/temperature requirement stated in the rule. Annual costs will vary for long distance operators depending on many factors, including scale of operation and type of fuel available for producing process heat.

Both initial and continuing compliance costs will likely vary between long distance operators since some operators will have some of the infrastructure required for heat-treatment already in place. Others will have the capacity to install required equipment for less cost than the estimate due to their ability to fabricate certain types of equipment "in-house" rather than purchasing from an outside vendor, or the purchase of used equipment.

Finally, it is anticipated that some long distance operators would be able to recoup an unknown portion of additional annual operating costs by raising prices to the consumer.

Local operators will face little up front capital cost and negligible costs in order to maintain compliance on an annual basis. Costs to maintain

compliance will be mostly in the form of additional administrative and record keeping time to the operator.

5. Economic and technological feasibility: Compliance is technologically feasible for both long distance and local operators, however, it is less likely that long distance operators will be willing or able to comply with the regulation due to both their relatively small scale of business and economic constraints of compliance costs noted above. Although one long distance operator currently sells firewood that meets the proposed compliance requirement, and two sell "kiln-dried" firewood (partially meeting the compliance requirement), these operations are unique in that they sell "retail" firewood on a large scale basis and command a premium price since it is sold in bagged or wrapped units of one cubic foot or less. These operations contrast with most long distance operators who generally deliver unwrapped green firewood "in bulk" (between 40 and 1,000 cubic feet).

It is not anticipated that the proposed rule will have a net negative impact on the overall level of firewood trade in New York. However, it is anticipated that it will have the effect of shifting the firewood trade between the existing pool of long distance operators so that more firewood is sold locally.

6. Minimizing adverse impact: The proposed compliance requirement minimizes adverse impact to the potentially affected segments of the firewood industry. The heat-treatment requirements proposed for long distance operators and the labeling requirement proposed for local operators are the only feasible methods known to prevent the accidental human-caused spread of invasive forest pests. The only other option for preventing the spread of invasives by firewood would be banning the sale of firewood, which would be far more onerous on the firewood industry.

7. Small business and local government participation: Department staff have had numerous conversations with firewood related businesses and individuals related to the proposed regulation. These conversations included some long distance operators that either currently heat-treat firewood to the required standard as stated in the proposal or to a lesser standard. No alternative methods have been discovered that would be less adverse to small businesses and at the same time meet the objective of the proposal. In addition, the Department plans to hold a series of public information meetings at various locations around the state. An announcement will appear in the New York Timber Producers Association Quarterly Newsletter as well as in local newspapers, and on the Department's website, regarding a schedule for these meetings.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposal is applicable Statewide and covers all rural and non-rural areas equally.

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

Producers of firewood across the state would be required to document treatment of firewood or document sources of firewood or logs converted to firewood. The firewood producer would need to maintain and make available for inspection documentation of the treatment method and sources of firewood upon request of an inspecting official, but would not be required to file any documentation with the Department of Environmental Conservation.

Wholesale and retail firewood dealers would be required to provide to their customers documentation regarding treatment or local source(s) of firewood, which can be accomplished by labeling the firewood or by providing this information on an invoice or receipt.

No professional services are anticipated to be necessary for any firewood producer or dealer to comply with the regulation.

3. Costs:

The proposed regulation will impose additional costs to out-of-state producers who export firewood to New York State because firewood would have to be heat treated. In state producers who choose to distribute their firewood beyond 50 miles would also incur additional costs due to the heat-treat requirement. This cost will likely be passed on to consumers. Equipment investment of up to \$250,000 may be required for a business acquiring new heat-treatment equipment, although many large producers already have much of the necessary equipment (e.g., kilns, controls, and racks) or could acquire used equipment. Other compliance requirements that would increase costs to heat-treated wood producers that may be passed on to consumers include increased documentation and record keeping on firewood, monitoring equipment and personnel time to maintain records that comply with the product labeling standard. Compliance with the product labeling standard would be minimal if the compliance information is added to an existing label or invoice. Source labeling could be an added expense for all firewood producers, in state and out-of-state, if it is not already being done. Labeling, however, could be a positive investment, as it could increase marketability of the product to consumers and serve as advertising.

The regulation may increase markets and demand for treated or "New

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York-Sourced Firewood". Users change their behavior patterns relating to firewood use in response to the Department's outreach education promoting the new regulations and "don't move firewood" and "use local firewood" messages. Ultimately, the Department anticipates no changes in the overall amount of firewood use, but, rather, a re-distribution, or change in the pattern of consumption. It is expected that long distance movement of firewood will be dramatically reduced, and firewood produced in a given area will be bought, sold and used primarily within that area. Due to the ready availability of firewood in most parts of the state where significant quantities of firewood are used, this should have minimal impact on the availability of firewood for consumers or the businesses of producers.

The regulation would increase costs and demands on Department staff due to the following:

- Increased public outreach,
- Increased communication with campers and other firewood users,
- Increased outreach to firewood producers and vendors,
- Enforcement of the regulation, and
- Disposal of confiscated material.

Many of these costs would also be incurred by the Office of Parks, Recreation and Historic Preservation and, to a lesser extent, the New York State Department of Agriculture and Markets.

4. Minimizing adverse impact:

The Department has minimized unnecessary adverse impacts on New York State jobs by creating a mechanism for the continued production and sale of firewood in the State. In some areas of the State, including rural areas, this may increase employment or economic opportunities because there will be a greater demand from consumers for locally-sourced firewood. Restricting the importation of untreated firewood into the state may also increase demand for locally-sourced firewood and the market opportunities for New York State based producers and retailers of this commodity.

5. Rural area participation:

The Department intends to hold a series of public information meetings around the State to inform the public of the proposed regulations, the need for them, how they will affect producers, dealers and consumers of firewood, and how all can comply with the regulation.

Job Impact Statement

1. Nature of impact:

The regulation is not expected to have any significant impact on job numbers. Most people involved in producing and selling firewood do so as a sideline or part-time endeavor, or as a secondary aspect of another business (e.g., an arborist whose crew cuts logs and limbs from tree care work into firewood for later sale). Much of the firewood business and "employment" is typically "underground", and not documented in Labor statistic or with IRS. The regulations should prompt only a shift in the distribution, sales and use patterns of firewood, encouraging local use by discouraging the long-distance movement of wood. The total count of firewood produced and used should not be affected. For larger business that choose to heat-treat firewood for broader distribution, there may be an increase in jobs related to the heat-treating requirements.

2. Categories and numbers affected:

The jobs affected would primarily be laborer types, requiring minimal skills and training, related to cutting and splitting log length wood into firewood pieces and handling, treating, packaging and delivering the product. No data is available on the number of people employed in producing firewood, as this is not a well-documented workforce. It is highly seasonal, and intermittent in nature. The "workforce" may, at times, include arborists, tree care and landscape contractors, nurseries and garden centers, loggers, farmers, and possibly anyone who owns a chainsaw and pick-up truck. Due to the nature of the product and market, there are few large-scale producers and dealers.

3. Regions of adverse impact:

The regulation applies equally across the State. There are no regions where the rule would have a disproportionate adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact:

The Agency has minimized unnecessary adverse impacts on New York jobs by creating a mechanism for the continued local production and sale of firewood. In some areas of the State, this may increase job or economic opportunities since there will be a greater demand from consumers for locally-sourced firewood. Restricting the importation of untreated firewood into the state may also increase demand for locally-sourced firewood and the market opportunities for producers and retailers of this commodity.

5. Self-employment opportunities:

Much of the firewood market is supplied through self-employment (and much of it is undocumented). As previously stated, it is anticipated there will be more opportunities for individuals to enter the firewood business, both as producers and dealers, in their local areas as customers seek to find more local sources of firewood supply.

Migratory Game Bird Hunting Regulations for the 2008-2009 Season

I.D. No. ENV-39-08-00004-EP

Filing No. 855

Filing Date: 2008-09-08

Effective Date: 2008-09-08

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

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

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

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

Specific reasons underlying the finding of necessity: The Department of Environmental Conservation (Department) is adopting this rule by emergency rule making to conform state migratory game bird hunting regulations with the federal regulations for the 2008-2009 season and flyway guidelines for resource conservation. Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. Environmental Conservation Law section 11-0307 requires that the Department adjust state migratory game bird regulations to maintain consistency with federal regulations. The final federal regulations are adopted in late summer, thereby necessitating emergency adoption of state regulations in order to have them in place for the migratory game bird seasons that begin in September.

The promulgation of this regulation on an emergency basis is necessary to preserve the general welfare by implementing New York State's 2008-2009 waterfowl hunting regulations. Our regulations need to be amended to be in compliance with ECL section 11-0307, which requires state regulations to conform with federal regulations. In addition, law enforcement problems, public dissatisfaction, and adverse economic impacts would ensue if migratory game bird hunting regulations were not adjusted annually to conform with federal regulations and hunter preferences.

Subject: Migratory game bird hunting regulations for the 2008-2009 season.

Purpose: To change migratory game bird hunting regulations to conform to federal regulations.

Text of emergency/proposed rule: Title 6 of NYCRR, Section 2.30, entitled "Migratory game birds," is amended as follows:

Amend existing paragraph 2.30 (b)(2) to read:

(2) with a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells, except that this prohibition shall not apply to the taking of crows or to the taking of snow geese or Ross' geese during the special snow goose harvest program described in subparagraph 2.30 (e)(2)(vii);

Amend existing paragraph 2.30 (b)(7) to read:

(7) by the use or aid of recorded or electrically amplified bird calls or sounds, or recorded or electrically amplified imitations of bird calls or sounds, except that this prohibition shall not apply to the taking of crows or to the taking of snow geese or Ross' geese during the special snow goose harvest program described in subparagraph 2.30 (e)(2)(vii);

Amend existing subparagraphs 2.30(d)(6)(v) and (vii) to read:

(v) The West Central Goose Hunting Area consists of the following WMUs: 7A, 7H, 8A, 8C, 8F, 8H, 8J, 8K, [8M, 8N, 8P,] 8R, and 8S. The West Central Goose Hunting Area also includes: that part of WMU 6K lying west of a continuous line extending along the north shore of the Salmon River from US Route 11 to Interstate Route 81, then south along Route 81 to Route 49; those parts of WMUs 7F and 7J lying west of Interstate Route 81; and that part of WMU 8G lying north and east of a continuous line extending along the New York State Thruway from Crittenden Murrays Corners Road (near the Erie Genesee County line) to Exit 48 in Batavia, then south along Route 98 to Route 20.

(vii) The South Goose Hunting Area consists of the following WMUs: 3A, 3C, 3H, 3K, 3N, 3P, 3R, 4G, 4H, 4O, 4P, 4R, 4W, 4X, 7R, 7S, 8M, 8N, 8P, 8T, 8W, 8X, 8Y, 9A, 9C, 9F, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X, and 9Y. The South Goose Hunting Area also includes: that part of WMU 8G lying south and west of a continuous line

extending along the New York State Thruway from Crittenden Murrays Corners Road (near the Erie Genesee County line) to Exit 48 in Batavia, then south along State Route 98 to State Route 20; that part of WMU 3G lying in Putnam County; and that part of WMU 3S lying north of Interstate Route 95.

Repeal subparagraphs 2.30(d)(6)(viii) through (x) and adopt new subparagraphs (viii) through (xi) to read:

(viii) *The Western Long Island Goose Hunting Area is that area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of the Sunken Meadow State Parkway; then south on the Sunken Meadow Parkway to the Sagtikos State Parkway; then south on the Sagtikos Parkway to the Robert Moses State Parkway; then south on the Robert Moses Parkway to its southernmost end; then due south to international waters.*

(ix) *The Central Long Island Goose Hunting Area is that area of Suffolk County lying between the Western and Eastern Long Island Goose Hunting Areas, as defined above and below.*

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

(xi) *The Special Late Canada Goose Hunting Area is that portion of the Central Long Island Goose Hunting Area lying north of State Route 25A and west of a continuous line extending northward from State Route 25A along Randall Road (near Shoreham) to North Country Road, then east to Sound Road and then north to Long Island Sound and then due north to the New York Connecticut boundary.*

Amend clauses 2.30(e)(1)(i)(a) and (b) to read:

(i) ducks, coot and mergansers

- (a) Western Zone Open for [45] 44 consecutive days beginning on the [Tuesday after the third] fourth Saturday in October, and for [15] 16 consecutive days beginning on the last Saturday in December.
- (b) Northeastern Zone Open for [9] 10 consecutive days beginning on the first Saturday in October, and for [51] 50 consecutive days beginning on the [Wednesday following the third] fourth Saturday in October.

Amend subparagraphs 2.30(e)(1)(ii) through (iv) to read:

(ii) Canada geese, cackling geese, and white-fronted geese

- (a) Lake Champlain Goose Hunting Area Open for 45 consecutive days beginning on [the first Saturday after October 19] October 20.
- (b) Northeast Goose Hunting Area Open for 45 consecutive days beginning on the fourth Saturday in October.
- (c) West Central Goose Hunting Area Open for [30] 29 consecutive days beginning on the [first] fourth Saturday in [November] October, and for [15] 16 consecutive days beginning on the last Saturday in December [26].
- (d) East Central Goose Hunting Area Open for [30] 21 consecutive days beginning on the [first] fourth Saturday in [November] October, and for [15] 24 consecutive days beginning on the [last] fourth Saturday in [December] November.
- (e) Hudson Valley Goose Hunting Area Open for [21] 18 consecutive days beginning on the fourth Saturday in October, and for [24] 27 consecutive days beginning on the [third] first Saturday in December.

- (f) South Goose Hunting Area Open for [51] 54 consecutive days beginning on the fourth Saturday in October, and for [19] 16 consecutive days beginning on the last Saturday in December [26], and from March 1 through March 10.

- (g) Western Long Island Goose Hunting Area Open [the same 60 days as the regular duck season in the Long Island Zone, and for 10 consecutive days immediately following the regular duck season] for 76 consecutive days beginning on Thanksgiving Day (observed).

- (h) Central Long Island Goose Hunting Area Open for 70 consecutive days beginning on Thanksgiving Day (observed).

- [h] (i) Eastern Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone.

(iii) snow geese and Ross' geese

- (a) Western Zone Open for [34] 54 consecutive days beginning on the [first] fourth Saturday in [November] October, for 16 consecutive days beginning on the last Saturday in December, and for [73] 37 consecutive days ending on March 10.

- (b) Northeastern Zone Open for [66] 92 consecutive days beginning on [the first Saturday in] October 1, and for [41] 15 consecutive days ending on March 10.

- (c) Lake Champlain Zone Open for [81] 83 consecutive days beginning on the Wednesday after the first Saturday in October.

- (d) Southeastern Zone Open for 85 consecutive days beginning on the fourth Saturday in October, and for 22 days ending on March 10.

- (e) Long Island Zone Open for 107 consecutive days [beginning on November 1] ending on February 10.

(iv) brant

- (a) Western Zone Open for [50] 60 consecutive days beginning on the first Saturday in October [1].

- (b) Northeastern Zone Open for [50] 60 consecutive days beginning on the first day of the regular duck season in the Northeastern Zone.

- (c) Lake Champlain Zone Open for [50] 60 consecutive days beginning on the first day of the regular duck season in the Lake Champlain Zone.

- (d) Southeastern Zone Open for [the first 50 days of the regular duck season in the Southeastern Zone] 16 consecutive days beginning on the third Saturday in October and for 44 consecutive days beginning on the second Saturday in November.

- (e) Long Island Zone Open [for the last 50] the same 60 days [of] as the regular duck season in the Long Island Zone.

Amend subparagraph 2.30(e)(2)(ii) to read:

(ii) Hunters may take Canada geese in all Canada Goose Hunting Areas from September 1 through September 25, except:

(a) in the Lake Champlain Goose Hunting Area where hunters may take Canada geese from the day after Labor Day through September 25 only; and

(b) in the Western Long Island, Central Long Island, and Eastern Long Island Hunting Areas, where hunters may take Canada geese from the [day] Saturday after Labor Day through September 30.

Amend subparagraph 2.30(e)(2)(iii) to read:

(iii) Hunters may take Canada geese in the Special Late Canada Goose Hunting Area from February [7th] 5th through February [14th] 10th.

Amend clauses 2.30(e)(2)(v)(b) and (d) to read:

(v) Youth Waterfowl Hunt Days are as follows:

- (b) Northeastern Zone Saturday and Sunday of the [fourth] *third* full weekend in September.
- (d) Southeastern Zone Saturday and Sunday of the [fourth] *third* full weekend in September.

Adopt new subparagraph 2.30(e)(2)(vi) to read:

(vi) Any person who has migratory game bird hunting privileges in New York, including a valid Harvest Information Program confirmation number, may take snow geese and Ross' geese in the Western, Northeastern, Southeastern, and Lake Champlain Zones from March 11 through April 15 annually, in addition to regular seasons specified in paragraph 2.30 (e)(1) above. All migratory game bird hunting regulations and requirements shall apply to the taking of snow geese or Ross' geese during this period, except that use of recorded or electrically amplified calls or sounds is allowed and use of shotguns capable of holding more than three shells is allowed. Any person who participates in the special snow goose harvest program must provide accurate and timely information on their activity and harvest upon request from the Department.

Amend subparagraph 2.30(g)(3)(i) to read:

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

* The daily bag limit for ducks includes mergansers, and may include no harlequin ducks, *no canvasbacks*, and no more than 4 mallards (no more than 2 hens), 1 black duck, [2] 3 wood ducks, 1 pintail, [2 canvasbacks,] 2 redheads, [2] 1 scaup (except during periods specified below, when 2 scaup may be taken daily), 4 scoters or 2 hooded mergansers. The daily limit for ducks may include 2 scaup per day during the following periods only in each waterfowl hunting zone: *Western Zone - last 20 days of the regular duck season; Northeastern Zone - November 1 through November 20; Lake Champlain Zone - 20 consecutive days beginning on the fourth Saturday in October; Southeastern Zone - 20 consecutive days beginning on the fourth Saturday in November; and Long Island Zone - last 20 days of the regular duck season.* Possession limits for all duck species are twice the daily limit.

Amend subparagraph 2.30(g)(3)(iii) to read:

Species	Times and/or places within seasons	Daily bag limit	Possession limit
(iii) Canada geese	During September in the Lake Champlain Goose Hunting Area	5	10
	During September in all other areas	8	16
	During Youth Waterfowl Hunt Days in all areas and during the regular goose hunting season in the Eastern Long Island Goose Hunting Area	2	4
	During the regular goose hunting season in the Lake Champlain, Northeast, West Central, East Central, Hudson Valley, and [Western] Central Long Island Goose Hunting Areas	3	6
	During the regular goose hunting season in the South Goose Hunting Area, the Western Long Island Goose Hunting Area, and during the Special Late Canada Goose Season	5	10

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 6, 2008.

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: wfseason@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory Authority

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

2. Legislative Objectives

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

3. Needs and Benefits

The primary purpose of this rule making is to adjust annual migratory game bird hunting regulations to conform with federal regulations, as required by ECL 11-0307, for the 2008-2009 season and flyway guidelines for resource conservation. This rule making also reflects preferences of migratory game bird hunters in New York.

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

The Department is proposing the following regulatory changes: season date adjustments for ducks, geese, brant and Youth Waterfowl Hunt Days in all areas; changes to the delineation of Canada goose hunting area boundaries in western New York and on Long Island; changes in daily bag and possession limits for wood ducks, scaup, canvasback ducks and brant; and implementation of a special snow goose harvest program.

Season date adjustments contained in this rule making are intended to maximize hunting opportunities when they are most desired by hunters (for example, maximizing the number of weekend days open to hunting), within constraints established by the U.S. Fish and Wildlife Service (USFWS). The Department provided considerable opportunity for public input, including recommendations from regional waterfowl hunter task forces, as part of the season selection process.

The daily bag limits for wood duck and brant were both increased based on current population assessments and harvest strategies developed by USFWS and approved by the Atlantic Flyway Council. Similarly, the daily bag limits for scaup and canvasback were reduced across the country, based on current population assessments and harvest strategies for those species.

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

Changes to Canada goose hunting areas will provide for more effective management of resident (local-nesting) and migrant populations that occur in New York. The special snow goose harvest program will allow for additional take of snow geese in New York to help limit population growth for this overabundant species in the Atlantic Flyway.

4. Costs

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

5. Paperwork

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

6. Local Government Mandates

This amendment does not impose any program, service, duty or

responsibility upon any county, city, town village, school district or fire district.

7. Duplication

Each year, the USFWS establishes "framework" regulations which specify allowable season lengths, dates, bag limits and shooting hours for various migratory game bird species based on their current population status. Within constraints of the federal framework, New York selects specific hunting season dates and bag limits for various migratory game birds, based primarily on hunter preferences. These selections are subsequently included in a final federal rule making (50 CFR Part 20 section 105), which appears annually in the Federal Register in September. However, section 11-0307 of the ECL specifies that the Department's migratory game bird hunting seasons and bag limits conform with the federal regulations. This requires that section 2.30 be amended annually.

8. Alternatives

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

9. Federal Standards

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

10. Compliance Schedule

All waterfowl hunters must comply with this rule making during the 2008-2009 and subsequent hunting seasons.

Regulatory Flexibility Analysis

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

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

The hunting activity resulting from this rule making will not require any new or additional reporting or record-keeping by any small businesses or local governments. For these reasons, the Department has concluded that this rule making does not require a Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

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

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

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

Job Impact Statement

The purpose of this rule making is to amend migratory game bird hunting regulations. The Department of Environmental Conservation (Department) has historically made regular revisions to its migratory game bird hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rule making, the Department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Moreover, this rule making is not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

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

NOTICE OF ADOPTION

New York State CO₂ Budget Trading Program

I.D. No. ENV-43-07-00028-A

Filing No. 859

Filing Date: 2008-09-09

Effective Date: 30 days after filing

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

Action taken: Addition of Part 242 and amendment of section 200.9 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 24-0103, 25-0102, 34-0108, 49-0309, 71-2103 and 71-2105; Energy Law, sections 3-101 and 3-103; and Public Authorities Law, sections 1850, 1851, 1854 and 1855

Subject: New York State CO₂ Budget Trading Program.

Purpose: To reduce CO₂ emissions from fossil fuel-fired electric generating sources statewide to counter the threat of a warming climate.

Terms and identification of rule: Nonsubstantive changes were made in sections 242-1.2(b)(41), 242-1.5(b)(11), 242-6.4(c) and 242-10.5(d)(1)(ii)(a)(1)(ii).

Substance of final rule: Part 242 establishes the New York State CO₂ Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO₂), a greenhouse gas (GHG), from CO₂ Budget sources in an economically efficient manner.

Part 242 establishes emission budgets for CO₂. Part 242 establishes a trading program by creating and allocating allowances that are limited authorizations to emit up to one ton of CO₂ in each control period. Affected sources are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the source for the control period immediately preceding such deadline.

For Part 242, the first control period commences on January 1, 2009 and concludes on December 31, 2011. Subsequent control periods begin on January 1st and conclude on the December 31st three years later. Part 242 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells or uses any amount of electricity.

Part 242 includes a limited exemption provision that allows units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. A limited exemption is available to industrial units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit.

Part 242 requires each CO₂ budget unit to have a CO₂ authorized account representative (AAR) who shall be responsible for, among other things, complying with the CO₂ budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. The owner and/or operator of the unit may also designate an alternate CO₂ AAR to perform the above duties. The CO₂ Budget Trading Program was designed to allow for the use of agents that can make electronic submissions on behalf of the AAR and Alternate AAR. If the CO₂ budget source is also subject to the CAIR NOx Ozone Season Trading Program, CAIR NOx Annual Trading Program, or CAIR SO₂ Trading Program then, for a CO₂ Budget Trading Program compliance account, this natural person shall be the same person as the alternate CAIR designated representative under such programs. If the CO₂ budget source is also subject to the Acid Rain Program, then for a CO₂ Budget Trading Program compliance account, this natural person shall be the same person as the alternate designated representative under the Acid Rain Program.

In order to meet the necessary permit requirements, the authorized account representative of each CO₂ budget unit shall submit a complete application for a facility operating permit or a modification to an existing permit in accordance with the provisions of 6 NYCRR Parts 201 and 621. The CO₂ AAR shall submit to the department a compliance certification report for each control period by March 1st immediately following the relevant control period.

The Statewide CO₂ Budget Trading Program base budget is 64,310,805

tons per year for the first two control periods (2009-2011 and 2012-2014). The base budget decreases as follows: to 62,703,035 tons in 2015, to 61,095,265 tons in 2016, to 59,487,495 tons in 2017 and to 57,879,725 tons per year for 2018 and beyond. By January 1, 2009, the department or its agent will record in the energy efficiency and clean technology account the CO₂ allowances for all allocation years.

The department will allocate most of the CO₂ Budget Trading Program base budget to the energy efficiency and clean energy technology account. The New York State Energy Research and Development Authority (NYSERDA) will administer the energy efficiency and clean technology account so that allowances will be sold in an open and transparent allowance auction or auctions. The proceeds of the auction or auctions will be used to promote the purposes of the energy efficiency and clean technology account and for administrative costs associated with the CO₂ Budget Trading Program. The auction will be carried out to achieve the following objectives to the extent practicable: achieve fully transparent and efficient pricing of allowances; promote a liquid allowance market by making entry and trading as easy and low-cost as possible; be open to participation for bidding by any individual or entity that meets reasonable minimum financial requirements; monitor for and guard against the exercise of market power and market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing over-the-counter allowance markets; align well with wholesale energy and capacity markets; and be designed to not act as a barrier to efficient investment in existing or new electricity generating sources.

New York has agreed to specific design elements of the auction. These include: reserve price, auction structure and format, allowance sale schedule, participation, unsold allowances, notice of auctions, monitoring, and auction results.

The Reserve Price represents the price below which no allowances will be sold at the auction. It will be used to mitigate the potential for auction prices to clear significantly below current market prices, due to tacit or explicit collusion, weak competition, or to maintain a minimum rate of progress in reducing emissions below business as usual. The Department and the Authority will disclose the Reserve Price before every auction.

The hybrid reserve price mechanism includes two components: 1) a Minimum Reserve Price (MRP) of \$1.86 (adjusted for the Consumer Price Index); and 2) a Current Market Reserve Price (CMRP) that is 80 percent of the Current Market Price of a CO₂ Allowance for the particular allowance vintage year. The reserve price for each auction will be the higher of the Minimum Reserve Price or Current Market Reserve Price.

The first component of the hybrid reserve price mechanism, the Minimum Reserve Price of \$1.86, was established based on the ICF International's Integrated Planning Model. Some of the critical program impacts evaluated with the model include CO₂ emission reductions achieved, projected CO₂ allowance prices, and projected impacts on electricity prices. According to the model, the projected CO₂ allowance price under the selected RGGI program design is \$2.32/ton (2009 dollars) at the beginning of the Program in 2009. Because the modeled value of \$2.32 is the expected Current Market Price for the first auction, it was determined that \$1.86, or 80 percent of the modeled value of \$2.32, will be Minimum Reserve Price.

The second component of the hybrid reserve price mechanism, the Current Market Reserve Price, is 80 percent of the Current Market Price of a CO₂ Allowance for the particular allowance vintage year. A volume-weighted average of market transactions will be used to produce an estimate of the Current Market Price.

All unsold allowances will be available for sale in auctions where the reserve price in effect is greater than the Minimum Reserve Price. Since unsold allowances may exist at the end of the first control period, the Department will decide whether to retire any unsold allowances from the first control period or to roll these allowances into auctions during the second control period.

The department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO₂ Budget Trading Program annual base budget.

The department may award early reduction allowances to a CO₂ budget source for reductions in the CO₂ budget source's CO₂ emissions (inclusive of all emissions from the CO₂ budget units at the CO₂ budget source) that are achieved by the source during the early reduction period (2006, 2007 and 2008). Total facility shutdowns or reductions that result from enforcement actions shall not be eligible for early reduction allowances. Early reductions during the control period will be demonstrated against the baseline period (2003, 2004 and 2005).

The department will establish one CO₂ compliance account for each CO₂ budget source. Deductions of allowances for compliance purposes will be made from the compliance account. Allowances may be banked without discount until deducted for compliance. The CO₂ AAR may

specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the source's budget emissions limitation for the control period immediately preceding, CO₂ allowances must be submitted for recordation in a unit's compliance account by midnight of March 1st. After making the deductions for compliance, if a unit has excess emissions the department will deduct from the source's compliance account, allowances allocated for a subsequent control period, allowances equal to three times the unit's excess emissions. If the source has insufficient CO₂ allowances to cover three times the number of allowances in its compliance account, the source shall be required to immediately transfer sufficient allowances into its compliance account.

Part 242 will provide for the award of CO₂ offset allowances to sponsors of CO₂ emissions offset projects or CO₂ emission credit retirements that have reduced or avoided atmospheric loading of CO₂, CO₂ equivalent (a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential) or sequestered carbon as demonstrated in accordance with the offset consistency application and monitoring and verification report requirements of the program. Offsets can be obtained from eligible landfill methane capture and destruction projects, reduction in emissions of sulfur hexafluoride, sequestration of carbon due to afforestation, reduction or avoidance of CO₂ emissions from natural gas, oil or propane end-use combustion due to end-use energy efficiency, and from avoided methane from agricultural manure management operations. CO₂ retirements include the permanent retirement of GHG allowances or credits issued pursuant to any governmental mandatory carbon constraining program outside of the United States that places a specific tonnage limit on GHG emissions, or certified GHG emissions reduction credits issued pursuant to the United Nations Framework Convention on Climate Change (UNFCCC) or protocols adopted through the UNFCCC process.

For CO₂ offset allowances, the number of CO₂ offset allowances that are available to be deducted for compliance with a CO₂ budget source's CO₂ budget emissions limitation for a control period may not exceed the number of tons representing 3.3 percent of the CO₂ budget source's CO₂ emissions for that control period. If the department determines that there has been a stage one trigger event, five percent will be allowed and if the department determines that there has been a stage two trigger event, offset up to 10 percent will be allowed. A stage one trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO₂ allowance price that is equal to or greater than the stage one threshold price (\$7.00 adjusted annually by the consumer price index). A stage two trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO₂ allowance price that is equal to or greater than the stage two threshold price (\$10.00 adjusted annually by the consumer price index plus two percent).

Part 200 cites the portions of Federal statute and regulations that are incorporated by reference into Part 242.

Final rule as compared with last published rule: Nonsubstantial changes were made in 242-1.2(b)(41), 242-1.5(b)(11), 242-6.4(c) and, 242-10.5(d)(1) and (ii)(a)(1)(ii).

Revised rule making(s) were previously published in the State Register on May 7, 2008.

Text of rule and any required statements and analyses may be obtained from: Michael P. Sheehan, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 242rggi@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to article 8 of the State Environmental Quality Review Act, a short environmental assessment form, a positive declaration and a generic environmental impact statement are on file. A coastal assessment form is also on file. This rule has been approved by the Environmental Board.

Summary of Revised Regulatory Impact Statement

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The statutory authority to promulgate Part 242 in the State derives primarily from the Department's obligation to prevent and control air pollu-

tion, as set out in the Environmental Conservation Law (ECL) at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105. The Department's obligation to preserve and protect the other natural resources and public health in the State as it relates to climate change extends beyond the control of air pollution, however, as set out in ECL Sections 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 24-0103, 25-0102, 34-0108, and 49-0309. The promulgation of the Program is also consistent with the Department's obligations under Energy Law 3-101 and Energy Law 3-103. The general powers of the New York State Energy Research and Development Authority (NYSERDA) that are relevant to the Program's ability to sell allowances in a transparent auction are set forth in the Public Authorities Law Sections 1850, 1851, 1854 and 1855.

Mitigating the impacts of New York's warming climate represents one of the most pressing environmental challenges for the State, the nation and the world. Extensive scientific work demonstrates the need for immediate world-wide action to reduce emissions from burning fossil fuels, as well as the great benefits that will accrue if the emissions are reduced through programs like RGGI. This section outlines the Department's analysis of the needs and the considerable benefits of the Program.

A naturally occurring greenhouse effect has regulated the earth's climate system for millions of years. Solar energy from the sun that reaches the surface of the earth is radiated back out into the atmosphere as long wave or infrared radiation. CO₂ and other naturally occurring GHGs trap heat in our atmosphere, maintaining the average temperature of the planet approximately 50 degrees Fahrenheit (°F) above what it would be otherwise. An enhanced greenhouse effect, and associated climate change, results as large quantities of anthropogenic GHGs, especially CO₂ from the burning of fossil fuels, are added to the atmosphere.

Atmospheric concentrations of CO₂ and other GHGs have substantially increased since the mid-1700s due to human activities. In addition, ice core samples spanning thousands of years have proven that CO₂ concentrations far exceed pre-industrial values. These global increases in CO₂ concentration are due primarily to fossil fuel use and land-use change.²

While there is strong evidence that the climate is warming, there is also clear scientific consensus that anthropogenic emissions of CO₂ from the burning of fossil fuels are contributing to observed warming of the planet. The evidence comes from direct measurements of rising surface air and subsurface ocean temperatures, increases in sea levels, retreating glaciers and changes to many physical and biological systems.

Scientists have already observed significant warming in New York's climate due in part to increased concentrations of GHGs in the atmosphere.³ Since 1970, the Northeast United States has been warming at a rate of 0.5°F per decade. Winter temperatures have risen even faster, at a rate of 1.3°F per decade from 1970 to 2000. Temperature increases in the coastal areas of the state have been more dramatic. In summary, scientists have concluded that the New York climate has already begun migrating south, taking on the characteristics of the climate formerly found in the states south of New York.⁴

Scientific literature confirms that reducing emissions of GHGs like CO₂ will help to mitigate the impacts of climate change. It is clear that these projections about New York's potential future will have adverse impacts on New York's environment and human health. It is also clear that reducing GHG emissions will reduce those impacts. More intense and prolonged periods of summertime heat can result in increased mortality and heat illnesses, especially in cities that experience the heat island effect. The term "heat island" refers to urban air and surface temperatures that are higher than nearby rural areas. Many U.S. cities and suburbs have air temperatures up to 10°F warmer than the surrounding natural land cover.⁵ The United States Environmental Protection Agency (EPA) reports that a one degree Fahrenheit increase in average temperature could more than double heat related fatalities in New York City from 300 to 700 per year.⁶ Increased GHG emissions contribute to conditions that enhance the formation of ground-level ozone, specifically by increasing temperature through global climate change. Increased temperature and precipitation levels also produce conditions favorable to the introduction or spread of vector-borne illnesses such as Lyme Disease, Equine Encephalitis, West Nile Virus, and other diseases spread by mosquitoes, ticks, and wild rodents.⁷

New York has approximately 2,625 miles of coastline including barrier islands, coastal wetlands, and bays that could also be affected by a warming climate.⁸ The major contributor to sea level rise is thermal expansion and melting of glaciers and ice sheets. In New York City for example, sea level has risen 0.27 cm/year on average over the last hundred years and is expected to increase over the next century to an average of approximately 0.60 cm/year.⁹ Accelerated sea level rise due to global climate change is expected to increase the frequency and magnitude of storms such as the 100 year storm, which would result in increased flood damage. The return period of the resulting 100 year flood could be reduced to once every 50 years by the 2080s, and as often as once every four years in worst case scenarios.¹⁰

New York's public water supply could also be stressed by changes in temperature and precipitation. The majority of drinking water is obtained from surface flow, which can be highly variable. The New York City water supply comes from a 2,000 square mile watershed area in upstate New York that is greatly influenced by temperature and precipitation levels.¹¹ Lake Erie and Lake Ontario are critical water sources to New York State which would also be threatened by global climate change. New York relies on these Great Lakes for drinking water, hydroelectric power, commercial shipping, and recreation, including boating and fishing. New York State has approximately 331 miles of shoreline along Lake Ontario and approximately 77 miles along Lake Erie.¹²

Agriculture and forests in New York will also be affected by global climate change. The majority of crops grown in New York may be able to withstand a warmer climate with the exception of cold weather crops which include apples, potatoes, and others which would shift to the north or have reduced growing seasons. Dairy farmers would also be impacted since milk production is maximized under cooler conditions ranging from 41°F to 68°F.¹³ Global climate change could also affect the current forest mix in New York. New York State's Adirondack Park is the largest forested area east of the Mississippi and it consists of six million acres including 2.6 million acres of state-owned forest preserve.¹⁴ Climate change would also negatively impact New York's maple syrup industry since specific temperature conditions are required in order for the sugar maples to produce sap. As forest species change, the dulling of fall foliage will likely have a negative impact on regional tourism.¹⁵ Distribution of wildlife is also likely to change due to increased temperature and changes in precipitation. As a result, cold-water salmon and trout fisheries and migratory birds could be adversely impacted due to loss or changes in habitat.

The global community must reduce its GHG emissions well below 1990 levels within a few decades if we are to stabilize atmospheric concentrations of CO₂ at acceptable levels. The burning of fossil fuels in power plants in New York is a major contributor to increased atmospheric concentrations of CO₂. In 2005, power plants in New York burned fossil fuels to produce approximately 61 million tons of CO₂ and significant amounts of other harmful pollutants that impact the health and welfare of New Yorkers. This represents approximately one-quarter of the State's total GHG emissions. Any effort to curb the State's contribution to atmospheric concentrations of CO₂, therefore, must address CO₂ pollution from power plants.

Offsets are an integral part of RGGI and the Program. An "offset" is a project-based GHG reduction (or sequestration) occurring at sources that are not subject to the Program that may be used by regulated sources for the purpose of compliance with the Program. Offsets not only provide flexibility for regulated sources, but also provide significant environmental and/or economic co-benefits. Offsets allowed under the Program are from: Landfill Gas; SF₆; reduction of fugitive emissions from electricity transmission and distribution infrastructure; Afforestation; Agricultural methane; and Natural gas and oil/ end-use energy efficiency. The Program also incorporates an energy efficiency and clean energy technology allocation (the "EE & CET Allocation"). The EE & CET Allocation will be administered by NYSERDA and allowances in the account will be sold in a transparent allowance auction or auctions. This will better achieve the emissions reduction goals of the Program by promoting or rewarding investments in energy efficiency, renewable or non-carbon-emitting technologies, innovative carbon emissions abatement technologies with significant carbon reduction potential, and/or the administration of the Program.

The allowance auctions will include a Reserve Price. The Reserve Price represents the price below which no allowances will be sold at the auction. Its use is important for mitigating the potential for auction prices to clear significantly below current market prices, due to tacit or explicit collusion, weak competition, or to maintain a minimum rate of progress in reducing emissions below business as usual. Setting a Reserve Price can be accomplished in a variety of ways, including mechanisms that are, or are not, directly linked to current market prices.

NYSERDA currently administers similar energy efficiency and clean energy technology programs, and the addition of the EE & CET Allocation, should be readily accomplished. The EE & CET Allocation will increase the emissions reduction benefits of the Program while simultaneously reducing impacts on consumers. The Department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the Department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO₂ Budget Trading Program annual base budget.

The Department sought input from NYSERDA and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance of the Program. The analysis provided by NYSERDA includes modeling of the electricity sector showing the

impacts of RGGI. ICF International (ICF) was contracted by NYSEDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the program may have on the state economy.¹⁶

CO₂ allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. Under the Program, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 KWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.¹⁷ A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.¹⁸ The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

There will also be costs associated with the administration of the Program. First and foremost, the Department will incur costs associated with the implementation of the Program. The Department estimates that between five and eight person years (the full time equivalent of working 100 percent on a project for a full work year expressed as 220 days) will be required to implement all aspects of the Program at a cost of \$110,000 per person year or up to \$880,000 annually. The Department will also need to reimburse its agent for its costs in administering the emission and allowance tracking and reporting system. Based on contractor costs associated with the administration of the Acid Deposition Reduction Program (ADRP) under Parts 237 and 238, the Department estimates that the capital start up costs for designing and implementing a regional system for tracking CO₂ allowance transactions will be between \$500,000 and \$950,000. The Department is currently contracting with an agent to administer the ADRP program and the annual operating costs for the administration of the emission and allowance tracking and reporting system under that program are approximately \$160,000. The Department estimates that administration of a regional system will be between \$150,000 and \$300,000.

The owners and operators of each source subject to the Program and each unit at the source shall keep each of the following documents for a period of 10 years from the date the document is created: account certificate of representation form; all emissions monitoring information; copies of all reports, compliance certifications, and other submissions and all records made or required under the Program; copies of all documents used to complete a permit application and any other submission under the Program or to demonstrate compliance with the Program; copies of all documents used to complete a consistency application and monitoring and verification report to demonstrate compliance with the offset provisions of the Program.

For each control period in which one or more units at a source are subject to the CO₂ budget emission limitation, the CO₂ authorized account representative of the source shall submit to the Department, a compliance certification report for each source covering all such units. This must be submitted by the March 1st following the relevant control for the units subject to the Program.

The Department examined the alternative of an emission rate based program for CO₂ to the cap-and-trade structure of the Program that could conceivably be used to achieve equivalent emissions reductions. This alternative is a command-and-control regulatory structure which the Department concluded is less cost-effective and more difficult for sources to implement than the Program. The Department also determined that an emission rate program would be no more protective of the public health and the environment.

The Department also considered a number of variations of the emissions cap-and-trade construct that could share many or most of the features of the Program as proposed. These alternatives included: (1) a New York only trading program; (2) allocating allowances to generators at no cost; and (3) applicability to smaller sources.

In carrying out its statutory obligation to assess all relevant factors in

developing an appropriate control program that is most cost-effective, the Department determined that emissions cap-and-trade programs are the most appropriate programs for the control of CO₂ emissions from the subject sources.

There are currently no Federal standards that limit CO₂ emissions from the electricity generating sector. The Program will reduce CO₂ emission from electric generating sources to 10 percent below current levels by 2018. In response to the need to reduce GHG and the lack of a national program, the Department has determined that fossil fuel-fired electricity generators will have to reduce emissions of CO₂.

The Program will require affected sources and units to comply with the emission limitations of the Program beginning with the first three year control period (2009, 2010 and 2011). In order to meet the necessary permit requirements, the CO₂ authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units. Each year, the owners and operators of each source subject to the Program shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² IPCC WGI Fourth Assessment Report, Climate Change 2007: The Physical Science Basis, February 2007, and available at: <http://www.ipcc.ch>

³ Climate Change in the U.S. Northeast, A Report of the Northeast Climate Impacts Assessment (2006), available at: http://www.climatechoices.org/ne/resources_ne/jump.jsp?path=/assets/documents/climatechoices/NECIA_climate_report_final.pdf.

⁴ Id.

⁵ <http://www.epa.gov/hiri/about/index.html>

⁶ United States Environmental Protection Agency. "Climate Change and New York." September 1997. Page 3.

⁷ National Assessment Synthesis Team (NAST), 2001: Climate Change Impacts On The United States, The Potential Consequences of Climate Variability and Change. Page 450.

⁸ National Oceanic and Atmospheric Administration (NOAA). Treasures Our New York Coasts and Estuaries. June 2003. Page 1.

⁹ Goddard Institute for Space Studies Institute on Climate and Planets (GISS ICP). Climate Impacts in New York City: Sea Level Rise and Coastal Floods. 2002. Page 3.

¹⁰ GISS ICP. Rising Seas: A View From New York City. August 2000. Page 2.

¹¹ NAST. Page 123.

¹² Michigan Department of Environmental Quality: Shorelines of the Great Lakes. http://www.michigan.gov/deq/0,1607,7-135-3313_3677-15959B,00.html

¹³ Garcia, Alvaro. Dealing With Heat Stress In Dairy Cows. South Dakota Cooperative Extension Service. September, 2002. Page 1.

¹⁴ New York State Adirondack Park Agency (APA). http://www.apa.state.ny.us/About_Park

¹⁵ NAST. Page 125.

¹⁶ "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

¹⁷ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEDA, Patterns and Trends (December 2005).

¹⁸ "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF", by the Economic Development Research Group, dated November 17, 2005.

Revised Regulatory Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State’s air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

1. Effects on Small Businesses and Local Governments. No small businesses will be directly affected by the adoption of new Part 242 and the amendments to Part 200.

The only local government affected by the Programs is the Jamestown Board of Public Utilities (JBPU), a municipally owned utility which owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of the Program, 40 CFR part 75. Therefore, no additional monitoring costs will be incurred. The costs associated with the Program will be dictated by how JBPU decides to comply with the provisions of the regulation.

2. Compliance Requirements. The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the Program, as described below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009-2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each CO₂ subject unit shall submit to the Department a complete CO₂ Budget permit application, by January 1, 2009 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to the Program shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the source’s compliance account that is not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units.

3. Professional Services. The only local government affected by the Program, the JBPU, may need to hire outside professional consultants to comply with the Program and the amendments to Part 200. This work would likely be associated with any analyses of the Program. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

4. Compliance Costs. In addition to the costs identified for regulated parties and the public, state and local governments will incur costs. The Jamestown Board of Public Utilities (JBPU), a municipally owned utility, owns and operates the S.A. Carlson Generating Station (SACGS). Since the emissions monitoring at SACGS currently meets the monitoring provisions of the Program, no additional monitoring costs will be incurred.

Notwithstanding this, the JBPU will need to purchase allowances equal to the number of tons emitted. The Department limited the analysis of control costs to the purchase of allowances to comply with the Program and assumed the costs of allowances will be \$3 per ton for CO₂.² To estimate total costs for SACGS under the Program, the Department reviewed 2002 through 2004 emissions from Jamestown’s affected unit. The highest emissions from the affected unit during that time frame were approximately 41,772 tons. Purchasing allowances to cover emissions will result in estimated costs of approximately \$125 thousand annually. These costs will eventually be passed on to the consumers of electricity from the JBPU.

The JBPU has a range of compliance options open to it and can utilize the flexibility inherent under the Program to comply. Since the Program has a three year control period with the compliance obligation at the end of the control period, the emission peaks associated with electricity generation will be averaged out and more long term planning options will be available to SACGS. In addition, the Program allows affected sources to offset up to 3.3 percent of their emissions utilizing reductions from emission categories outside of the regulated sector.

5. Minimizing Adverse Impact. The promulgation of the Program and the amendments to Part 200 do not directly affect small businesses. Only

one local government is affected by the Program, the JBPU. The Program constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program in such a manner, the Department will minimize the adverse economic impacts of the Program on the JBPU.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the Program with interested parties.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the Program: increase the efficiency of the natural gas-fired turbine, co-fire biofuel; purchase allowances, or purchase offsets. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² Regional Greenhouse Gas Initiative (RGGI): New York Electricity Sector Modeling Results, September 15, 2006, DRAFT.

Revised Rural Area Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State’s commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State’s air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

REPORTING, RECORD KEEPING AND OTHER COMPLIANCE REQUIREMENTS

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, record keeping and compliance requirements detailed below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009 - 2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each Program unit shall submit to the Department a complete CO₂ Budget permit application by January 1, 2009 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to the Program and each unit at the source shall comply with the monitoring and reporting requirements thereof.

Each control period, the owners and operators of each source shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline (midnight of March 1st, or if March 1st is not a business day, midnight of the first business day thereafter), in the source’s compliance account that is not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units.

COSTS

Introduction

The Department sought input from the New York State Energy Research and Development Authority (NYSERDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance with the Program. The analysis provided by NYSERDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSERDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.²

Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSERDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO), a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the Program.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."³ Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. were projected to be approximately \$7/MMBtu (constant 2003 dollars).

Building new coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO₂, NO_x and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Generation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the

increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO₂ emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual CO₂ emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing factor is an upward bias in emissions recorded by continuous emissions monitoring systems as reported to EPA.⁴ As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in nine northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, Massachusetts, Rhode Island, and Delaware. For modeling purposes, the proposed initial CO₂ cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case are compared including generation mix, net electricity imports, changes in generation capacity, CO₂ emissions, CO₂ allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000 GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO₂ emissions from New York generators are projected to be 5.1 million tons (8.7 percent) lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO₂ emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO₂ emission reductions resulting from RGGI are projected to be

achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

Under the Program Case, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 kWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.⁵

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSEDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State's bulk power system. The selection of those units was based on provisions in the New York State Reliability Council's reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF's conclusion that the units would not retire. The second phase of the analysis conducted by the DPS consisted of more detailed modeling with General Electric's MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.⁶ The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

MINIMIZING ADVERSE IMPACT

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the Program to all sources on a statewide basis.

RURAL AREA PARTICIPATION

Since the announcement of the Regional Greenhouse Gas Initiative in September of 2003, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF", by the Economic Development Research Group, dated November 17, 2005.

³ The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>

⁴ Russel S. Berry and Jack C. Martin (RMB Consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). "CEMS Analyzer Bias and Linearity Effects Study." rmb-consulting.com/newspaper/cable/cable.htm

⁵ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEDA, 'Patterns and Trends' (December 2005).

⁶ REMI.

Revised Job Impact Statement

1. Nature of Impact: On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

Based on analyses conducted for the RGGI states by the Economic Development Research Group, the Program is expected to have a very modest net positive impact on economic growth in New York and in the region.² As such, the Program will have minimal positive impacts on overall job and employment opportunities. Electricity generators will incur costs related to the requirements of the Program and based on the modeling this will translate into modest increases in electricity costs.

2. Categories and Numbers Affected: The Department sought input from the New York State Energy Research and Development Authority (NYSEDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance with the Program. The analysis provided by NYSEDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSEDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.³ In addition, a jobs impact analysis has been provided based on NYSEDA's experience with the Energy Smart Program and their administration of energy efficiency programs that are very similar to those that will be funded with auction proceeds.

Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSEDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO, a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the Program.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."⁴ Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All

estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. were projected to be approximately \$7/MMBtu (constant 2003 dollars).

Building new coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO₂, NO_x and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Generation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO₂ emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual CO₂ emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing is an upward bias in emissions recorded by continuous emissions monitoring systems as reported to EPA.⁵ As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in nine northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, Massachusetts, Rhode Island, and Delaware. For modeling purposes, the proposed initial CO₂ cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case

are compared including generation mix, net electricity imports, changes in generation capacity, CO₂ emissions, CO₂ allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000 GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO₂ emissions from New York generators are projected to be 5.1 million tons (8.7 percent) lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO₂ emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO₂ emission reductions resulting from RGGI are projected to be achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

CO₂ allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. The availability of emissions offsets to meet a limited portion of the emission reduction requirement (as allowed by the Program) contributes significantly to maintaining CO₂ allowance prices below the \$7/ton offset expansion threshold specified.

Under the Program Case, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 kWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.⁶

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSEDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State's bulk power system. The selection of those units was based on provisions in the New York State Reliability Council's reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF's conclusion that the units would not retire. The second phase of the analysis conducted by the DPS consisted of more detailed modeling with General Electric's MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.⁷ The study used a computer model called the Regional Economic Models, Inc. (REM) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

NYSERDA currently administers, through the New York Energy Smart Program, energy efficiency and clean energy technology programs that are very similar to those that will be funded with auction proceeds under the CO₂ Allowance Auction Program. A 2006 Macroeconomic Impact Analysis of the New York Energy Smart Program concluded that expenditures under that program created approximately 4.8 new sustained jobs per \$1 million of program funds spent. The following chart illustrates the breakdown of jobs created per sector:

2006 Update

Economic Sector	% of Total Added Jobs Through 2006
Agriculture, Forestry, and Mining	0.60%
Construction	10.52%
Products Manufacturing	5.07%
Equipment and Instrument Manufacturing	6.46%
Transportation, Communication, and Other Public Services	3.30%
Wholesale and Retail Trade	30.86%
Personal and Business Services	52.81%
Electric utilities	-9.63%
Total	100%

The results of the Macroeconomic Impact Analysis were published in the March 2007 New York Energy Smart Evaluation Report, which is available on NYSERDA's website at: http://www.nyserda.org/Energy_Information/evaluation.asp.

3. Regions of adverse impact: A statewide analysis was performed for the Program and the modeling predicts that the statewide average increase in wholesale electricity prices will be 1.6 percent in 2015 and 2.4 percent in 2021.

4. Minimizing Adverse Impact: The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program through an allowance based cap and trade system, the Department has attempted to minimize the adverse economic impacts including the adverse employment impacts of the Program.

5. Self-Employment Opportunities: Not applicable.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

³ REMI.

⁴ The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>

⁵ Russel S. Berry and Jack C. Martin (RMB Consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). "CEMS Analyzer Bias and Linearity Effects Study." rmb-consulting.com/newpaper/cable/cable.htm

⁶ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSERDA, Patterns and Trends (December 2005).

⁷ REMI.

Assessment of Public Comment

The New York State Department of Environmental Conservation (Department) is proposing to establish 6 NYCRR Part 242, CO₂ Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO₂), a greenhouse gas (GHG), from CO₂ budget sources in an economically efficient manner. The New York State Energy Research and Development Authority (Authority) is proposing to establish 21 NYCRR Part 507, CO₂ Allowance Auction Program, which implements essential segments of the CO₂ Budget Trading Program.

The Department and the Authority proposed Parts 242 and 507 on October 24, 2007. Public hearings were held during the week of December 10, 2007 and the public comment period closed at 5:00 p.m. on December

24, 2007. Based on an assessment of the public comments, the Department and the Authority proposed revised Parts 242 and 507 on May 7, 2008. Hearings were held in Albany, NY and in Stony Brook, NY on June 9, 2008. The comment period closed on June 23, 2008. The Department and the Authority received written and oral comments from 539 commentors on the proposed revised regulations. All of these comments have been reviewed, summarized, and responded to by the Department and the Authority.

Commentors generally support the Department's and the Authority's adoption of the CO₂ Budget Trading Program and CO₂ Allowance Auction Program (collectively "the Program"), although many, primarily electric generators and those affiliated with the energy industry, are opposed to the Program for various reasons. Comments address legal issues, proposed revisions to the regulations, implementation, and the potential benefits and impacts of the Program.

Several commentors challenge the Department's and the Authority's statutory authority to establish the Program. Specifically, it is asserted that the Department and the Authority cannot establish the Program without legislative expression of a statewide policy addressing global climate change. In response, the Department and the Authority cite extensive statutory authority which overwhelmingly supports the Department's and the Authority's statutory authority to establish the Program. Principally, the Department has the authority to enact the Program pursuant to New York State Environmental Conservation Law (ECL) Sections 19-0103 and 19-0301. The Department's broad authority to develop regulatory programs derives primarily from its obligation to prevent and control air pollution, as set out in the ECL at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105. Further, the Department's obligation to preserve and protect natural resources and public health in the State as it relates to climate change also extends beyond the control of air pollution, as set out in ECL Sections 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 24-0103, 25-0102, 34-0108, and 49-0309 and the Energy Law Sections 3-101 and 3-103.

Similarly, the general powers of the Authority that are relevant to the Program's ability to sell allowances in an auction are set forth in the Public Authorities Law (PAL) Sections 1851, 1854 and 1855. Under the Program, the Authority's activities would include the conduct of allowance auctions and the administration of the Energy Efficiency and Clean Energy Technology Account (Account). The statutory provision relevant to the Authority's statutory authority to accept the allowances allocated to it by the Department is PAL Section 1855, subsections 10, 14 and 17.

Commentors also argue that the Legislature has never authorized the Authority to issue or sell regulatory licenses/permits and the Program purports to empower the Authority to auction allowances, which constitute licenses/permits under New York State law. The Department and the Authority disagree with this contention and believe that the allowances themselves are not permits or licenses under New York Law. Rather, an allowance is a condition of an operating permit that constitutes a limited authorization to emit up to one ton of CO₂.

Another significant comment states that the Program constitutes taxation in contravention of the New York State Constitution. Alternatively, commentors argue that if the Program does not impose a tax, the Program is ultra vires because the Department and the Authority lack the statutory authority to create fees.

The Department and the Authority do not believe that the Program constitutes a tax. The primary purpose of this measure is to discourage the emissions of CO₂. The sale and auction of allowances will help create CO₂ allowance price signals at a level sufficient to cause investment in technologies and strategies that would reduce or avoid emissions of CO₂. Similarly, the Program does not implement a fee. Rather, the Department is requiring owners and operators of each CO₂ budget unit at the source to acquire allowances either at an auction or in the secondary market.

Regarding reliability, many commentors suggest that the Program might have an impact on electric system reliability; some further allege that the modeling conducted to assess potential impacts on reliability is inadequate. Notwithstanding this, the New York Independent System Operator (NYISO), ICS Consulting, and the Department of Public Service (DPS) each concluded that reliability would not be impacted. Based on their research, these entities all found that no generating facility would be forced to retire as a result of the Program.

Several commentors expressed concern over the potential for leakage. Concerns regarding cost effectiveness, price increases for energy in Regional Greenhouse Gas Initiative (RGGI) states, utility diminishment, and importation of energy from non-RGGI states are also expressed. In response, the Department submitted a final report of the RGGI Emissions Leakage Workgroup dated March 31, 2008. Among other things, the report includes: 1) information about the tracking of potential leakage, 2) a number of possible leakage mitigation policies, and 3) information about the current political momentum towards a national cap-and-trade program.

Comments were also received requesting additional offset categories. The Department responded that it will not deviate from the five categories included in the original proposal, but it will work with the other RGGI states to determine additional categories in the future.

In addition to the offset comments, several comments regarding the auction component of the Program were received which center on the structure of the auction system, the transparency of its operation, the pricing and allocation of allowances and the implementation of the Account. Many comments are directed at the perceived potential for manipulating the auction process, and the need for a "robust" oversight and monitoring system. The Department and the Authority responded that the revisions to the rule provide for an independent monitor to observe the conduct and outcome of each auction and activity among and between the allowance accounts looking for collusion, price manipulation or unfair market power.

Concern is also voiced about the use of a reserve price in the auctions. Several comments expressed concern that allowances not sold would be taken out of the market or have their market entry delayed. Others said that a reserve price creates an artificial floor. The Department's and the Authority's decision to use a reserve price was based upon extensive analysis by the Authority's research team with stakeholder input. Both the Authority and the Department agree that the reserve price protects against the possibility of collusion and provides a price signal that supports a minimum rate of investment in technologies and strategies that reduce CO₂ emissions.

Several comments are directed at the structure and implementation of the Account. Furthermore, while many support the Authority as the appropriate manager of auction proceeds and suggest that an oversight committee to assist with distribution issues would also be appropriate, some make specific requests that the auction proceeds flow back to certain entities or for specific purposes, including rate payer relief.

The Authority responded that the proceeds raised through the sale of allowances will be used to promote and implement programs for energy efficiency, renewable or non-carbon emitting technologies, and innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will periodically convene an advisory group of stakeholders representing a broad array of energy and environmental interests to advise it on how to best utilize the funds to achieve the goals of the Account. As part of initial program development, the Authority will outline draft program guidelines and funding criteria for the Account. Stakeholders will have an opportunity to provide input and comment on these guidelines through the stakeholder advisory group and open public comment. Subsequently, a draft multi-year operating plan will be presented to the stakeholder advisory group for comment. An annual program evaluation and progress report will be prepared and shared with the stakeholder advisory group and the public.

A number of comments voiced support for a regional auction that uses a uniform price auction formula. Accordingly, revised Part 507 provides that participation in a multi state auction is the preferred approach. New York State will not take part in the first scheduled auction in September, but plans to participate in the December multi state auction.

Concerns regarding the potential participation of eligible companies in the auction were also expressed. The proposed revised regulations allow the Authority to limit the participation of any applicant or bidder found to have violated any rule, regulation or law associated with any commodity market. The Authority also may limit eligibility to participate in any auction to the level of security provided. The Program as revised also requires public disclosure of auction related results.

Apart from the auctions, some commentors allege that the Department and the Authority did not comply with the requirements of the State Environmental Quality Review Act (SEQRA). The Department and the Authority clearly believe that the Supplemental DGEIS and the Final DGEIS addressed these concerns. A Findings Statement will also be prepared.

Some commentors are concerned about the possible costs of the Program to both regulated facilities and electricity consumers. They oppose the decision to auction nearly 100 percent of the allowances, rather than allocate the allowances for free; they also claim that a price cap is needed in order to protect consumers. The Department and the Authority responded that a price cap would have no impact on the cost to consumers because it would not affect the price of allowances on the secondary market. Moreover, the investment of auction proceeds in energy efficiency will reduce electricity demand and thus lessen any increase in cost to consumers caused by the Program.

Most comments received regarding the voluntary renewable set-aside support this provision, while a small number oppose it. In particular, commentors addressed the 700,000 ton amount of the set-aside. Adjustments to the amount of the set-aside can be made through amendments to the regulation if the set-aside is determined to be over or under subscribed based on a review of applications during the implementation of the Program.

A number of commentors recommend that a sunset provision be included that is contingent upon the enactment of a Federal cap and trade or other climate change program. The Department and the Authority anticipate that they will repeal or amend the regulations to comport with a Federal program, in the event such a program is established.

Several comments address the Department's inclusion of a Long-term Contract (LTC) set-aside of 1.5 million allowances. The vast majority of these comments are opposed to the set-aside, while a small number of commentors urged an increase in the size of the set-aside. The Department created the set-aside to accommodate the small number of generators able to demonstrate a financial hardship created by having to purchase allowances.

The majority of comments received expressed support for the Program and New York's participation and leadership in RGGI. Commentors also expressed support for timely implementation of the Program. The Department acknowledged that adequately addressing climate change issues will eventually require economy-wide regulation.

Some commentors suggest that the emissions cap is set too high and request that the Department consider re-evaluating the numbers to reflect the reduction in emissions since 2005. Other commentors note that if the cap is too high in 2009, an artificially low market would be created. The Department maintains that the base budget will be used and will not be revisited at this time; however, there will be annual updates that may be used to adjust the cap if necessary. There were also concerns over the award of Early Reduction Allowances (ERAs) and how the addition of these allowances would further exacerbate the potential of an inflated cap. The Department responded that the ERA provision was created to reward CO₂ budget sources that made changes to reduce CO₂ emissions in contemplation of the development of RGGI and the Program, and that it will use appropriate discretion when assessing applications for ERAs.

Finally, many comments were received that provided specific recommendations for changes to or clarifications of the regulatory language, such as definitions and permitting requirements. In each instance, the Department and the Authority explained the reasoning behind the inclusion of the particular language. Any further changes will be considered, in consultations with the Participating States, in the event amendments to the proposed revised regulations are made.

NOTICE OF ADOPTION

Hunting Seasons for Black Bear

I.D. No. ENV-26-08-00017-A

Filing No. 853

Filing Date: 2008-09-05

Effective Date: 2008-09-24

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

Action taken: Amendment of section 1.31 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0903 and 11-0907

Subject: Hunting seasons for black bear.

Purpose: To expand the areas open to bear hunting.

Text or summary was published in the June 25, 2008 issue of the Register, I.D. No. ENV-26-08-00017-P.

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

Text of rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: grbatche@gw.dec.state.ny.us

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

Assessment of Public Comment

The department received comments on the proposed amendments. A summary of these comments and the department's response follows:

Comment:

Comments simply stating support for or opposition to the department's proposal were received.

Response:

The department recognizes that the management of bears is important to many people. In 2007-2008, the department held about 30 public meetings throughout upstate New York, attended by about 750 people, to provide an overview of the natural history and current

status of black bears, including recent range expansion, and to seek public input on future management. The department's proposal to expand the area open to black bear hunting is a partial outcome of those meetings. New York has a healthy and growing bear population. Opening the proposed areas to hunting will not jeopardize this bear population but will enhance management capability to control further growth and limit growth into areas where the existence of bears is likely to be problematic.

Comment:

Sightings of bears and bear sign have increased in recent years and that the bear population should be reduced.

Response:

The department uses population reconstruction models and harvest data to track bear populations in areas where bears are hunted. Additionally, the department monitors bear populations in all areas through bear sightings, nuisance activity, and reported bear mortality (e.g., bear-vehicle collisions). These data indicate that a bear population is established and growing outside of the existing bear hunting area. The department agrees that the growth of this bear population needs to be controlled.

Comment:

There is enjoyment in seeing black bears but also recognition of the increase in bear numbers over the past decade. Hunting is an effective means to manage black bears and proposed regulation change is appropriate to control bear population growth and reduce or stop bear range expansion. The department was complimented for taking proactive measures to address the growing bear population before it expands and becomes established in areas with high potential for bear related conflicts.

Response:

The department agrees. Regulated hunting is the only viable and cost effective tool for controlling bear numbers on a landscape scale. Opening the proposed Wildlife Management Units (WMUs) in central and western New York to black bear hunting will help control the bear population. Without this, the bear population could continue to grow. The resulting range expansion would impact highly agricultural and populated areas, increasing bear nuisance activity.

Comment:

The department received a large number of form letters and e-mails along with some individual comments stating opposition to the proposal and stating that hunting of bears is an ineffective approach to bear management and reducing conflicts; an expansion of the hunting range will not resolve problems created by a few bears; the department should educate the public in black bear management and nuisance prevention/control practices; and the department should implement a long-term non-lethal management program (e.g. preventing bear access to attractants, using fencing and repellents, and aversive conditioning by department staff).

Response:

The department has long standing and ongoing programs to increase the public's awareness of bears, inform the public on techniques to avoid conflicts with bears, and address nuisance situations with non-lethal intervention. The department recognizes that effective bear management involves education, non lethal intervention, and population management. Information on these methods is posted on the department's website (www.dec.ny.gov). Also, the department produced a "Living with New York Black Bears" DVD that was distributed to all public libraries in New York. This DVD is also being sent to high school and college libraries. The department's educational efforts include presentations at annual black bear forums, over 30 public meetings held in the fall and winter of 2007-2008, staff response and demonstration of mitigation techniques to landowners and municipalities with bear conflicts, and other information available on the department's website. In department response to bear conflicts, removal of attractants and non lethal control are primary actions in most situations. Through a combination of education, preventative measures, and aversive conditioning of individual bears, the department will continue to address bear-related conflicts regionally and on a case by case basis.

Public education, aversive condition of problem bears, and attractant removal are critical actions to reduce human-bear conflicts but are insufficient to control population growth and range expansion. The department believes that hunting is an important component of a comprehensive management program, which includes efforts to mitigate negative black bear impacts over large areas. The additional bear harvest anticipated in the areas proposed is expected to slow population growth and range expansion, thereby significantly reducing bear population expansion into areas where agricultural activity and human population densities are high and addressing a potentially high conflict situation before it arises.

Comment:

The proposed changes will provide more hunting opportunity, possibly generating more interest in sporting activities, reduce the decline in participation rates, and possibly boost tourism and local economies in the proposed areas. Additionally, it was noted that all resident big game hunters pay for a black bear tag as part of their license package, and the proposal may give more hunters the opportunity to use the tag.

Response:

The proposal would afford hunters additional black bear hunting opportunity. Most black bears are taken by deer hunters; less than 0.2 percent of New York's hunters take a bear. The additional opportunity will likely increase satisfaction of some New York hunters.

Comment:

Tioga County is the only county along the Pennsylvania border where bear hunting has not been permitted.

Response:

Pennsylvania has a well established and hunted bear population directly south of Tioga County. Bears originally captured and marked in Pennsylvania are periodically found in New York. This means that some of New York's bears are already hunted in Pennsylvania. The department's proposal will now afford New York residents the same opportunity as nearby Pennsylvania hunters.

Comment:

Is the bear population large enough to sustain a hunting season in the area proposed to be opened for hunting?

Response:

The department monitors annual bear harvest, nuisance complaints, non hunting mortality, and citizen observations to determine population trends which clearly indicate a growing bear population. Also, bears annually disperse into New York from other states. Opening new areas to hunting will not be detrimental to the viability of bear populations in central and western New York.

Comment:

The department should monitor the bear population in the proposed area for several more years before expanding the bear hunting area and the number of bears taken should be limited.

Response:

Delaying action would mean that the bear population would grow and expand, likely leading to increased bear conflicts requiring the department to propose more stringent management actions in the near future. The department will monitor trends in the bear population so that over-harvest does not occur.

Comment:

Expanding bear hunting would teach bears to be afraid of houses and people.

Response:

The learned avoidance of humans by individual bears is an unlikely outcome of the proposal. Hunter densities and hunting pressure is often high in the areas surrounding population centers and removal of bears from these areas may reduce bear-related conflicts.

Comment:

The proposal was made to increase the sale of hunting licenses.

Response:

All resident big game licensees currently receive a bear tag. Since the number of bear tags issued to residents will not be affected by this proposal, an increase in license sales is not expected. Between 2,000

and 2,500 non resident bear tags are sold annually but a significant increase in these sales is not anticipated.

Comment:

Bear hunting is a cruel and inhumane method of bear population control and results in cubs being orphaned.

Response:

Bear hunting is the only viable and cost effective tool for controlling bear numbers on a landscape scale and is an essential component of a comprehensive management program that also includes public education and non-lethal measures of reducing negative bear impacts. Bear hunting is a lawful and effective method of controlling bear populations through regulated harvest. Existing regulations for the southern bear hunting areas protect cubs and sows with cubs due to the timing of the season and by prohibiting hunters from taking cubs or taking a bear from among a group of bears.

Comment:

The proposed expansion of bear hunting is designed to satisfy trophy hunters. The proposal will increase illegal activity and trespass, decrease non-hunter's safety, and force bears into areas they would not normally inhabit.

Response:

The majority of bears will be taken by deer hunters, as is the case in the current bear hunting areas. There is very little selectivity for older, larger bears which would describe a "trophy" hunt. Additionally, no change in hunter behavior is expected that would increase trespass or illegal activity or decrease non-hunter safety. Hunting is a safe activity. As deer hunting, small game, and turkey hunting already occur in the new areas, no changes in bear movements are expected.

Comment:

The proposal will reduce crop and apiary damage. The proposal will be beneficial to New York's farmers and the hunting area should be expanded to other areas.

Response:

The proposal is designed to lower damage to farm interests by limiting bear population expansion. The department may consider changes to bear hunting in other areas of the state in the future.

Comment:

The effect of current harvest rates on bear populations is not well understood.

Response:

Bear populations in the southern bear range have expanded. Age and sex ratios show that current harvest rates are not negatively impacting the viability of these populations. Population estimates are generated from known bear mortalities, of which hunting harvest is a primary source. These are conservative, minimum estimates. Bears are established in an area about one third larger than the area from which the minimum population estimate has been generated.

Comment:

The increase in bear-related conflicts is due to habitat loss, development, and growth in human population rather than bear population growth and range expansion. The best long-term solution involves sustainable development to maintain wildlife habitat.

Response:

New York's bear population has clearly grown in number and increased in geographic distribution. Addressing only the human side of the bear-human conflict equation is insufficient for long-term bear management.

Comment:

Current laws which are designed to protect females and young bears contradict the effort to reduce bear numbers. Hunters could be more effective in reducing bear numbers if hunting over bait or trapping bears were allowed.

Response:

The firearms season for bear hunting in western New York begins seven days after the beginning of regular deer season. This lag could be reduced or eliminated through future rule making if additional population control is needed. Other prohibitions (e.g., trapping, using

bait, prohibition on taking cubs) are contained in the Environmental Conservation Law and would require legislative action.

Comment:

The department should use non-lethal measures to control bears, including trap and transfer and fertility control.

Response:

Fertility control or trap and transfer programs are not a viable option for bear management on a landscape scale. Fertility control (e.g., sterilization or immunocontraception) is not feasible for population management of black bears. Trap and transfer, while sometimes used to remove a bear from an urban or suburban situation, is not an effective means to control bear populations. Movement of bears is stressful to the animal, labor intensive, and expensive. Also, bears can move long distances to return to the original capture location.

The opening of the proposed area for bear hunting is intended as a continuation of efforts to manage population growth and range expansion. In central and western New York, it is an important first step in an effort to slow or stop growth into the Lake Plains where farming and human population densities are high as is the probability of conflict between bears and human interests. The department believes that this proposal will achieve these goals, and therefore the department is adopting the proposal as originally published.

NOTICE OF ADOPTION

Lobster Maximum Size Limit for Lobster Conservation Management Area 4 and Definition of the Term V-notch for Lobster Harvest

I.D. No. ENV-29-08-00005-A

Filing No. 860

Filing Date: 2008-09-09

Effective Date: 2008-09-24

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

Action taken: Amendment of Part 44 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 13-0105, 13-0329(5)(e) and 13-0329(16)

Subject: Lobster maximum size limit for Lobster Conservation Management Area 4 and definition of the term V-notch for lobster harvest.

Purpose: Reduce harvest of lobster consistent with the fishery management plan.

Text or summary was published in the July 16, 2008 issue of the Register, I.D. No. ENV-29-08-00005-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kim McKown, New York State Department of Environmental Conservation, 205 N. Belle Mead Road, Suite 1, East Setauket, NY 11733-3400, (631) 444-0454, email: kamckown@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Proposed New Major Facilities and Major Modifications to Existing Facilities Located in Attainment and Nonattainment Areas

I.D. No. ENV-39-07-00006-RC

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

Proposed Action: Amendment of Parts 200, 201 and 231 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303 and 19-0305; Federal Clean Air Act (42 U.S.C. 7470-7479; 7501-7515), sections 160-169 and 171-193

Subject: Proposed new major facilities and major modifications to existing facilities located in attainment and nonattainment areas.

Purpose: To comply with the 2002 Federal New Source Review (NSR) Rule promulgated and correct deficiencies that the EPA identified.

Substance of revised rule: The Department of Environmental Conservation (Department) is proposing revisions to its rulemaking proposal published in the State Register on September 26, 2007 for Parts 200, 201 and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and "New Source Review in Nonattainment Areas and Ozone Transport Regions" respectively.

The Part 200 amendments will add a definition for Routine Maintenance, Repair, or Replacement (RMRR), codifying current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. In addition, the Department is revising Part 200 (Sections 200.9 and 200.10). Section 200.9 is being amended to include all federal materials referenced in the proposed amendments to Part 231. Section 200.10(a) is being amended to reflect that the Department is no longer delegated responsibility for implementation of the Federal Prevention of Significant Deterioration (PSD) Program.

The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to a nominal 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed. Reg. 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area.

The existing nonattainment New Source Review program at Part 231 will be re-titled "New Source Review for New and Modified Facilities" and will include new Subparts 231-3 through 231-13. The new subparts will implement nonattainment New Source Review (NNSR) and attainment New Source Review (PSD). The NNSR requirements are based on New York's existing NNSR program Subpart 231-2, with revisions to include selected provisions from the December 31, 2002 Federal NSR reform rule and EPA's December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The PSD requirements are also based largely on the December 31, 2002 Federal NSR reform rule as codified at 40 CFR 52.21.

The proposed revisions to Part 231 will change the basis of applicability for modifications and emission reduction credits (ERCs) from an "Emission Unit" basis to an "Emission Source" basis, incorporate various federal requirements, provide clarification of existing requirements, and require comprehensive reporting, monitoring, and recordkeeping that will conform to the requirements of Title V. Through this rulemaking, the Department will also establish a new method for determining baseline actual emissions. Baseline actual emissions will be determined by using any 24 consecutive month period of emissions in the previous five years. All facilities (no separate baseline period for electric utility steam generating units) will be required to determine their baseline actual emissions using this method.

The Department will retain existing Subpart 231-1 "Requirements for emission sources subject to the regulation prior to November 15, 1992" and Subpart 231-2, "Requirements for emission units subject to the regulation on or after November 15, 1992". These regulations are currently cited in many air permits issued throughout the State and retaining them will facilitate implementation and enforcement of the NSR program. Existing Subpart 231-2 will be revised only to indicate that the Subpart will not apply after the date the proposed revisions to Part 231 become effective. Thus, permit applications received on or after the effective date of revised Part 231 will be processed according to the provisions of Subparts 231-3 through 231-13, as applicable.

New Subparts 231-3 through 231-13 have been added to include provisions from the EPA December 31, 2002 NSR Rule, and incorporate the Federal PSD program. The NNSR provisions currently specified in Subpart 231-2 are being updated and incorporated into these new subparts. The Department is also adopting a State PSD program which is based largely on the Federal PSD rule and included in Subparts 231-7, 231-8, and 231-12. The subparts of the proposed regulation are being organized to ease determinations of applicability, to collect common requirements into groups, and to streamline the regulation. The organization of the new regulation strives to make a more coherent series of requirements and obligations.

Subpart 231-3 General Provisions specifies provisions which apply generally such as a transition plan, exemptions, general prohibitions, source obligation, general permit requirements, facility shutdown

periods, and circumvention. Proposed Section 231-3.4 (Exemptions) has been revised to remove the Clean Coal technology exemptions. The Department has determined that these exemptions are out of date and no longer necessary for implementing the NSR program. The Source Obligation section (231-3.6) includes a requirement that any owner or operator of a facility that proposes a project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a facility emissions increase that equals or exceeds any of the significant project thresholds in Subpart 231-13, Tables 3, 4 or 6, must notify the Department in writing of the proposed project prior to implementing the change if the owner or operator determines that the project does not constitute a modification because all the emission increases are attributable to independent factors in accordance with Clause 231-4.1(b)(40)(i)(c). The notification must include (1) a description of the change, (2) the calculation of the projected emissions increase, (3) the proposed date of the change, and (4) an explanation of the factual basis for the conclusion that none of the projected emission increases are attributable to the proposed project.

Subpart 231-4 defines the terms used throughout Part 231 and incorporates terms from both the existing Subpart 231-2 and the Federal PSD rule, 40 CFR 52.21. The Department has made minor revisions to terms used in existing Subpart 231-2 and 40 CFR 52.21 so that definitions are consistent for both nonattainment and attainment NSR and with New York's regulations. The Department has also removed the previously proposed Clean Coal technology definitions to be consistent with the removal of the Clean Coal technology exemptions in Subpart 231-3.

To facilitate the implementation and administration of Part 231, the Department has included the requirements for new and modified facilities in four main Subparts (231-5 to 231-8) depending on the facility's location in an attainment or nonattainment area.

Subpart 231-5 is applicable to new facilities and to modifications at existing non-major facilities in nonattainment areas. Proposed new major facilities will continue to be subject to the requirements to install Lowest Achievable Emission Rate (LAER) and obtain emission offsets as they are under existing Subpart 231-2. The subpart also specifies that non-major facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-6 applies to modifications at existing major facilities in nonattainment areas. The subpart continues the requirements for LAER technology and emission offsets that exist in the Department's current nonattainment NSR program. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when considering other contemporaneous activities at the facility, would exceed applicable emissions thresholds.

Subpart 231-7 applies to new facilities and to modifications at existing non-major facilities in attainment areas. The subpart implements the requirements for determination of air quality impacts through modeling, and the application of Best Available Control Technology (BACT). The subpart also specifies that non-major facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-8 applies to modifications at existing major facilities in attainment areas of the State. The subpart implements the requirements for determination of air quality impacts through modeling and the application of BACT in the case of facilities which undertake a NSR major modification. These requirements address Federal PSD requirements. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when combined with other contemporaneous activities at the facility, would exceed emissions thresholds.

The remaining five subparts include general provisions that apply to both new and modified subject facilities.

Subpart 231-9 sets forth the requirements for establishing Plantwide Applicability Limitations (PAL) at Title V facilities. A PAL allows a facility to undertake modifications without being subject to NSR review as long as the facility does not exceed its PAL emission limit. Subpart 231-9 is based on the PAL provisions from the December 31, 2002 Federal NSR rule (67 Fed Reg at 80278), which specify PAL creation, duration, and expiration. The Department has made a few revisions to the Federal regulatory language to take into account Subpart 201-6, New York's approved Title V regulation and to ensure that reduced emissions and improved air quality will result. PALs are established in Title V permits and are subject to Title V permit application and processing procedures for creation, modification, or renewal. PALs are created for an initial period of 10 years, less if established during the middle of a Title V permit term, and can be renewed for 10 years, subject to certain restrictions. The proposed regulation requires that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative

reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The Department may authorize a reduction in the PAL to a level that would reflect the emissions from the facility if all major PAL emission sources are operated at full capacity after complying with BACT and/or LAER, as applicable.

Subpart 231-10 defines emission offset and Emission Reduction Credit (ERC) creation and use. The provisions for ERC creation and use are substantially the same as existing Subpart 231-2 except for the determination of ERC enforceability. Under proposed Subpart 231-10 the Department has clarified how ERCs are made enforceable.

Subpart 231-11 sets forth permit requirements for new major facilities, NSR major modifications, and netting. This Subpart also establishes reasonable possibility requirements for insignificant modifications. These requirements are in addition to any Part 201 requirements that may apply. The Federal Reasonable Possibility Rule only requires post-change monitoring for insignificant modifications if the projected actual emissions increase (Part 231 project emission potential) is by itself greater than or equal to 50 percent of the applicable significance threshold. Proposed Part 231 extends the post-change monitoring requirement to also include any modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. For such modifications, facilities will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations. Additionally, the Federal Reasonable Possibility Rule only requires EUSGUs to notify the Department, prior to beginning actual construction, for any modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold. Proposed Part 231 extends the pre-construction notification requirement to any facility that proposes a modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold or proposes a modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added.

Subpart 231-12 specifies the ambient air quality impact analysis requirements for facilities in attainment areas. These requirements emanate from the Federal PSD rule which is codified at 40 CFR 52.21.

Subpart 231-13 includes several tables which list applicable emission thresholds for proposed new and modified facilities, emission offset ratios, Federal Class I variance maximum allowable increase concentrations, and maximum allowable increase in SO₂ concentrations for gubernatorial variances. Table 9 - Source Category List includes the new chemical process plant exclusion for ethanol production facilities that produce ethanol by natural fermentation (included in NAICS codes 325193 or 312140). This exclusion was promulgated in the EPA May 1st, 2007 Final Rule for 40 CFR Parts 51, 52, 70, and 71 Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the "Major Emitting Facility" definition.

Revised rule compared with proposed rule: Substantial revisions were made in sections 200.10(a), 201-2.1(b)(21), 231-3.4(a), (b), (f), 231-3.5, 231-3.6(c), 231-3.9, 231-4.1(b)(4)(i)(a), (c), (9), (10), (11), (13), (20), (22), (23), (30)(v)(b), (vii), (ix), (x), (41)(i)(b), (c), (iv), (42)(i)(b), (c), (52), 231-5(c)(2), 231-5.3(f), 231-6.1(a), 231-6.4(f), 231-8.1(a), 231-7.2, 231-9.1(a)(4), 231-9.7(a)(1), 231-10.1(n), 231-10.3(a)(1), (b)(2)(iv), 231-11, 231-13.3, 231-13.4, 231-13.5 and 231-13.6.

Text of revised proposed rule and any required statements and analyses may be obtained from Rick Leone, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 231nsr@gw.dec.state.ny.us

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

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

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

Summary of Revised Regulatory Impact Statement

1. STATUTORY AUTHORITY:

The statutory authority for these regulations is found in the Environmen-

tal Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303 and 19-0305, and in Sections 160-169 and 171-193 of the Federal Clean Air Act (42 USC Sections 7470-7479; 7501-7515) (Act or CAA).

2. LEGISLATIVE OBJECTIVES:

Articles 1 and 3, of the ECL, set out the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York. They provide general authority to adopt and enforce measures to do so. In addition to the general powers and duties of the New York State Department of Environmental Conservation (Department) and Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air "quality" of New York from pollution. The Legislature bestowed specific powers and duties on the Department, including the power to formulate, adopt, promulgate, amend and repeal regulations for preventing, controlling and prohibiting air pollution.

The Clean Air Act (Act) requires states to have a preconstruction and operating permit program for new and modified major stationary sources. In 1970, Congress amended the Act "to provide for a more effective program to improve the quality of the Nation's air." The statute directed the United States Environmental Protection Agency (EPA) to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS. Congress amended the Act in 1977 to provide additional safeguards to protect the nation's air quality. The 1977 amendments required states to identify areas that did not meet the NAAQS which were then designated as "nonattainment" areas. The 1977 amendments strengthened the Act by (1) expressly creating a preconstruction review program for new or modified major sources located in "nonattainment" areas ("see generally" 42 USC Sections 7501-7515); and (2) expressly providing a parallel preconstruction review program for new or modified sources located in "attainment" areas ("see generally id." Sections 7470-7492).

In 1978, EPA promulgated a New Source Review (NSR) regulation, followed by multiple sets of regulations including regulations applying to prevention of significant deterioration (PSD) and nonattainment new source review (NNSR) in states with and without approved SIPs. In 1996, EPA proposed a NSR rule revision that it described as "the first comprehensive overhaul of the program in 15 years" (61 Fed Reg 38250 [July 23, 1996] [1996 Draft Rule]). On December 31, 2002, the EPA published a final rule revising the regulations that implement the PSD and NNSR provisions of the Act ("see" 67 Fed Reg 80185 [2002 Federal NSR Rule]. The 2002 Federal NSR Rule required states with approved PSD and NNSR programs to submit a SIP revision by January 2006. The Department's NNSR regulation at 6 NYCRR Part 231 is subject to this SIP submittal requirement. The Department implemented the PSD program on behalf of EPA pursuant to a delegation agreement with EPA that had been in effect since the mid 1980s. On May 24, 2004, the Department returned delegation of the PSD program to EPA after failing to reach agreement on a partial implementation of the program. The Department advised EPA that it intended to adopt a revised State NSR program, which includes PSD requirements, for SIP approval.

Following the Department's publication of its proposed rulemaking in the State Register on September 26, 2007, the EPA on December 21, 2007 published in the Federal Register (Vol. 72, No. 245, 72 Fed. Reg. 72607) its final NSR rule, "Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping". The rule finalizes EPA's proposed revisions to its 2002 Federal NSR Rule governing the major NSR programs mandated by parts C and D of title I of the Act by clarifying what constitutes "reasonable possibility" and when the "reasonable possibility" recordkeeping requirements of the 2002 Federal NSR Rule apply. The December 21, 2007 rule finalizes a "percentage increase trigger" for reasonable possibility and identifies the criteria under which an owner or operator of a major facility undergoing a physical change or change in the method of operation that does not trigger major NSR requirements (insignificant modification) must keep records. The standard also specifies the recordkeeping, monitoring and reporting requirements on such facilities.

3. NEEDS AND BENEFITS:

The Department is undertaking proposed revisions to its September 26, 2007 State Register Part 231 rulemaking proposal to address comments received, and EPA's final reasonable possibility requirements promulgated on December 21, 2007. Proposed Subparts 231-3 and 231-4 have been revised to remove the previously proposed Clean Coal technology exemptions and definitions. The Department has determined that these exemptions and definitions are out of date and no longer necessary for implementing the NSR program. Proposed Subpart 231-11 has been re-structured to include permit and reasonable possibility requirements. Facilities which undertake insignificant modifications will be required to comply with the proposed Part 231 Reasonable Possibility Requirements for Insignificant

Modifications set forth in revised Subpart 231-11, and comply with any other requirements that may be applicable, including Part 201 permitting requirements. The proposed revisions to Part 231 extend EPA's post-change reasonable possibility monitoring requirements for insignificant modifications. Some facilities that undertake insignificant modifications will only be required to maintain records of information that they would have needed to generate to determine whether they are subject to the proposed amendments to Part 231. Other facilities proposing an insignificant modification will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations. The proposed revisions also extend EPA's pre-construction notification requirements for insignificant modifications. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and to ensure accountability and enforceability. Additionally, any project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a significant facility emissions increase attributable solely to independent factors must notify the Department in writing of the proposed project prior to implementing the change. Finally, some revisions to clarify or correct requirements were also made to the Department's original proposal based on comments received, but the substantive requirements are essentially the same.

4. COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with the proposed Part 231 revisions will be very facility specific. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Based on the Department's proposed restructuring of Subpart 231-11 to address reasonable possibility requirements for insignificant modifications, some facilities that undertake an insignificant modification will only incur the costs associated with maintaining records of information that they would have needed to generate to determine whether they are subject to the proposed amendments to Part 231, therefore, there should be little if any additional cost associated with maintaining the records. Other facilities proposing an insignificant modification will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations. Although the Department anticipates that more facilities will be subject to recordkeeping, monitoring or reporting under Part 231 than under the Federal NSR Rule, and thus will likely incur some additional costs, the Department believes that the costs will not be significant and are necessary for accountability and enforceability, consistent with the D.C. Circuit Court's decision in 'New York v. EPA', 413 F.3d. 3. Facilities that undertake a project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a significant facility emissions increase attributable solely to independent factors must notify the Department in writing and submit supporting data of the proposed project prior to implementing the change. The requirement to submit data records is not expected to result in any significant cost increase. Annual compliance and administrative costs are expected to remain relatively consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

5. PAPERWORK:

While the proposed Part 231 revisions may include more specific recordkeeping, monitoring and reporting requirements than the Federal NSR rule for insignificant modifications, the paperwork involved in complying with the additional requirements is not considered extensive or significantly more than facilities are currently required to maintain under the Title V permit program.

6. STATE AND LOCAL GOVERNMENT MANDATES:

The adoption of the proposed amendments to Part 231 are not expected to result in any additional burdens on industry, state, or local governments beyond those currently incurred to comply with the requirements of the existing NSR process under 6 NYCRR 201-6, 6 NYCRR 231-2, and 40 CFR 52.21.

7. DUPLICATION:

This proposal is not intended to duplicate any other Federal or State regulations or statutes. The proposed amendments to Part 231 will ultimately conform to the Act. In the short term, some duplication may occur. Currently, EPA Region 2 implements the PSD program for new and modified major facilities in attainment areas of New York State. Once the proposed revisions are in effect, and approved by EPA into the SIP, the Department will have sole responsibility for the PSD provisions, and no duplication will occur.

8. ALTERNATIVES:

Adoption of the proposed amendments to Part 231 is necessary to conform to federal requirements. The Department returned delegation of

the PSD rules in a letter to EPA dated May 24, 2004, retroactively effective March 3, 2003. As a result, the Department must develop its own regulations in order to implement the PSD program. The Department is taking the opportunity to resolve issues cited by the USEPA and the regulated community, while incorporating the EPA NSR Reform provisions, in modified form. The amendments will provide further clarification of existing rules, coordinate review and requirements in both attainment and nonattainment areas, and make Part 231 less burdensome to the regulated community. The Department believes that no viable alternatives to this rulemaking are available.

The following is a discussion of the available alternatives:

1. Take no action. - This option is not a legitimate option. The State is required to either incorporate the Federal NSR regulations into the SIP or adopt its own program.

2. Adopt the Federal NSR Rule - The Department does not believe that adoption of the Federal NSR Rule is consistent with the policy objectives of the State as articulated in the ECL and therefore has determined that this is not a viable option.

3. Adoption a State-specific NSR program - Because neither option discussed above is acceptable, the Department proposes to adopt a State specific NSR program. The program will consist of modifications to the Department's existing Part 231 NNSR program and adoption of a State PSD program. The rulemaking will incorporate some of the provisions of the 2002 Federal NSR Rule as amended on December 21, 2007, as well as other provisions tailored to New York's air quality needs and objectives.

9. FEDERAL STANDARDS:

The Department's proposed revisions to its September 26, 2007 State Register Part 231 rulemaking proposal will align the state regulation with the federal NSR rule in terms of the methodology for determining emission increases, but will exceed minimum federal standards with more stringent provisions for determining baseline emissions and requiring emission reductions for PALS, which the Department has previously explained, and by requiring additional monitoring and reporting in connection with reasonable possibility requirements for insignificant modifications and for accountability of the NSR applicability requirements.

As noted above, on December 21, 2007 EPA finalized its Reasonable Possibility Rule. The rule identifies the criteria under which an owner or operator of a major facility undergoing a physical change or change in the method of operation that does not trigger major NSR requirements (insignificant modification) must keep records. Proposed Part 231 tracks these federal requirements with a few additional provisions. Some revisions for clarification were made to the Department's original proposal but the substantive requirements are essentially the same. EPA has concluded that it is "very important that the source retain a record of all information available to support its initial claim that an emissions increase predicted to occur as a result of demand growth did not result from the physical or operational change to an emissions unit."

The Federal Reasonable Possibility Rule only requires post-change monitoring for insignificant modifications if the projected actual emissions increase (Part 231 project emission potential) is by itself greater than or equal to 50 percent of the applicable significance threshold. Proposed Part 231 extends the post-change monitoring requirement to also include any modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. For such modifications, facilities will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations.

Additionally, the Federal Reasonable Possibility Rule only requires EUSGUs to notify the Department, prior to beginning actual construction, for any modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold. Proposed Part 231 extends the pre-construction notification requirement to any facility that proposes a modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231.

Some facilities that undertake insignificant modifications will only

incur the costs associated with maintaining records of information that they would have needed to generate to determine whether they are subject to the proposed amendments to Part 231. Therefore, there should be little if any additional cost associated with maintaining the records. Other facilities proposing an insignificant modification will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations. Although such facilities will incur some additional costs, the Department believes that the costs will not be significant and are necessary for accountability and enforceability, consistent with the D.C. Circuit Court's decision. While proposed Part 231 may include more specific recordkeeping and monitoring requirements for some insignificant modifications than under the Federal NSR Rule, as discussed above, the Department does not believe that the additional requirements are extensive or significantly more than facilities are currently required to maintain under the Title V permit program.

Subdivision 231-3.6(c) includes a requirement that any owner or operator of a facility that proposes a project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a facility emissions increase that equals or exceeds any of the significant project thresholds in Subpart 231-13, Tables 3, 4 or 6, must notify the Department in writing of the proposed project prior to implementing the change if the owner or operator determines that the project does not constitute a modification because all the emission increases are attributable to independent factors in accordance with Clause 231-4.1(b)(42)(i)(b). The notification must include (1) a description of the change, (2) the calculation of the projected emissions increase, (3) the proposed date of the change, and (4) an explanation of the factual basis for the conclusion that none of the projected emission increases are attributable to the proposed project. The Department believes these requirements are necessary to ensure accountability of the NSR applicability requirements and the Department's goals of improving air quality. Facilities that meet this requirement will only incur the costs associated with developing information that they would have needed to generate in order to determine whether they are subject to the proposed amendments to Part 231, therefore, there should be little if any additional cost.

10. COMPLIANCE SCHEDULE:

The proposed amendments do not involve the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the State Register.

Revised Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide. The Part 231 applicability thresholds for facilities in New York State (excluding New York City, Long Island, and Lower Orange, Rockland and Westchester Counties) is large enough that it is unlikely any small business or local government that owns or operates a facility would be subject to the applicability requirements of Part 231. For New York City, Long Island, and Lower Orange, Rockland and Westchester Counties, the Part 231 applicability threshold is very small, thus it is likely that some small businesses and local governments would be subject to the proposed revisions. The Department is undertaking this rulemaking to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rulemaking is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been

included in the proposed amendments to address reasonable possibility requirements for insignificant modifications. Additionally, any project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a significant facility emissions increase attributable solely to independent factors must notify the Department in writing of the proposed project prior to implementing the change. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for Routine Maintenance, Repair, or Replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews.

COMPLIANCE REQUIREMENTS:

As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. On December 21, 2007 EPA finalized its Reasonable Possibility Rule which identifies the criteria under which an owner or operator of a major facility undergoing a physical change or change in the method of operation that does not trigger major NSR requirements must keep records (72 Fed. Reg. 72607). Proposed Part 231 tracks these Federal requirements with a few additional provisions. Some revisions for clarification were made to the original proposal but the substantive requirements are essentially the same. The federal reasonable possibility rule only requires post-change monitoring if the projected actual emissions increase (Part 231 project emission potential) is by itself greater than or equal to 50 percent of the applicable significance threshold. Proposed Part 231 extends the post-change monitoring requirement to also include any modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. Additionally, the federal reasonable possibility rule only requires EUSGUs to notify the Department, prior to beginning actual construction, for any modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold. Proposed Part 231 extends the pre-construction notification requirement to any facility that proposes a modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold or proposes a modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231. Because facilities will have to generate this information to determine whether they are subject to the proposed amendments to Part 231, there should be little if any additional cost associated with maintaining the records. In the case of netting at existing major facilities, and for insignificant modifications, the proposed recordkeeping, monitoring, and reporting requirements are more extensive than those included in the 2002 Federal NSR Rule. For netting,

the proposed regulation is consistent with current Department practice which requires permits to include enforceable emission limits and appropriate recordkeeping, monitoring, and reporting. For insignificant modifications, the proposed regulation requires that facilities maintain records of the modification and comply with any other requirements that may be applicable, including Part 201 permitting requirements. While proposed Part 231 recordkeeping, monitoring, and reporting requirements may be more extensive than the 2002 Federal NSR Rule, from the perspective of New York State's implementation of NSR, the requirements are not significantly changing. Accordingly, these requirements are not anticipated to place any undue burden of compliance on businesses in rural areas. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231. Because facilities will have to generate this information to determine whether they are subject to the proposed amendments to Part 231, there should be little if any additional cost associated with maintaining the records. In the case of netting at existing major facilities, and for insignificant modifications, the proposed recordkeeping, monitoring, and reporting requirements are more extensive than those included in the 2002 Federal NSR Rule. For netting, the proposed regulation is consistent with current Department practice which requires permits to include enforceable emission limits and appropriate recordkeeping, monitoring, and reporting. For insignificant modifications, the proposed regulation requires that facilities maintain records of the modification and comply with any other requirements that may be applicable, including Part 201 permitting requirements. While proposed Part 231 recordkeeping, monitoring, and reporting requirements may be more extensive than the 2002 Federal NSR Rule, from the perspective of New York State's implementation of NSR, the requirements are not significantly changing. Accordingly, these requirements are not anticipated to place any undue burden of compliance on small businesses and local governments.

PROFESSIONAL SERVICES:

The professional services for any small business or local government that is subject to Part 231 are not anticipated to significantly change from the type of services which are currently required to comply with NNSR and PSD requirements. The need for consulting engineers to address NSR applicability and permitting requirements for any new major facility or major modification proposed by a small business or local government will continue to exist.

COMPLIANCE COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with either the Federal NSR rules or the proposed Part 231 revisions will be very facility specific. Under proposed Part 231, the following types of costs may be incurred by small businesses and local governments. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Some facilities that undertake insignificant modifications will only incur the costs associated with maintaining records while others may be also subject to some emission monitoring depending on the other activities at the facility. Facilities that require emission caps will have the costs of preparing permit applications and emissions monitoring, recordkeeping and reporting. Facilities that are subject to NSR in its entirety will have costs associated with preparing permit applications, including control technology and environmental impact assessments, emission offsets for nonattainment areas, and emissions monitoring, recordkeeping, and reporting. The proposed amendments to Part 231, in general, add provisions for increased regulatory flexibility and provide for a coordinated review process for NSR affected projects. The technology assessment requirements of LAER, for facilities subject to the Department's existing Part 231, remain unchanged in the Department's proposed amendments to Part 231. While some aspects of the regulatory applicability determination will be more restrictive for non-attainment NSR than current Part 231, i.e. the baseline actual emissions to projected actual emissions methodology will replace the maximum annual potential (MAP) methodology calculation, other aspects of the proposed regulation will be more flexible than the current regulation. For example, for baseline determinations facilities will have the option to choose any 24 consecutive month period in the past five years while the current Part 231 requires facilities to use the most recent 24 consecutive month period unless they can demonstrate that another period is more representative. It is possible that the proposed revisions to Part 231 will result in more facilities being subject to nonattainment NSR review than under current Part 231 since the Department is eliminating the maximum annual potential (MAP) applicability concept. It is also possible that more facilities will be subject to NSR under revised Part 231 than under the Federal regulations since the Department is proposing to determine baseline actual emissions based on a five-year look back period rather than a 10-year look back as in the Federal NSR rule. Although the Department anticipates that more facilities will be subject than under the

federal NSR rule since there will be less opportunity for an emission look back, the Department does not have definitive data to determine for certain that this will be the case. As far as the costs of compliance are concerned the Department does not envision significant increased costs. Since the proposed amendments to Part 231 apply to proposed major facilities and major modifications, annual compliance and administrative costs would remain consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

The proposed regulation requires that for any facility seeking the establishment of a PAL, that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The capital, operation and maintenance, and monitoring costs associated with the acceptance of a PAL, if any, will vary on a case-by-case basis. The requirement to reduce the PAL may cause an increase in cost to the facility that chooses to use a PAL, if a facility chooses a capital-intensive means of achieving the emission reductions. However, some facilities may meet the 25 percent reduction without incurring any additional costs, such as when a facility already plans to reduce the usage of a less efficient source within the facility, or implements efficiency improvements that reduce emissions and the cost of operation. Since PALs are a new compliance option, no specific cost estimates are available to determine if the PAL provisions will cause a monetary burden on any facility that chooses to use a PAL.

The proposed amendments to Part 231 set forth PM 2.5 applicability requirements for new major facilities and NSR major modifications consistent with new federal PM 2.5 requirements. The Department must include PM 2.5 in its proposed amendments to Part 231 to receive SIP approval. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 nonattainment area, the proposed rule requires the application of LAER and emission offsets of PM 2.5 at a ratio of one to one. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 attainment area, the proposed rule requires the application of BACT and preparation of an ambient air quality impact analysis. Facilities which meet the PM 2.5 applicability criteria will incur additional costs above those in existing Part 231 since PM 2.5 is not a regulated contaminant under existing Part 231 and was not previously a regulated contaminant under federal 40 CFR 52.21 (PSD). The most significant cost increase will be for new facilities and modifications that need to obtain PM 2.5 emission offsets. These costs will, however, vary greatly being dependent on the amount (tons per year) of emission offsets needed and the availability of approved reductions to be used as PM 2.5 offsets.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on any small business or local government. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

In May 2004, the Department convened a workgroup to discuss the development and adoption of a State NSR regulation (revised Part 231). Participants included members of the regulated community, State and Federal agencies, and environmental organizations: American Lung Association; the Business Council of New York State, Inc. (BCNYS); the Chemical Alliance; the National Federation of Independent Businesses; Consolidated Edison Company of New York; the Energy Association of New York State; EPA Region II; Independent Power Producers of New York; the Natural Resources Defense Council (NRDC); the New York Public Interest Research Group (NYPIRG); New York Department of Public Service (NYS DPS); New York State Office of the Attorney General (NYSOAG); and the Governor's Office of Regulatory Reform (GORR).

The Department held four meetings in the summer and fall of 2004 to discuss the major reform provisions included in EPA's 2002 Federal NSR Rule and Equipment Replacement Provision (ERP). The following issues were discussed: the Clean Unit and Pollution Control Project exemptions; whether the 2002 Federal NSR Rule adequately addressed compliance

monitoring, reporting and recordkeeping; the methodology for determining baseline actual emissions, including the appropriate look-back period (five years versus 10 years); the "reasonable possibility" test; the method for determining whether a significant emission increase occurred - the baseline actual emission to projected actual emissions test; whether "demand growth" should be excluded from the projection of post-modification actual emissions; routine maintenance, repair, and replacement, including the ERP rule, and the practice of conducting case-by-case determinations; and the PAL provision.

The workgroup reconvened on February 16, 2006 to discuss proposed amendments to Part 231. The Department presented an overview of the proposed amendments to Part 231 and discussed the differences between the proposed amendments to Part 231, EPA's 2002 Federal NSR Rule and the Department's existing NNSR Regulation (6 NYCRR Subpart 231-2). The workgroup commented on provisions which might be too broadly (e.g., permit modification triggers) or too narrowly construed (e.g., definition for routine maintenance repair and replacement). The attendees were also interested in the timing of the regulation and other pending and anticipated EPA regulations which might impact NSR review. The Department requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received. On September 6, 2006, the Department publicly notified for hearings and comment proposed amendments to Part 231. Following this proposal and receipt of comments, the workgroup reconvened once again on March 28, 2007 to discuss further changes that the Department planned to make to its proposed amendments to Part 231. The workgroup attendees were interested in the Department's proposed changes to baseline emissions, exemptions, PALs, and monitoring/reporting/recordkeeping requirements particularly as they relate to insignificant modifications and emissions attributable to independent factors such as demand growth. The Department once again requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received.

The Department has also provided outreach through Part 231 rulemaking presentations at the New York State Business Council's 2005 Annual Industry-Environmental Conference held on October 13 & 14, 2005 in Saratoga Springs, New York, and at the Air & Waste Management's Ninth Annual Environmental, Health & Safety Seminar held in Rochester, New York on February 15, 2006. Comments from these presentations were also considered during development of the proposed amendments to Part 231. The amendments to Parts 200, 201, and 231 were published in the State Register on September 26, 2007 for public hearings and comment. Hearings were held in Avon on November 13, 2007, Albany on November 15, 2007, and in Long Island City on November 16, 2007. The comment period closed on November 26, 2007. The Department received written and oral comments. All of the comments have been reviewed, summarized and responded to by the Department. Public notice will be held to obtain additional comments on the Department's proposed revisions to its original proposed amendments to 6 NYCRR Parts 200, 201, and 231 that were published in the State Register on September 26, 2007.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed revisions do not substantially alter the requirements for subject facilities as compared to those that currently exist. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. Therefore, the Department believes there are no additional economic or technological feasibility issues to be addressed by any small business or local government that may be subject to the proposed rulemaking.

Revised Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

Rural areas are defined as rural counties in New York State that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide and all rural areas of New York State will be affected.

The Department is undertaking this rulemaking to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement.

Another purpose of the rulemaking is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the Federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been included in the proposed amendments to address reasonable possibility requirements for insignificant modifications. Additionally, any project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a significant facility emissions increase attributable solely to independent factors must notify the Department in writing of the proposed project prior to implementing the change. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for routine maintenance, repair, or replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews.

COMPLIANCE REQUIREMENTS:

As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with NNSR and PSD requirements. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program.

On December 21, 2007 EPA finalized its Reasonable Possibility Rule which identifies the criteria under which an owner or operator of a major facility undergoing a physical change or change in the method of operation that does not trigger major NSR requirements must keep records (72 Fed. Reg. 72607). Proposed Part 231 tracks these federal requirements with a few additional provisions. Some revisions for clarification were made to the original proposal but the substantive requirements are essentially the same.

The Federal reasonable possibility rule only requires post-change monitoring if the projected actual emissions increase (Part 231 project emission potential) is by itself greater than or equal to 50 percent of the applicable significance threshold. Proposed Part 231 extends the post-change monitoring requirement to also include any modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. Additionally, the Federal reasonable possibility rule only requires EUSGUs to notify the Department, prior to beginning actual construction, for any modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold. Proposed Part 231 extends the pre-construction notification requirement

to any facility that proposes a modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold or proposes a modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231. Because facilities will have to generate this information to determine whether they are subject to the proposed amendments to Part 231, there should be little if any additional cost associated with maintaining the records. In the case of netting at existing major facilities, and for minor modifications, the proposed recordkeeping, monitoring, and reporting requirements are more extensive than those included in the 2002 Federal NSR Rule. For netting, the proposed regulation is consistent with current Department practice which requires permits to include enforceable emission limits and appropriate recordkeeping, monitoring, and reporting. For minor modifications, the proposed regulation requires that facilities maintain records of the modification and comply with any other requirements that may be applicable, including Part 201 permitting requirements. While proposed Part 231 recordkeeping, monitoring, and reporting requirements may be more extensive than the 2002 Federal NSR Rule, from the perspective of New York State's implementation of NSR, the requirements are not significantly changing. Accordingly, these requirements are not anticipated to place any undue burden of compliance on businesses in rural areas.

COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with either the Federal NSR rules or the proposed Part 231 revisions will be very facility specific. Under proposed Part 231, the following types of costs may be incurred by a facility located in a rural area. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Some facilities that undertake insignificant modifications will only incur the costs associated with maintaining records while others may be also subject to some emission monitoring depending on the other activities at the facility. Facilities that require emission caps will have the costs of preparing permit applications and emissions monitoring, recordkeeping and reporting. Facilities that are subject to NSR in its entirety will have costs associated with preparing permit applications, including control technology and environmental impact assessments, emission offsets for nonattainment areas, and emissions monitoring, recordkeeping, and reporting. The proposed amendments to Part 231, in general, add provisions for increased regulatory flexibility and provide for a coordinated review process for NSR affected projects. The technology assessment requirements of LAER, for facilities subject to the Department's existing Part 231, remain unchanged in the Department's proposed amendments to Part 231. While some aspects of the regulatory applicability determination will be more restrictive for non-attainment NSR than current Part 231, i.e. the baseline actual emissions to projected actual emissions methodology will replace the maximum annual potential (MAP) methodology calculation, other aspects of the proposed regulation will be more flexible than the current regulation. For example, for baseline determinations facilities will have the option to choose any 24 consecutive month period in the past five years while the current Part 231 requires facilities to use the most recent 24 consecutive month period unless they can demonstrate that another period is more representative. It is possible that the proposed revisions to Part 231 will result in more facilities being subject to nonattainment NSR review than under current Part 231 since the Department is eliminating the maximum annual potential (MAP) applicability concept. It is also possible that more facilities will be subject to NSR under revised Part 231 than under the Federal regulations since the Department is proposing to determine baseline actual emissions based on a five-year look back period rather than a 10-year look back as in the Federal NSR rule. Although the Department anticipates that more facilities will be subject than under the Federal NSR rule since there will be less opportunity for an emission look back, the Department does not have definitive data to determine for certain that this will be the case. As far as the costs of compliance are concerned the Department does not envision significant increased costs. Since the proposed amendments to Part 231 apply to proposed major facilities and major modifications, annual compliance and administrative costs would remain consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

The proposed regulation requires that for any facility seeking the establishment of a PAL, that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction

is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The capital, operation and maintenance, and monitoring costs associated with the acceptance of a PAL, if any, will vary on a case-by-case basis. The requirement to reduce the PAL may cause an increase in cost to the facility that chooses to use a PAL, if a facility chooses a capital-intensive means of achieving the emission reductions. However, some facilities may meet the 25 percent reduction without incurring any additional costs, such as when a facility already plans to reduce the usage of a less efficient source within the facility, or implements efficiency improvements that reduce emissions and the cost of operation. Since PALs are a new compliance option, no specific cost estimates are available to determine if the PAL provisions will cause a monetary burden on any facility that chooses to use a PAL.

The proposed amendments to Part 231 set forth PM 2.5 applicability requirements for new major facilities and NSR major modifications consistent with new Federal PM 2.5 requirements. The Department must include PM 2.5 in its proposed amendments to Part 231 to receive SIP approval. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 nonattainment area, the proposed rule requires the application of LAER and emission offsets of PM 2.5 at a ratio of one to one. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 attainment area, the proposed rule requires the application of BACT and preparation of an ambient air quality impact analysis. Facilities which meet the PM 2.5 applicability criteria will incur additional costs above those in existing Part 231 since PM 2.5 is not a regulated contaminant under existing Part 231 and was not previously a regulated contaminant under federal 40 CFR 52.21 (PSD). The most significant cost increase will be for new facilities and modifications that need to obtain PM 2.5 emission offsets. These costs will, however, vary greatly being dependent on the amount (tons per year) of emission offsets needed and the availability of approved reductions to be used as PM 2.5 offsets.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on rural areas. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

RURAL AREA PARTICIPATION:

In May 2004, the Department convened a workgroup to discuss the development and adoption of a State NSR regulation (revised Part 231). Participants included members of the regulated community, State and Federal agencies, and environmental organizations: American Lung Association; the Business Council of New York State, Inc. (BCNYS); the Chemical Alliance; the National Federation of Independent Businesses; Consolidated Edison Company of New York; the Energy Association of New York State; EPA Region II; Independent Power Producers of New York; the Natural Resources Defense Council (NRDC); the New York Public Interest Research Group (NYPIRG); New York Department of Public Service (NYSDPS); New York State Office of the Attorney General (NYSOAG); and the Governor's Office of Regulatory Reform (GORR).

The Department held four meetings in the summer and fall of 2004 to discuss the major reform provisions included in EPA's 2002 Federal NSR Rule and Equipment Replacement Provision (ERP). The following issues were discussed: the Clean Unit and Pollution Control Project exemptions; whether the 2002 Federal NSR Rule adequately addressed compliance monitoring, reporting and recordkeeping; the methodology for determining baseline actual emissions, including the appropriate look-back period (five years versus 10 years); the "reasonable possibility" test; the method for determining whether a significant emission increase occurred - the baseline actual emission to projected actual emissions test; whether "demand growth" should be excluded from the projection of post-modification actual emissions; routine maintenance, repair, and replacement, including the ERP rule, and the practice of conducting case-by-case determinations; and the PAL provision.

The workgroup reconvened on February 16, 2006 to discuss proposed amendments to Part 231. The Department presented an overview of the proposed amendments to Part 231 and discussed the differences between the proposed amendments to Part 231, EPA's 2002 Federal NSR Rule and

the Department's existing NNSR Regulation (6 NYCRR Subpart 231-2). The workgroup commented on provisions which might be too broadly (e.g., permit modification triggers) or too narrowly construed (e.g., definition for routine maintenance repair and replacement). The attendees were also interested in the timing of the regulation and other pending and anticipated EPA regulations which might impact NSR review. The Department requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received. On September 6, 2006, the Department publicly notified for hearings and comment proposed amendments to Part 231. Following this proposal and receipt of comments, the workgroup reconvened once again on March 28, 2007 to discuss further changes that the Department planned to make to its proposed amendments to Part 231. The workgroup attendees were interested in the Department's proposed changes to baseline emissions, exemptions, PALs, and monitoring/reporting/recordkeeping requirements particularly as they relate to insignificant modifications and emissions attributable to independent factors such as demand growth. The Department once again requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received.

The Department has also provided outreach through Part 231 rulemaking presentations at the New York State Business Council's 2005 Annual Industry-Environmental Conference held on October 13 & 14, 2005 in Saratoga Springs, New York, and at the Air & Waste Management's Ninth Annual Environmental, Health & Safety Seminar held in Rochester, New York on February 15, 2006. Comments from these presentations were also considered during development of the proposed amendments to Part 231. The amendments to Parts 200, 201, and 231 were published in the State Register on September 26, 2007 for public hearings and comment. Hearings were held in Avon on November 13, 2007, Albany on November 15, 2007, and in Long Island City on November 16, 2007. The comment period closed on November 26, 2007. The Department received written and oral comments. All of the comments have been reviewed, summarized and responded to by the Department. Public notice will be held to obtain additional comments on the Department's proposed revisions to its original proposed amendments to 6 NYCRR Parts 200, 201, and 231 that were published in the State Register on September 26, 2007.

Revised Job Impact Statement

NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide.

The Department is undertaking this rulemaking to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rulemaking is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been included in the proposed amendments to address reasonable possibility requirements for insignificant modifications. Additionally, any project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a significant facility emissions increase attributable solely to independent factors must notify the Department in writing of the proposed project prior to implementing the change. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for routine maintenance, repair, or

replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:

Due to the nature of the proposed amendments to Part 231, as discussed above, no measurable effect on the categories or numbers of jobs, or employment opportunities in any specific category is anticipated. There may be some job opportunities for persons providing consulting services and/or manufacturers of pollution control technology in relation to the new requirements.

REGIONS OF ADVERSE IMPACT:

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. The existing NSR requirements are not being substantially changed from those that currently exist.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or promote the development of any significant new employment opportunities. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

SELF-EMPLOYMENT OPPORTUNITIES:

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

Summary of Assessment of Public Comment

Comments received September 26, 2007 through November 26, 2007.

The New York State Department of Environmental Conservation (Department) is proposing to amend existing 6 New York Code of Rules and Regulations (NYCRR) Parts 200 (General Provisions), 201 (Permits and Registrations), and 231 (New Source Review In Nonattainment Areas and Ozone Transport Regions). The amendments to Part 200 add a definition for Routine Maintenance Repair and Replacement, amend the definition of potential-to-emit, and remove the reference to delegation of the federal Prevention of Significant Deterioration (PSD) requirements. The amendment to Part 201 modifies the definition for Major Stationary Source. Existing Part 231 will be re-titled as New Source Review for New and Modified Facilities and will include new Subparts 231-3 through 231-13. The existing Part 231 regulations (Subparts 231-1 and 231-2) are being retained with only modification of applicability dates. The new Subparts will implement nonattainment, and attainment (PSD) New Source Review.

The Department's proposed amendments to 6 NYCRR Parts 200, 201, and 231 were published in the State Register on September 26, 2007. Hearings were held in Avon on November 13, 2007, Albany on November 15, 2007, and in Long Island City on November 16, 2007. The comment period closed on November 26, 2007. The Department received written and oral comments from 618 different commenters regarding the proposed regulation. All of the comments have been reviewed, summarized and

responded to by the Department in its Assessment of Public Comments document.

Some commenters supported the Department's effort to revise its new source review regulations and adopt a State PSD program. Other commenters, including the public, industry and environmental organizations, expressed opposition to various aspects of the proposed amendments for a variety of reasons. The comments covered a number of topics including, general support for and opposition to the proposed amendments, regulatory efficiency, technical concerns, economic impacts, perceived inconsistencies with the Environmental Conservation Law (ECL) and the Clean Air Act (CAA), and legal concerns.

The proposed definition for routine maintenance, repair, and replacement was added to Part 200 to clarify an existing federal regulatory exemption from the definition of "modification" for those activities that involve "routine maintenance, repair, and replacement" (RMRR). Several commenters supported the Department's proposal to establish a definition for "Routine Maintenance, Repair, and Replacement" in Part 200.1(c). Several other commenters, while supporting the RMRR exemption, characterized the definition as being vague and unworkable. These commenters expressed concern with the Department's use in the definition of the words "generally" and "typically" and requested further definition of those terms. Other commenters took issue with the indication that RMRR is "typically paid for out of the operation and maintenance budget of the facility." The Regulatory Impact Statement addresses the federal "Equipment Replacement Provision" rule which was promulgated by EPA in 2005 and subsequently vacated by the US District Court. The proposed definition reflects the common understanding that non-routine activities at facilities are typically paid for from funding sources beyond the operating and maintenance budget used for routine activities. Commenters also stated that the RMRR definition, as proposed, could limit the availability and reliability of the equipment at their facilities, and that all maintenance activities could be considered as life extending and therefore not meet the definition of RMRR. The proposed Part 231 definition states that the Department will continue to review activities on a case-by-case basis as has been the established practice. Some commenters supported the establishment of a RMRR definition, stating that it provides a level of regulatory certainty, while others requested that the definition be eliminated completely or revised to include additional clarification of the terms contained in the definition. As explained in more detail in the Assessment of Public Comments, the department will retain the proposed definition as proposed.

A comment was received regarding the proposed definition of "major stationary source" in Paragraph 201-2.1(b)(21). The commenter believes that the Department intends to use the proposed definition for implementing the major NSR requirements in Part 231 as well as the Title V permitting requirements in Part 201, and that the proposed definition unintentionally changes the Title V permit applicability. The commenter is correct that the Department intends to use the proposed new definition for implementing the Title V permitting requirements in Part 201 and the major NSR requirements in proposed Part 231. Commenter is also correct that the Department's proposed definition inadvertently changes the applicability of the Department's Subpart 201-6 regulation. To address this issue, the Department will revise the proposed definition by adding a new Subparagraph (i), deleting the originally proposed Subparagraph (iv), and renumbering the remaining Subparagraphs of Paragraph 201-2.1(b)(21).

A comment was received regarding the timing of Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) determinations. The commenter requested that the Department cut off consideration of BACT and LAER at the end of the public comment period, not at the time of final permit issuance as proposed. The commenter believes the establishment of BACT and LAER at the time of permit issuance could greatly complicate and extend the NSR permitting process. In accordance with federal requirements, BACT or LAER is not established in final form until the final permit is issued (see EPA's "New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting"). The Department disagrees with commenter that the proposed provisions could greatly complicate and extend the NSR permitting process, and believes that the final BACT and LAER determinations should be established at the time the final permit is issued. The Department will not make the requested change.

A comment was received regarding the Department's mandated use, by reference, of Departmental "policy" documents with regard to air quality impact analyses. Concern was stated that references to such guidance and policy are construed as establishing binding and enforceable standards. During the formulation of the draft Part 231 rule, the air quality impact analysis procedures referred to were proposed for public comment on March 8, 2006 and finalized as DAR-10 in the Environmental Notice Bulletin on May 24, 2006 after minor public comments were received. DAR-10 is titled "NYSDEC Guidelines on Dispersion Modeling Procedures for Air Quality Impact Analysis." In accordance with Section

3-0301(z) of the Environmental Conservation Law, the Department must make available for public notice, and in appropriate cases public comment, all guidance memoranda and similar documents of general applicability which provide guidance to the general public in complying with the Environmental Conservation Law and its regulations. The purpose of DAR-10 is to provide guidance to the regulated community as to what methods will be considered acceptable approaches for dispersion modeling methodologies and related air analysis procedures.

Several commenters requested that the Department revise the exemption for facilities exempt from NOx requirements upon petitioning of the Department and the EPA on demonstration of no ozone air quality impact, and eliminate the exemptions for temporary clean coal demonstration projects. These exemptions are in the current 6 NYCRR Subpart 231-2 regulation. The Department has determined that the clean coal technology exemptions and associated definitions are out of date and no longer necessary for implementing the NSR program. Therefore, the Clean Coal technology definitions and exemptions have been removed from proposed Part 231.

Several comments were received regarding the Department's proposal to continue with a single baseline period for all regulated NSR contaminants for a single project. The commenters on this issue requested that multiple baselines be allowed for a single project, indicating that the Department is overly restrictive compared to the EPA, limiting the ability of a facility to account for variability in production rates, fuels and raw materials. The use of multiple baselines could result in a facility selecting several different baseline periods to maximize the determination of past actual emissions for several different pollutants. The Department believes this could create an artificially high profile of baseline actual emissions which in fact were never emitted by the facility (or emission source) and, in extreme cases, could never be achieved by the facility in actual operation. With higher baseline emissions during a particular two-year period, a proposed project could possibly avoid being subject to NSR for those pollutants as a result of selecting that baseline period. The result of this is the potential for a project that would otherwise be considered major except for the artificially high baseline to either "cap out" or "net out" of NSR. This would cause an increase in emissions that would exacerbate air quality problems in New York State. The Department has determined that a single baseline period for a specific project is more appropriate for New York's NSR program. The use of a single baseline period assures that a proposed project is based on an actual operating scenario and not an artificially high emissions baseline. The Department will not make the requested change.

Comments from various environmental groups and various industry representatives were received regarding the Department's proposal to allow a baseline period of five years for determining baseline actual emissions. The Department's proposal allows the determination of baseline actual emissions by calculating pre-change emissions based on actual emissions during any 24 consecutive months within the five years immediately preceding the change. The environmental commenters state that the definition of baseline period in the proposed rule is weaker than the NSR regulations in place prior to the Bush Administration's rollbacks. They requested that the Department require the determination of baseline actual emissions by calculating pre-change emissions based on actual emissions during the two consecutive years immediately preceding a change, with the ability to look back five years if the two year period immediately preceding the change is determined by the DEC not to be representative of a source's normal operations. The industry commenters requested that the proposed baseline period be consistent with the current Federal baseline period (10 year look-back) provisions. Alternatively, they requested that the Department allow for a 10 year look-back while reserving the ability to determine whether a proposed baseline period is most representative of normal operations. The Department does not believe that the definition of baseline period represents a rollback, especially when viewed with the entirety of the Part 231 rule revisions being adopted. Furthermore, the Department believes that the implementation of NSR in New York needs to be streamlined, and having a more straightforward approach to determining baseline actual emissions is a significant step to achieving that goal. Under the baseline period definition in current Subpart 231-2, facilities are not allowed to demonstrate that a 24 consecutive month period, outside of the five years immediately preceding a project, is more representative of normal facility operations. Facilities do, however, have the opportunity to make a case that another 24 consecutive month period within five years immediately preceding a project is more representative of baseline emissions. This requires a case-by-case review of historical facility operations by Department staff, an extremely resource intensive process, as noted in the Regulatory Impact Statement, that can lead to inconsistent application of the rule throughout the State. Allowing facilities to choose any 24 consecutive months in the five years immediately preceding a project avoids this result. The Department believes that allowing any 24 consecutive months in five years provides facilities

with a sufficient period of time to establish baseline emissions. The Regulatory Impact Statement discusses in detail the rationale behind the Department's decision to propose the baseline period consisting of any 24 consecutive months in the five years immediately preceding a project. No change will be made to the proposed baseline period.

One commenter objected to the provision in the proposed definition of baseline period that when there is less than a consecutive 24 month period of operation, the lesser period of operation must be used as the baseline period. This provision currently exists in the Department's Subpart 231-2 regulation. Commenter has stated that the Department's required baseline period for sources where there is no consecutive 24-month period of operation is unnecessarily more restrictive than the Federal rule, however, has not provided any Federal citation to support such statement. The commenter has also stated that clarification is needed as to how this provision is to be implemented. The Department disagrees that its proposed baseline period is more restrictive than the Federal rule, and will retain the provision that if less than two consecutive years of operation exist, that period of operation shall be used as the baseline period. The following example illustrates how the Department would determine baseline actual emissions in accordance with this provision. If a new source operated for 18 months (1 ½ years) and then shutdown, they would be required to sum up the lower of actual or allowable emissions over the 18 month period and then divide the total by 1.5 years. So, if the source reported actual emissions of 120 tons for the first 12 months and 90 tons for the next six months then the baseline actual emissions would be $(120 \text{ tons} + 90 \text{ tons} = 210 \text{ tons} / 1.5 \text{ years} = 140 \text{ tons per year})$.

One comment, from various environmental groups asked that the Department reject the baseline actual-to-projected actual emissions test and instead adopt the pre-2002 federal baseline actual-to-potential emissions test, while an industry commenter supported the Department's proposed baseline actual-to-projected actual emissions test. The actual-to-projected actual emissions test is a key component of the December 2002 federal NSR rule and was upheld by the Court. Because the Department is requiring applicants to incorporate permit conditions with federally enforceable limits which reflect the projected actual emissions of an NSR major modification, the Department believes that there will be no relaxation from the pre-2002 Federal and existing Part 231 requirements.

Comments from various environmental groups and industry representatives were received regarding the proposed Subpart 231-11 reporting and recordkeeping requirements associated with projects for which there exists a reasonable possibility of triggering NSR applicability. The comments from environmental groups suggested that the proposed regulations may result in fewer sources maintaining documentation of their emissions increases than under the Federal "reasonable possibility" test. The commenters recommend that the Department require any source that projects a significant post-change actual emission increase to report its emissions increase calculation to DEC for review regardless of whether the source attributes some or all of the increase to demand growth. The industry comments stated that the proposed provisions will impose regulatory requirements that are more stringent than Federal requirements, and the recordkeeping requirements are excessive for modifications that have no reasonable possibility of resulting in a significant emissions increase. They further state that there is no justification for requiring the Section 231-11.4 recordkeeping and monitoring requirements when a project's potential to emit ensures there's no reasonable possibility that actual emissions will exceed the significance thresholds. The Department understands the concerns of both the environmental and industry commenters. The Department disagrees with the environmental groups' assertion that the proposal would require fewer sources to monitor post-change emissions than required under the federal reasonable possibility rule. The Department also disagrees with the industry comment that the recordkeeping requirements are excessive for modifications that have no reasonable possibility of resulting in a significant emissions increase. Requiring such records is important if a facility proposes a project in the future for which a net emission increase determination is necessary. Furthermore, Federal regulations require that all emissions, including emissions from any exempt or trivial activity, which are contemporaneous with a proposed project, be included in any net emissions increase determination. Maintaining the records under proposed Subdivisions 231-11.4(a) ensures that all emission increases are on record and available should a net emission increase determination be required. The Department believes that the rule as proposed strikes an appropriate balance between environmental concerns and economic and administrative concerns. However, the Department recognizes the need to clarify the Subpart 231-11 requirements and to incorporate EPA's final reasonable possibility requirements promulgated on December 21, 2007. Proposed Subpart 231-11 has been restructured to include permit and reasonable possibility requirements. EPA's reasonable possibility rule only requires EUSGUs to notify the Department prior to beginning actual construction of a modification if the projected actual emissions increase equals or exceeds 50 percent of the ap-

plicable significant project threshold. Proposed Subpart 231-11, as revised, extends the pre-construction notification requirement to any facility that proposes a modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold or proposes a modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded per Clause 231-4.1(b)(42)(i)(c) are added. Part 231 also provides for emission caps for any facility that uses netting to avoid major NSR requirements. These facilities will be subject to permit conditions with enforceable emissions limitations to ensure that anticipated emissions reductions are achieved.

Comments were received regarding the Plantwide Applicability Limitation in proposed Subpart 231-9. Both the environmental and industry commenters supported the PAL provisions, but both had concerns with specific aspects of the PAL provisions. Environmental commenters objected to allowing sources to use different baseline periods for different pollutants, allowing a source which has not yet commenced construction to include emissions equal to the potential to emit, and allowing a PAL to be presumptively renewed at the existing PAL level. The industry commenters objected to the 25 percent reduction requirement in the sixth year of the PAL. As discussed in the Regulatory Impact Statement, the Department wants to encourage the use of PALs in the State and believes that they could provide a measure of regulatory flexibility while at the same time providing for long-term protection of the environment. The environmental commenters' proposed revisions would significantly reduce the flexibility provided by the rule and, as a result, discourage the use of PALs in the State. The industry commenters' request to delete the 25 percent reduction requirement would not be consistent with the Department's environmental protection goals. The Department has determined that additional environmental benefits will result from requiring a reduction in the PAL of up to 25 percent in the sixth year of the PAL. The Department believes that the proposed PAL provisions best balance the goals of improving air quality while reducing the burden of NSR compliance on industry. The Department will not revise these provisions.

Several comments were received regarding the Department's proposal to allow the exclusion, in the determination of projected actual emissions, of emissions following a project that the existing emission source could have accommodated during the consecutive 24 month period used to establish the baseline actual emissions and that are also unrelated to the particular project. The comments were specifically directed at emissions increases resulting from product demand growth. Product demand growth is an example of a factor that could result in emissions increases that are unrelated to a project. The comments received from various environmental groups stated that the most dangerous and egregious proposed change to Part 231 is to let facilities increase pollution to meet growth in market demand. They were concerned that the demand growth exemption creates a "self-policing scheme" that is unenforceable, and the proposed monitoring and reporting requirements included in the proposal would not ensure the Department's ability to review demand growth calculations. The environmental commenters requested that the Department rescind the proposed demand growth exemption. The Department also received comment from industry regarding this proposed change to Part 231. Industry commenters support retention of this provision. They believe the exemption reflects the intent of NSR to address emission increases related to physical and operational changes, will provide valuable operational flexibility to businesses in states that conform to the federal NSR reforms, and is a key Federal reform issue whose adoption in New York will help assure a more even regulatory "playing field" for in-State business. The Department understands both the pros and cons of this aspect of the proposal, and believes the revised Part 231 effectively balances the Department's concerns with adhering to the legislative intent of the Clean Air Act, assuring compliance with NSR, balancing the State's environmental and economic interests, and enacting a workable regulatory program that the Department can reasonably implement taking into account available resources.

Several commenters requested that the Department reject all of the Bush Administration's 2002 Regulatory rollbacks. The commenters stated that they understand that New York must adopt an NSR program but ask that it be modeled on the Federal NSR regulations in place as they existed prior to the Bush Administration 2002 regulatory rollbacks. The Department does not believe the proposed Part 231 rule represents a wholesale adoption of the 2002 Federal NSR Rule. In fact, there are few provisions the Department adopted wholesale and those which the Department did incorporate included additional regulatory safeguards. The Department has utilized NSR reform as an opportunity to strengthen NSR requirements, including stricter requirements for emission calculations and additional recordkeeping and reporting requirements. The Regulatory Impact Statement discusses in detail the rationale behind the Department's Part

231 proposal, including the substantial additional recordkeeping and monitoring provisions over and above the Federal rule.

Department of Health

EMERGENCY RULE MAKING

Payment for FQHC Psychotherapy and Offsite Services

I.D. No. HLT-39-08-00005-E

Filing No. 856

Filing Date: 2008-09-08

Effective Date: 2008-09-08

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

Action taken: Amendment of section 86-4.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 201.1(v)

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

Specific reasons underlying the finding of necessity: The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for FQHC Psychotherapy and Offsite Services.

Purpose: Permit psychotherapy by certified social workers as a billable service under certain circumstances.

Text of emergency rule: Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in subdivision (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services with the exception of clinical social services in FQHC clinics as defined in subdivision (g) of this section, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a proce-

cedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee for service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in subdivision (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the State Register at some future date. The emergency rule will expire December 6, 2008.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act (42 USC

1396a(a)(10)) and 1905(a)(2) of the Social Security Act (42 USC 1396d(a)(2)) require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act (42 USC 1395x(aa)) defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
- Payment will be made on the basis of a FQHC group rate.
- Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

COSTS:

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

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Downstate	Up-state	Statewide Average	Cost Estimates
Offsite Visits				Offsite Visits
Susequent Hospital Care	\$62.73	\$55.19	\$58.96	\$1,117,212
Psychotherapy Services				Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84	\$6,222,733
2004 FQHC Visit Volume	\$1,894,864			
Volume Increase Assumptions				Total
Group Therapy Increase= 10% Increase				\$7,339,945

2004 FQHC Volume.

Off-site Visit Increase= 1% Increase

Over 2004 FQHC Volume

Cost to the Department of Health:

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

No impact on small businesses or local governments is expected.

Compliance Requirements:

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

Professional Services:

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

Compliance Costs:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Economic and Technological Feasibility:

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

Compliance Costs:

There are no direct costs associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

The Department has had conversations with the National Association of

Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

Job Impact Statement

Nature of Impact:

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

Categories and Numbers Affected:

There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

Minimizing Adverse Impact:

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Notification and Submission Requirements for Continuing Care Retirement Communities

I.D. No. HLT-39-08-00007-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 901.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 4602(2)(g) and 4603(8)

Subject: Notification and Submission Requirements for Continuing Care Retirement Communities.

Purpose: Revises necessary approvals required for a continuing care retirement community's extended construction completion date.

Text of proposed rule: Pursuant to the authority vested in the Continuing Care Retirement Community Council and the Commissioner of Health by sections 4602(2)(g) and 4603(8) of the Public Health Law, subdivision (c) of section 901.9 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register to read as follows:

Subdivision (c) of Section 901.9 is amended to read as follows:

(c) Changes in the construction timetable that result in the extension of the completion date beyond one year of the current approved completion date shall require the approval of the [Life Care Community Council] Commissioner, with the advice and consent of the Superintendent, and, if required, the advice and consent of the Attorney General;

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

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

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

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

Consensus Rule Making Determination

Statutory Authority:

Article 46 of the Public Health Law ("PHL") provides statutory authority for the establishment and operation of continuing care retirement communities ("CCRCs") in New York State. This proposal is authorized pursuant to PHL Sections 4602(2)(g) and 4603(8). Section 4602(2)(g) authorizes the Continuing Care Retirement Community Council ("Council") to adopt rules and regulations and amendments

thereto to effectuate the provisions of Article 46. PHL Section 4603(8) authorizes the Commissioner to promulgate rules and regulations and amendments thereto that have been adopted by the Council to effectuate the provisions of Article 46.

Basis:

The proposed rule amends the approval process pertaining to certain requests by CCRCs for an extension of a community's construction completion date subsequent to approval of its Certificate of Authority application by the Council. Presently, requests for changes in the construction timetable that extend the completion date beyond one year of the current approved completion date are reviewed and approved by state agency staff (including staff of the Department of Health, the State Insurance Department and, if required, the Office of the Attorney General) and then presented to the Council for an additional approval. This twofold approval process has been problematic for communities working within strict financing deadlines. Consequently, the Council has determined that state agency review and approval are sufficient for these requests and an additional Council approval is unnecessary in those instances when a community is proposing an extension of the construction completion date beyond one year of the completion date previously approved under the Certificate of Authority. Such requests for an extended construction completion date will continue to be reviewed by appropriate state agency staff. Approval of such requests will be vested in the Commissioner, with the advice and consent of the Superintendent and, if required, the advice and consent of the Attorney General.

This rule is being proposed as a consensus rule as the Department does not expect to receive any comments in opposition to the proposed revision following its publication in the State Register. The proposed rule will provide a more streamlined approval process for requests made by CCRCs for certain extensions to an approved construction completion date. CCRC sponsors and developers which submit such requests and CCRC provider organizations support the proposed rule since the proposed communities will benefit from the expedited review and approval process. The Continuing Care Retirement Community Council discussed the proposed amendment at the June 4, 2008 Council meeting. The amendment has Council support and the Council has recommended the change.

Job Impact Statement

A Job Impact Statement is not required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act, since it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. The effect of the proposed rule will be to establish a more efficient approval process when a continuing care retirement community requests approval of an extension of a construction completion date beyond one year of the date previously approved under its Certificate of Authority.

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Insurance Sales Practices on Military Installations or Involving Military Personnel

I.D. No. INS-39-08-00009-P

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

Proposed Action: Addition of Part 223 (Regulation 186) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 308, 309, 2103, 2104, 2107, 2109, 2110, 2123, 3201, and 4226, and arts. 24 and 45

Subject: Insurance sales practices on military installations or involving military personnel.

Purpose: To declare certain sales practices occurring on military installations or involving military personnel as unfair trade practices.

Substance of proposed rule (Full text is posted at the following State website: www.ins.state.ny.us): Section 223.1 sets forth the main purposes of the regulation, including setting forth standards to protect active duty

service members of the United States Armed Forces from dishonest and predatory insurance sales practices by prohibiting certain identified sales practices.

Section 223.2 is the applicability section. It indicates that this regulation shall apply only to the solicitation or sale of an insurance policy, as defined in section 223.3, by an insurer or insurance producer to an active duty service member of the United States Armed Forces.

Section 223.3 is the definitions section.

Section 223.4 is the exemptions section.

Section 223.5 describes various sales practices that are prohibited when they take place on a military installation.

Section 223.6 describes various sales practices that are prohibited regardless of location.

Section 223.7 indicates that violations of this Part will be deemed "determined violations" for purposes of Article 24 of the Insurance Law.

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

Data, views or arguments may be submitted to: Peter A. Dumar, Esq. Associate Insurance Attorney, New York State Insurance Department, One Commerce Plaza, Albany, New York 12257, (518) 474-4552, email: pdumar@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for promulgation of this rule derives from sections 201, 301, 308, 309, 2103, 2104, 2107, 2109, 2110, 2123, 3201, and 4226, and Articles 24 and 45 of the Insurance Law.

These statutory provisions give the superintendent authority over the sale and marketing of insurance products, including the sale of insurance products on military installations and to military personnel.

Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise make regulations.

Section 308 and 309 authorize the superintendent to inquire with relation to the transactions or condition of any authorized insurer or its officers, including the authority to require special reports.

Article 21 establishes the requirements, including standards of competency and trustworthiness, for obtaining and renewing certain licenses, including agents, brokers, adjusters, consultants, and intermediaries. It also provides for the investigation and disciplining of the licensees.

Sections 2103, 2104, 2107 and 2109 provide the superintendent with licensing authority over insurance agents, brokers and consultants.

Section 2110 gives the superintendent authority to revoke or suspend licenses of insurance producers, consultants or adjusters.

Section 2123 prohibits licensees from making misrepresentations, misleading statements and incomplete comparisons.

Section 3201 governs the use and approval of policy forms in New York State.

Article 24 of the Insurance Law regulates trade practices in the insurance industry by prohibiting practices that constitute unfair methods of competition or unfair or deceptive acts or practices.

Section 4226 prohibits insurers from making misrepresentations, misleading statements and incomplete comparisons.

Article 45 deals with fraternal benefit societies, providing the requirements for the incorporation, licensing and operation of domestic, foreign, and alien fraternal benefit societies; requirements for issuance of insurance; and the grounds for revocation or suspension of a license.

2. Legislative objectives: Congress determined that sales abuses were occurring on military installations or involving military personnel. Congress passed, and President Bush signed on September 29, 2006, the Military Personnel Financial Services Protection Act, Pub. L. No. 109-290 (2006) (the "Federal Act"). In order to effectuate the Federal Act, the Insurance Department is promulgating this regulation to declare certain sales practices occurring on military installations or involving military personnel as false, misleading, deceptive or unfair.

3. Needs and benefits: Responding to 30 years of documented abuse regarding the sale of life insurance to members of the military, Congress found it imperative that members of the United States Armed Forces be shielded from "abusive and misleading sales practices" and protected from certain life insurance products that are "improperly marketed as investment products, providing minimal death benefits in exchange for excessive premiums that are front-loaded in the first few years, making them entirely inappropriate for most military personnel."

To address these concerns, Congress required that the "States collectively work with the Secretary of Defense to ensure implementation of ap-

propriate standards to protect members of the Armed Forces from dishonest and predatory insurance sales practices while on a military installation," and directed that each state report to Congress by September 29, 2007, on the progress made regarding its adoption of the standards collectively developed. To ensure that service members are offered only "first rate financial products", Congress also called on the National Association of Insurance Commissioners (the "NAIC"), in coordination with the Secretary of Defense to report on "ways of improving the quality of and sale of life insurance products. . . by creating standards for products specifically designed to meet the particular needs of members of the Armed Forces, regardless of the sales location."

The Military Sales Practices Model Regulation (the "Model Regulation") was developed by the NAIC to meet these dual Congressional mandates. It makes actionable certain acts and practices that until now have not been declared to be false, misleading, deceptive or unfair under state trade practices statutes. Many of the practices identified incorporate Department of Defense (the "DoD") solicitation rules. For example, the Model Regulation, by tracking DoD regulations, makes it a deceptive trade practice to solicit in barracks, day rooms and other restricted areas.

The Model Regulation also addresses Congressional concerns regarding suitability and product standards. In this regard, the Model Regulation makes it a deceptive or unfair trade practice to recommend the purchase of any life insurance product that includes a "side fund" to junior enlisted service members in pay grades E-4 and below, unless the insurer has reasonable grounds for believing that the life insurance portion of the product, standing alone, is suitable.

In order to comport with New York law, the Model Regulation's exclusion provision was revised to remove the reference to prearranged funeral contracts. In light of the restrictions found in Insurance Law Section 3208, prepaid funeral agreements do not fall within the applicability of the regulation and as such do not need to be excluded. The Model Regulation was also revised to remove the prohibition against the use of war exclusions in life insurance policies. Insurance Law sections 3203(c) and 4510(b)(1) specifically authorize such exclusions. The definition of a formal banking relationship was slightly modified from the Model Regulation, in order to encompass a greater range of depository institutions.

In recognition of Congress' concerns and in furtherance of its goals, the Insurance Department is adopting the Model Regulation, with minimal modifications necessary to comport with existing New York law, as Part 223 to Title 11 NYCRR (Regulation No. 186).

4. Costs: The cost for insurers, fraternal benefit societies and insurance producers to comply with the regulation should be nominal. While some changes in sales practices may necessitate training for field personnel, the acts prohibited by the regulation comport with those prohibited directly by Insurance Law Article 24. The regulation clarifies the prohibitions without imposing significant new obligations.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, town, village, school district, fire district or other special district.

6. Paperwork: The regulation does not impose any reporting requirements on the affected insurers and fraternal benefit societies. They may have to make changes to some existing policy forms with respect to disclosure requirements.

The regulation does not impose any reporting requirements on insurance producers. While the documentation required with respect to the sale of life insurance to military personnel may need to be revised, there is no indication that it will increase to any significant degree.

7. Duplication: The DoD has exerted authority over some aspects of insurance sales on military installations. The regulation, having been developed in consultation between the NAIC and the DoD, is meant to complement DoD practices without being duplicative, overlapping or conflicting. Insurers, fraternal benefit societies and insurance producers are already subject to regulation regarding insurance sales generally. The regulation complements, but does not replace those existing requirements.

8. Alternatives: The Insurance Department considered not implementing the Model Regulation and proceeding under the Department's more general enforcement authority under Article 24. However, because of the abuses documented by Congress, the Department determined that a regulation would be the best way to address the situation.

9. Federal standards: As noted above, this proposed regulation was developed in response to the Federal Act. Congress required that the "States collectively work with the Secretary of Defense to ensure implementation of appropriate standards to protect members of the Armed Forces from dishonest and predatory insurance sales practices while on a military installation.." Congress also called on the National Association of Insurance Commissioners to report to the Secretary of Defense on "ways of improving the quality of and sale of life insurance products. . . by creating standards for products specifically designed to meet the particular needs of members of the Armed Forces, regardless of the sales location."

10. Compliance schedule: This rulemaking will be effective upon publication in the State Register after adoption. The insurers, fraternal benefit societies and insurance producers who engage in sales covered by the regulation may have to adjust some of their sales practices and retrain some of the field personnel, but the time to implement such changes is not expected to be significant.

Regulatory Flexibility Analysis

1. Small businesses: The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

This rule is directed at all insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies and believes that none of them fall within the definition of "small business", because there are none that are independently-owned and operated and have less than one hundred employees.

Further, this rule is directed to licensed insurance producers within New York State. It was developed in consultation between the Department, the National Association of Insurance Commissioners and the United States Department of Defense. With respect to insurance producers, it is intended to implement the federal mandate, by establishing specific rules and regulating sales practices life insurance sold to military personnel in New York.

The rule does not impose any additional reporting requirements on insurance producers. While the documentation required with respect to the sale of life insurance to military personnel may need to be revised, and may necessitate some additional training for insurance producers, it is not expected to have significant impact.

2. Local governments: The Insurance Department finds that this rule will not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at insurers, fraternal benefit societies and insurance producers, none of which are local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers, fraternal benefit societies and insurance producers to whom the rule applies do business in every county in the state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: Insurers and fraternal benefit societies may need to modify their policy form filings with the Insurance Department and may need to revise their sales practices, including training for field personnel.

3. Costs: The costs to insurers, fraternal benefit societies and insurance producers as a result of the regulation will be limited to the costs associated with the need to modify filings with the Department and to revise sales practices, including training for field personnel.

4. Minimizing adverse impact: The rule applies to the insurance market throughout New York, not only to rural areas. The same requirements that will apply to regulated entities located in rural areas will apply to regulated entities outside those areas. The regulation was developed in response to the Federal Military Personnel Financial Services Protection Act. Congress required that the "States collectively work with the Secretary of Defense to ensure implementation of appropriate standards to protect members of the Armed Forces from dishonest and predatory insurance sales practices while on a military installation." The regulation was, in fact, originally developed at the national level under the auspices of the National Association of Insurance Commissioners ("NAIC").

In developing this regulation, the Department did outreach through the NAIC. The NAIC, with Department participation, received input from various consumers groups, industry groups and other interested parties. The rule does not impose any additional reporting requirements on regulated parties. While the documentation required with respect to the sale of life insurance to military personnel may need to be revised, and may necessitate some additional training for insurance producers, it is not expected to have significant impact.

5. Rural area participation: The regulation was developed at the national level under the auspices of the National Association of Insurance Commissioners. No concerns specific to rural areas were identified.

Job Impact Statement

Nature of Impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for sales practices on military installations or involving military personnel. It is unlikely that the standards will affect the total amount of life insurance written to members of the military in New York. It will help

ensure that insurance producers do not sell certain types of life insurance not suitable to military personnel, or engage in certain acts and practices, that are false, misleading, or deceptive. The regulation is unlikely to have an impact on jobs or employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers, fraternal benefit societies, and insurance producers authorized to do business in New York State. There would be no region in New York that would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

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

Self-employment opportunities:

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

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rights and Responsibilities of Persons Receiving Services

I.D. No. MRD-39-08-00003-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 633.4 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Rights and Responsibilities of Persons Receiving Services.

Purpose: To amend the current language in the regulation regarding the right to a balanced and nutritious diet.

Text of proposed rule: • Paragraph 633.4(a)(3) is amended as follows:

(3) The rights set forth in this section are intended to establish the living and/or program environment that protects individuals and contributes to providing an environment in keeping with the community at large, to the extent possible, given the degree of the disabilities of those individuals. Rights that are self-initiated or involve privacy or sexuality issues may need to be adapted to meet the need of certain persons with the most severe handicaps and/or persons whose need for protection, safety and health care will justify such adaptation. It is the responsibility of the agency/facility or the sponsoring agency to ensure that rights are not arbitrarily denied. [Limitations of client rights] *Rights limitations must be documented and must be on an individual basis, for a specific period of time, and for clinical purposes only.*

- Subparagraph 633.4(a)(4)(xvii) is amended as follows:

(xviii) a balanced and nutritious diet[, served at appropriate times and in as normal a manner as possible, and which is not altered or totally denied for behavior management or disciplinary (punishment) purposes;]. *This right shall provide that:*

(a) *meals are served at appropriate times and in as normal a manner as possible; and*

(b) *altering the composition or timing of regularly served meals for disciplinary or punishment purposes, for the convenience of staff, or for behavior modification shall be prohibited.*

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of

SEQRA and 14 NYCRR Part 602, OMRDD has on file a Negative Declaration with respect to this Action. OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Consensus Rule Making Determination

Chapter 324 of the Laws of 2008 changed the language regarding the person's right to a balanced and nutritious diet to amplify already existing requirements. OMRDD has made revisions to the regulation to make that language uniform and consistent with the wording of the NYS Mental Hygiene Law. OMRDD has determined that due to the nature and purpose of the amendment no person is likely to object to the rule as written.

Job Impact Statement

A JIS for this amendment was not submitted because it is apparent from the nature and purpose of the amendment that they will not have an impact on jobs and/or employment opportunities. The finding is based on the fact that the proposed rule making only revises existing language in the regulations regarding a person's right to a balanced and nutritious meal to conform with revisions made in 2008 to the Mental Hygiene Law.

Department of Motor Vehicles

NOTICE OF ADOPTION

Motor Vehicle Inspections

I.D. No. MTV-30-08-00006-A
Filing No. 858
Filing Date: 2008-09-09
Effective Date: 2008-09-24

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

Action taken: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(a), (c), (d), (f), 302(a), (e), (f), 304(b) and 304-a

Subject: Motor vehicle inspections.

Purpose: Creates a shared network for inspection stations in the New York Metropolitan Area.

Text or summary was published in the July 23, 2008 issue of the Register, I.D. No. MTV-30-08-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Carrie L. Stone, Department of Motor Vehicles, Counsel's Office, 6 Empire State Plaza, Room 526, Albany, NY, (518) 474-0871.

Assessment of Public Comment

The agency received no public comment.

Niagara Frontier Transportation Authority

NOTICE OF ADOPTION

Procurement Guidelines

I.D. No. NFT-26-08-00013-A
Filing No. 852
Filing Date: 2008-09-05
Effective Date: 2008-09-24

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

Action taken: Amendment of sections 1159.4 and 1159.5 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1299-e(5) and 1299-t

Subject: Procurement guidelines.

Purpose: To make technical changes and conform to Federal and State law.

Text or summary was published in the June 25, 2008 issue of the Register, I.D. No. NFT-26-08-00013-P.

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

Text of rule and any required statements and analyses may be obtained from: Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott St., Buffalo, NY 14203, (518) 855-7398, email: Ruth_Keating@nfta.com

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Iberdrola's Acquisition of Energy East Corporation

I.D. No. PSC-36-07-00007-A
Filing Date: 2008-09-09
Effective Date: 2008-09-09

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

Action taken: On September 3, 2008, the PSC approved with conditions the joint petition for Iberdrola S.A.'s acquisition of Energy East Corporation.

Statutory authority: Public Service Law, section 70

Subject: Iberdrola's acquisition of Energy East Corporation.

Purpose: To approve with conditions Iberdrola's acquisition of Energy East Corporation.

Substance of final rule: The Commission, on September 3, 2008, adopted an abbreviated order, approving with conditions, the joint petition of Iberdrola S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation, and Rochester Gas and Electric Corporation for Iberdrola S.A.'s acquisition of Energy East Corporation, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Assessment of Public Comment

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

(07-M-0906SA1)

NOTICE OF ADOPTION

Deferral of Capital Investment Plan Expenditures

I.D. No. PSC-13-08-00009-A
Filing Date: 2008-09-05
Effective Date: 2008-09-05

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

Action taken: On July 16, 2008, the PSC adopted an order regarding the petition of Niagara Mohawk Power Corporation for authorization to defer electric transmission and distribution investment costs.

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

Subject: Deferral of Capital Investment Plan expenditures.

Purpose: To direct the company to supplement the record concerning its petition for deferral of certain capital investment expenditures.

Substance of final rule: The Commission, on July 16, 2008, adopted an order directing Niagara Mohawk Power Corporation d/b/a National Grid to supplement the record concerning its request for deferral of certain 2008 electric transmission and distribution costs through a supplemental filing which includes a further demonstration and information consistent with the discussion contained in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Assessment of Public Comment

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

(07-E-1533SA1)

**PROPOSED RULE MAKING
HEARING(S) SCHEDULED**

Major Electric Rate Filing

I.D. No. PSC-39-08-00014-P

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

Proposed Action: The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service.

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

Subject: Major electric rate filing.

Purpose: To consider a proposal to increase annual electric revenues by approximately \$654.1 million or 5.8%, subject to update.

Public hearing(s) will be held at: 11:00 a.m., October 15, 2008* at Public Service Commission, 3 Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY; various times, Oct. 16-17, 2008; Oct. 20-24, 2008; and Oct. 27-30, 2008, as necessary, at Public Service Commission, 3 Empire State Plaza, 19th Fl. Board Rm., Albany, NY.

* On occasion, there will be requests to postpone or reschedule and scheduling changes will be available on the DPS website (www.dps.state.ny.us) for Case 08-E-0539.

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

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

Substance of proposed rule: The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) to increase its annual electric revenues by approximately \$654.1 million or 5.8% over total electric revenues (15.4% over transmission and distribution revenues) for the rate year ending March 31, 2010. Testimony and exhibits filed in support of the Company's proposals are posted on the DPS web page for Case 08-E-0539. That page may be accessed at www.dps.state.ny.us. The amount requested by the Company for that rate year was increased to \$774.4 million in a July 25, 2008 update. Both the initial and updated requests reflect Company proposals to mitigate the revenue increases. The Company also proposes electric revenue increases in the rate years ending March 31, 2011 and March 31, 2012 of \$474.7 million and \$420.5 million, respectively. These figures have not been updated yet. The Company also offers the option of leveling the three annual revenue increases. The statutory suspension period for the filing runs through April 5, 2009. The Commission may adopt in whole or in part or reject terms set forth in Con Edison's filings. The Commission may also adopt changes that go beyond the Company's filings.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.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

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

(08-E-0539SA1)

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

RG&E's Economic Development Plan and Tariffs

I.D. No. PSC-39-08-00010-P

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

Proposed Action: The Public Service Commission is considering a filing from Rochester Gas & Electric Corporation (RG&E) dated August 28, 2008 proposing an economic development plan and tariff revisions.

Statutory authority: Public Service Law, sections 5(1)(b), 65 (1), (2), (3), 66 (1), (3), (5), (10), (12), (12-b)

Subject: RG&E's economic development plan and tariffs.

Purpose: Consideration of the approval of RG&E's economic development plan and tariffs.

Substance of proposed rule: The Public Service Commission is considering a filing from Rochester Gas & Electric Corporation (RG&E) dated August 28, 2008 proposing an economic development plan and tariff revisions in conformance with the requirements adopted in an Order Raising Spending Ceiling and Providing for Revised Procedures issued May 13, 2008 in Case 02-E-0198. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.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

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-G-0199SA7)

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

RG&E's Economic Development Plan and Tariffs

I.D. No. PSC-39-08-00011-P

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

Proposed Action: The Public Service Commission is considering a filing from Rochester Gas & Electric Corporation (RG&E) dated August 28, 2008 proposing an economic development plan and tariff revisions.

Statutory authority: Public Service Law, sections 5(1)(b), 65 (1), (2), (3), 66 (1), (3), (5), (10), (12), (12-b)

Subject: RG&E's economic development plan and tariffs.

Purpose: Consideration of the approval of RG&E's economic development plan and tariffs.

Substance of proposed rule: The Public Service Commission is considering a filing from Rochester Gas & Electric Corporation (RG&E) dated August 28, 2008 proposing an economic development plan and tariff revisions in conformance with the requirements adopted in an Order Raising Spending Ceiling and Providing for Revised Procedures issued May 13, 2008 in Case 02-E-0198. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.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

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-E-0198SA14)

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

Rehearing of Commission Order

I.D. No. PSC-39-08-00012-P

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

Proposed Action: On August 18, 2008, Warwick Water Corporation filed a Petition for Rehearing of the Commission's Order issued on July 22, 2008 in Case 07-W-1129.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10) and 22

Subject: Rehearing of Commission Order.

Purpose: To consider a Petition for Rehearing of the Commission's Order issued July 22, 2008 in Case 07-W-1129.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a Petition for Rehearing of the Commission's Order issued July 22, 2008, filed by Warwick Water Corporation.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.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

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

(07-W-1129SA2)

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

The Quality and Rates Charged for the Provision of Water and Electric Service

I.D. No. PSC-39-08-00013-P

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

Proposed Action: The Commission is considering whether to approve, reject or modify, in whole or in part, the petition of Calverton Owners Association Against M-GBC, LLC regarding the quality and rates charged for the provision of water and electric service.

Statutory authority: Public Service Law, sections 65, 66, 89-b, 89-c

Subject: The quality and rates charged for the provision of water and electric service.

Purpose: To consider the petition of Calverton Owners Association Against M-GBC, LLC regarding water and electric service.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify, in whole or in part, the petition of Calverton

Owners Association against M-GBC, LLC regarding the quality and rates charged for the provision of water and electric service.

M-GBC, LLC provides electric and non-potable water service for fire suppression to occupants of the Calverton Industrial Park, which is located on Long Island. M-GBC, LLC came under the Commission's jurisdiction when the former tenants of the industrial park purchased the properties they then occupied and M-GBC, LLC, the owner of Calverton Industrial Park, continued to provide utility services to the former tenants. Past cases, 05-M-0073 and 05-S-0074, dealt with the rates M-GBC, LLC provided for utility services and the eventual termination of those services as alternate sources became available.

Calverton Owners Association now claims that M-GBC, LLC has not abided by the terms of the prior orders and seeks Commission.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.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

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

(08-M-0890SA1)

Department of State

**EMERGENCY
RULE MAKING**

Firefighter Training

I.D. No. DOS-39-08-00001-E

Filing No. 850

Filing Date: 2008-09-03

Effective Date: 2008-09-03

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

Action taken: Addition of Part 438 to Title 19 NYCRR.

Statutory authority: Executive Law, section 156(6) (chapter 615 of the Laws of 2006)

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

Specific reasons underlying the finding of necessity: Chapter 615 of the Laws of 2006 required that regulations concerning firefighter training be adopted by February 12, 2007. Regulations were adopted on an emergency basis and this rule keeps the regulations in effect until a permanent rule can be adopted.

Subject: Firefighter training.

Purpose: To set forth standards concerning the state firefighter training program.

Substance of emergency rule: PART 438 MINIMUM STANDARDS REGARDING OUTREACH FIRE TRAINING PROGRAM.

Section 438.1 Purpose. The purpose of this rule is to implement the requirements of subdivision 6 of section 156 of the Executive Law, as enacted by Chapter 615 of the Laws of 2006. This subdivision empowers the State Fire Administrator to plan, coordinate, and provide training related to fire and arson prevention and control for paid and volunteer firefighters and governmental officers and employees. Subdivision 6 also directs the Office of Fire Prevention and Control (OFPC) to adopt rules and regulations relating to training, including training standards, the allocation of training hours to counties and the establishment of a uniform procedure for counties to request and OFPC to provide additional training hours.

Section 438.2 contains definitions of terms used in Part 438.

Section 438.3 describes training standards to guide OFPC in its implementation of the rule including instructor and student qualifications, live fire training requirements, and a listing of the standards, manuals, statutes, and regulations which will be used to provide the training authorized by subdivision 6 of section 156 of the Executive Law.

Section 438.4 deals with firefighter training hours, course allocations and scheduling procedures delivered through the Outreach Training Program.

Section 438.5 deals with the requirements and restrictions associated with creating and maintaining a supplemental firefighter training program.

Section 438.6 deals with the requirements and restrictions associated with creating and maintaining a municipal training program.

Section 438.7 deals with the requirements and restrictions associated with creating and maintaining a fire brigade training program.

Section 438.8 deals with firefighter training course allocations and scheduling procedures delivered through the Regional Training Program and Residential Training Program.

Section 438.9 deals with restrictions relating to the state fire training programs.

Section 438.10 deals with the State Fire Administrator's ability to suspend and/or terminate authorization to deliver state fire training courses if an officer, instructor or program violates one or more of the provisions of this Part.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 1, 2008.

Text of rule and any required statements and analyses may be obtained from: Elisha S. Tomko, Esq., Department of State, 99 Washington Avenue, Albany, NY 12231, (518) 474-6740.

Regulatory Impact Statement

1. STATUTORY AUTHORITY

Section 156(6) of the Executive Law requires that the Office of Fire Prevention and Control of the Department of State (OFPC) provide fire and arson prevention and control training to firefighters and related governmental officers and employees. This section requires OFPC to adopt rules related to such training. These rules must include statements concerning training standards used by OFPC, the process by which OFPC allocates training hours to counties, and a uniform procedure for counties to request and OFPC to provide additional training hours.

2. LEGISLATIVE OBJECTIVES

The legislative objectives behind section 156(6) are to make the state training program more transparent, addressing the following processes: allocation of training hours to counties; the uniform procedure for counties to request and OFPC to provide additional training hours; and the training standards which OFPC and its representatives will follow when it delivers training. This rule fulfills the legislative objectives.

3. NEEDS AND BENEFITS

Section 156(6) of the Executive Law requires that OPFC adopt a rule related to firefighter training. Adoption of this rule would add transparency to the process by which firefighter training hours are allocated to counties, describe the training standards which will be followed by OFPC when it delivers training, establish the qualifications of instructors delivering state fire training courses and prescribe a uniform procedure for counties to request and OFPC to provide additional training hours.

4. COSTS

a. Cost to regulated parties for the implementation of and continuing compliance with the proposed rule.

Fire departments would experience no additional out-of-pocket costs if the rule is adopted. The equipment and facilities required by the training provided for in this rule are already in the possession of these departments.

b. Costs to the Agency, the State and Local Governments for the Implementation and Continuation of the Rule.

This rule would not impose any costs to local governments or the State. The Department of State is currently appropriated approximately \$1,500,000 per year outreach firefighter training.

5. LOCAL GOVERNMENT MANDATES

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts. Participation in the firefighter training provided for in this rule is voluntary.

6. PAPERWORK

Several new forms would be required as a result of the rule:

County fire coordinators desiring that training be provided to fire departments within their jurisdiction will be required to answer a survey related to such training and submit a proposed training schedule.

If this rule is adopted, state fire instructors, municipal fire instructors, and county fire instructors would be required to complete student attendance cards.

7. DUPLICATION

No rules or other legal requirements of either the state or federal govern-

ment exist at the present time which duplicate, overlap, or conflict with the proposed rule.

8. ALTERNATIVES

Section 156(6) of the Executive Law requires that OPFC adopt a rule which deals with firefighter training. This section requires that the rule describe the process by which firefighter training hours are allocated to counties, the training standards which will be followed by OFPC when it delivers such training, and prescribe a uniform procedure for counties to request and OFPC to provide additional training hours.

The Department of State considered several alternatives to this rule but established this rule to ensure public safety and compliance with the current federal regulations related to training. For instance, the Department of State considered assigning less state fire instructors per county, but needed to assign 4 instructors per county based on safety concerns, workload and the National Fire Protection Association standard for a required number of instructors based on student enrollment for certain firefighter training, such as live fire. The Department of State also considered using only full-time staff to conduct firefighter training statewide, but it would be cost prohibitive to consider that alternative. Another example of an alternative considered was not to require pre-requisites for training courses, but based on the hazardous nature of firefighting and the need for skills progression, such an alternative was not advisable.

9. FEDERAL STANDARDS

No standards have been set by the federal government for the same or similar subject areas addressed by this proposed rule.

10. COMPLIANCE SCHEDULE

Fire departments interested in receiving the training which is provided for in this proposed rule can comply immediately with the requirements of the rule.

Regulatory Flexibility Analysis

1. Effect of rule

The proposed rule potentially would affect all of the counties and all of the approximately 1850 fire departments located in New York State. The proposed rule would not affect small businesses located in New York State.

2. Compliance requirements

Counties and fire departments wishing to avail themselves of the training offered by the proposed rule would be required to submit a proposed fire training schedule to the Office of Fire Prevention and Control of the Department of State.

3. Professional services

Counties and fire departments will not need any additional professional services in order to comply with the proposed rule.

4. Compliance costs

There would be no costs to counties or fire departments which would be associated with compliance with the rule, or annual costs to these entities for continuing compliance with the rule.

5. Economic and technological feasibility

The proposed rule sets forth a voluntary process whereby counties and fire departments may make requests for firefighter training. The only requirement that the rule imposes on these counties and fire departments is that they make requests for this training. It is therefore economically and technologically feasible for these counties and fire departments to comply with this rule.

6. Minimizing adverse impact

The proposed rule sets forth a voluntary process whereby counties and fire departments may make requests for firefighter training. Since the rule would regulate the administration of a state program rather than the activities of counties and fire departments, engaging in this voluntary process would not have any adverse economic impact on these entities.

7. Small business and local government participation

Representatives of fire departments and local governments participated in legislative hearings at which they urged the implementation of a more transparent process for the allocation of firefighter training resources. This resulted in the passage of Chapter 615 of the Laws of 2006, which requires the promulgation of these rules.

OFPC has reached out to the regulated parties, including County Fire Coordinators, State Fire Instructors, Regional Fire Administrators and Municipal Training Officers to provide them with the processes and procedures OFPC will be following and requiring with respect to the state fire training program. OFPC has provided copies of the rulemaking to the regulated parties. In addition, this rule has been discussed at the instructor's conferences, the regional state fire administrators conference, county fire coordinators conferences, Association of State Fire Chiefs conference and it has been posted on the Office of Fire Prevention and Control's website. To date, the Department of State has not received any feedback based on its outreach.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas

The proposed rule would apply throughout New York State. All of the counties and all of the approximately 1850 fire departments in New York State, including those located in rural areas as that term is defined in section 102(10) of the State Administrative Procedure Act (“SAPA”), would potentially be affected by the rule.

The proposed rule would not regulate any activities of private entities in rural areas of the State.

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

Counties wishing to avail themselves of the training offered by the proposed rule would be required to submit a proposed fire training schedule to the Office of Fire Prevention and Control of the Department of State. Counties and fire departments located in rural areas will not need any additional professional services in order to comply with the proposed rule.

3. Costs

There would be no costs to counties and fire companies located in rural areas associated with compliance with the rule, or annual cost for continuing compliance with the rule by these entities.

4. Minimizing adverse impact

The proposed rule sets forth a voluntary process whereby counties may make requests for firefighter training. The rule would regulate the administration of a state program rather than the activities of public or private entities located in rural areas. Since this process is voluntary, it would not have any adverse economic impact on rural areas of New York State.

5. Rural area participation

Representatives of rural areas participated in legislative hearings at which they urged the implementation of a more transparent process for the allocation of firefighter training resources. This resulted in the passage of Chapter 615 of the Laws of 2006.

OFPC has reached out to the regulated parties, including County Fire Coordinators, State Fire Instructors, Regional Fire Administrators and Municipal Training Officers to provide them with the processes and procedures OFPC will be following and requiring with respect the state fire training program. OFPC has provided copies of the rulemaking to the regulated parties. In addition, this rule has been discussed at the instructor’s conferences, the regional state fire administrators conference, county fire coordinators conferences, Association of State Fire Chiefs conference and it has been posted on the Office of Fire Prevention of Control’s website. To date, the Department of State has not received any feedback based on its outreach.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. In fact, this rule may result in the employment of several additional Office of Fire Prevention and Control fire protection specialists and temporary part-time instructors by the Department of State.

NOTICE OF ADOPTION

Local Government Efficiency Grant Program

I.D. No. DOS-30-08-00012-A

Filing No. 857

Filing Date: 2008-09-09

Effective Date: 2008-09-24

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

Action taken: Addition of Part 815 to Title 19 NYCRR.

Statutory authority: State Finance Law, section 54(10) and Executive Law, section 91

Subject: Local Government Efficiency Grant Program.

Purpose: To establish eligibility requirements and criteria for the Local Government Efficiency Grant Program.

Text or summary was published in the July 23, 2008 issue of the Register, I.D. No. DOS-30-08-00012-P.

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

Text of rule and any required statements and analyses may be obtained from: Kyle Wilber, Department of State, Local Government Services, 99 Washington Ave., Suite 1015, Albany, New York 12231, (518) 473-3355, email: kyle.wilber@dos.state.ny.us

Assessment of Public Comment

The agency received no public comment.