

# 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.

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## Office of Alcoholism and Substance Abuse Services

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### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Office of Alcoholism and Substance Abuse Services publishes a new notice of proposed rule making in the *NYS Register*.

#### Opioid Treatment for Addiction

I.D. No.	Proposed	Expiration Date
ASA-49-08-00007-P	December 3, 2008	December 3, 2009

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## Banking Department

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### NOTICE OF ADOPTION

#### Mortgage Loan Regulations

I.D. No. BNK-18-09-00009-A  
Filing No. 1356  
Filing Date: 2009-12-08  
Effective Date: 2009-12-23

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

**Action taken:** Amendment of Parts 38, 410 and 413 and Supervisory Procedure MB 106 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 14(1), 6-I and 590(3)

**Subject:** Mortgage loan regulations.

**Purpose:** To make various amendments to mortgage loan regulations.

**Substance of final rule:** Section 38.1 – New definitions of net branch, branch manager, branch and application will be added and the definitions of loan solicitation branch and full service branch will be deleted. Additionally, most of the definitions will be re-lettered.

Section 38.3 – The amendment will require a statement to be added to the introductory paragraph of an application which will alert the borrower to the gravity of falsifying any information that they put on their application.

Section 38.3(a)(vii) – The amendment will clarify the disclosure requirements of mortgage brokers in connection with compensation to be received from lenders and borrowers. It specifically will require that fees and points, paid by lenders and borrowers, be disclosed separately and as an aggregate.

Section 38.3(b)(1) – A new section will be added to Part 38. It will require that a statement regarding the charging of discount points by the lender be added to the application. The statement will point out to the borrower that (i) discount points may lower the interest rate paid on the loan but may not lower the overall cost of the loan; (ii) if the borrower refinances or pays off the loan quickly, they will lose the benefit of any lower interest rate provided by the discount points; and (iii) if the borrower finances the discount points, this will increase the amount of money that they must repay to the lender and they will have to pay interest on the discount points as part of the amount they borrowed.

Section 38.7 – A new section will be added to the list of Prohibited Conduct outlined in Part 38.7. This will prohibit a mortgage banker, mortgage broker or exempt organization from engaging any employee or independent contractor who has an employment relationship with any other mortgage banker, mortgage broker or exempt organization, except with the written approval of the superintendent.

Section 38.11 – This section will be amended to address employees working from their homes and net branching. It will explicitly prohibit the establishment of a net branch and it specifically state that, if an employee, independent contractor, or consultant works from a place other than a defined branch, that person must be assigned to a specific branch location for purposes of managerial and regulatory oversight.

Part 410.6 – The amendment will eliminate the reference to “full service branch” and “loan solicitation branch” and replace these references with a single reference to “branch”.

Part 413.3(a)(5) and MB 106 – The amendments will clarify the corporate surety bond requirements for mortgage brokers to act as FHA Mortgage Loan Correspondents.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in section 38.7(a)(16).

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, Esq., State of New York Banking Department, 1 State Street, New York, New York, (212) 709-1658, email: sam.abram@banking.state.ny.us

#### Revised Regulatory Impact Statement

1. Statutory authority:

Banking Law section 14(1) authorizes the Banking Board to adopt regulations not inconsistent with the law. Section 6-i of the Banking Law specifically states that no banking organization, partnership, corporation, exempt organization or other entity (hereafter “lender”) can make a mortgage loan in New York State unless those entities conform to Banking Law requirements pertaining to mortgage bankers (Article 12-D of the Banking Law) and rules and regulations promulgated by the Banking Board or prescribed by the Superintendent. Banking Law Section 590(3) authorizes and empowers the Banking Board to promulgate regulations that are consistent with the purposes of Article 12-D, which include such rules and regulations in connection with the activities of mortgage brokers, mortgage bankers and exempt organizations as may be necessary and appropriate for the protection of consumers and such rules and regulations as

may define the terms used in, as may be necessary and appropriate to interpret and implement the provisions of Article 12.

#### 2. Legislative objectives:

The Legislature enacted Banking Law Article 12-D because it found that it is essential for the protection of the citizens of New York State and the stability of the state's economy that reasonable standards governing the business practices of mortgage lenders and brokers be imposed. The Legislature further found that the obligations of lenders and brokers to consumers in connection with making, soliciting, processing, placing or negotiating of mortgage loans are such as to warrant the uniform regulation of the residential mortgage lending process. Consistent with the purposes of promoting mortgage lending for the benefit of citizens by responsible providers of mortgage loans and services and avoiding requirements inconsistent with legitimate and responsible business practices in the mortgage lending industry, the purpose of Article 12-D is to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operating fairly, honestly and efficiently, free from deceptive and anti-competitive practices.

In furtherance of this mandate, Part 38 was promulgated to provide definitions of terms used in the mortgage banking industry; advertising guidelines; rules regarding application and commitment disclosures and procedures; and prohibitions on improper conduct.

#### 3. Needs and Benefits:

##### Definitions of Branch

Currently, New York State is the only state in the country to have two types of branches for the mortgage banking and mortgage brokerage industries, a full service branch and a loan solicitation branch. All other states have only a single type of branch defined in their laws or regulations. Since January of 2002, New York has been a participant in the Nationwide Mortgage Licensing System ("NMLS"). This system, developed by the Conference of State Banking Supervisors ("CSBS"), the American Association of Residential Mortgage Regulators ("AARMR") and the Financial Industry Regulatory Authority ("FINRA"), streamlines the licensing process by utilizing uniform application forms that can be electronically submitted to participating state regulators. The applications include ones to become a mortgage banker or mortgage broker, to become a mortgage loan originator or to open a branch. The NMLS system uses only a single definition of branch. Additionally, in 2006, the Department's entire fee structure was changed by the enactment of Banking Law section 18-a. This new law set a single fee for an application to open a branch office. The elimination of the two types of branches listed in the regulation will make the regulation consistent with the Banking Law section 18-a. Furthermore, having a single definition will reduce the regulatory burden associated with manual applications for branch types that could not be processed through the NMLS.

Finally, over the past several years, the Department also met with various members and representatives of the mortgage industry a number of times regarding the amendment of the definitions of branch. The industry has recognized that because of technological advances that have taken place over the years, there needs to be changes in how a branch is defined and there needs to be clarification as to when a branch license will be required.

Section 38.11 (Requirements for full service, loan solicitation branches) needs to be amended to reflect the aforementioned sole definition of a branch as amended in Part 38.1. Part 410.5 (Branch applications; investigation fees) will be amended to reflect the elimination of the distinction between full service and loan solicitation branches.

##### Net Branching Prohibition

The Department has had a long-standing policy of disallowing any form of what it has termed "net branching" for mortgage bankers or mortgage brokers. This long-standing policy, which has previously been conveyed to the residential mortgage industry primarily by means of an Industry Letter, seeks to deter situations where an employee of a licensee or registrant, acting as a branch manager, operates and exercises control over his or her own branch office without being licensed or registered by the Department. In such instances, the individual or entity approved by the Department to make or broker mortgage loans is not the individual or entity that is actually performing such activities. Rather, an unknown, unapproved individual or entity is performing them outside of the regulatory construct created by Article 12-D. Since the prohibition has been conveyed primarily by means of an Industry Letter, there is a need to codify and update the Department's definition of and position regarding a "net branch" so that it may be clear to the industry what actions may be construed as net branching and therefore prohibited by the Department. Therefore, a definition of "net branch" will be added to Section 38.1.

##### Definition of Application

Part 38 does not currently contain a definition of "application." Yet this is a term that is used constantly within the mortgage lending industry. Furthermore, the amount of the bond that mortgage brokers are required to have after July 1, 2004 is predicated on the number of New York

applications. In order to provide a definition without causing undue confusion in the industry, the Department has decided to utilize the definition of "application" set forth in Regulation B of the Federal Reserve System since it is a definition that is familiar to all mortgage brokers and mortgage bankers. Therefore, a definition of "application" will be added to Section 38.1.

##### Disclosure of Points and Fees

Part 38.3(a)(vii) will be amended solely to clarify the disclosure requirements of mortgage brokers in connection with compensation to be received from lenders and borrowers. Currently, the language in Part 38.3(a)(vii) seems to cause some confusion among mortgage brokers: Should fees and points, paid by lenders and borrowers, be disclosed as an aggregate, or should they be disclosed separately? The proposed amendment would clarify this matter and require that fees and points, paid by lenders and borrowers, be disclosed separately, and as an aggregate.

##### Dual Employment Prohibition

Part 38.7 will be clarified by adding a specific prohibition against a mortgage banker, mortgage broker or exempt organization engaging any employee who has an employment relationship with any other mortgage banker, mortgage broker or exempt organization. This long-standing prohibition is based on the definition of "employee". Adding this prohibition to the list set forth in Part 38.7 should provide clarity to bankers and brokers as well as eliminate any conflicts of interests that could arise which could negatively affect and harm consumers. However, to address concerns expressed in comments received by the Department, the Department will add the underlined language to the proposed amendment to Part 38.7: "enter into an employment agreement or otherwise engage any employee or independent contractor who has an employment or independent contractor relationship with any other mortgage banker, mortgage broker or exempt organization, except with the written approval of the superintendent." This addition will give the Department the authority to approve certain dual-employment situations where it is determined that conflict-of-interest issues do not exist and therefore a high level of risk is not present.

##### Discount Points Disclosure

The Department has found in several examinations that discount points are not clearly explained to or understood by consumers who are charged such points. Accordingly, an addition to the subdivision of Part 38.3(b)(1) concerning application disclosures of mortgage bankers and exempt organizations will require that the mortgage banker or exempt organization alert consumers in writing of the consequences of lenders charging discount points. This will be accomplished by providing a new required disclosure in those instances in which such points are charged. This will benefit consumers by highlighting these consequences.

##### Corporate Surety Bond Requirements

Part 413.3 (Minimum standards required for approval to act as a Federal Housing Administration mortgage loan correspondent) and Supervisory Procedure MB 106.3(i) (Application to act as a FHA Mortgage Loan Correspondent) will be amended to clarify the already existing corporate surety bond requirements stated in Part 410.3 (Mortgage broker registration; minimum standards).

##### 4. Costs:

In the case of the revised application disclosure, minimal increased costs are warranted in order to allow the Banking Department to ensure that consumers understand the costs of the mortgage loan that they are obtaining.

##### 5. Local government mandates:

The amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 do not impose any requirements or burdens upon any units of local government.

##### 6. Paperwork:

The amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 do not impose any additional paperwork requirements. However, the amendments to 38.3(b)(1) regarding the new disclosure concerning discount points and fees will result in minimal paperwork.

##### 7. Duplication:

None.

##### 8. Alternatives:

During the past few years, the Department has had numerous meetings with various members and representatives of the mortgage industry regarding the definition amendments and the disclosures issues concerning discount points. During these meetings, various alternative forms of definitions were discussed and the now-proposed definitions were finally settled upon among all parties. In January of 2006, the Banking Department, along with banking regulators and law enforcement officials from 48 states and the District Columbia entered into a settlement agreement with Ameriquest Mortgage Company, a subprime lender. This settlement agreement was predicated on the issue of easing consumer confusion regarding discount points. After discussions with the industry, it was decided that the best way to accomplish this goal would be to include an explanatory

statement about the discount points in the required application disclosures given to customers.

In the past year, the Department had anticipated that enactment of the New York's Subprime Lending Reform Law and S.A.F.E. Mortgage Licensing Act of 2008 would lead to revisions of the Department's regulations relating to residential mortgages, and it was contemplated that action on the subject regulatory amendments would be included in that process. However, while the broader revision of the Department's mortgage regulations is proceeding, there is a desire to move forward on the subject regulatory changes without further delay given that these amendments are necessary to codify various positions taken by the Department over the years.

9. Federal standards:

None.

10. Compliance schedule:

With regard to the amendments to the disclosure statements, compliance should be within 90 days of the effective date.

#### **Revised Regulatory Flexibility Analysis**

The amendments as proposed would have prohibited a mortgage banker, mortgage broker or exempt organization from engaging an employee or independent contractor who has a similar relationship with another such organization (a "dual employer").

As a result of comments received, the proposed prohibition on dual employment has been changed to allow dual employment with the written approval of the Superintendent of Banks. A revised Regulatory Flexibility Analysis is not required because this change, by its nature, will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

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

The amendments as proposed would have prohibited a mortgage banker, mortgage broker or exempt organization from engaging an employee or independent contractor who has a similar relationship with another such organization (a "dual employer").

As a result of comments received, the proposed prohibition on dual employment has been changed to allow dual employment with the written approval of the Superintendent of Banks. A revised Rural Area Flexibility Analysis is not required because this change, by its nature, will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

#### **Revised Job Impact Statement**

The amendments as proposed would have prohibited a mortgage banker, mortgage broker or exempt organization from engaging an employee or independent contractor who has a similar relationship with another such organization (a "dual employer").

As a result of comments received, the proposed prohibition on dual employment has been changed to allow dual employment with the written approval of the Superintendent of Banks. A revised Job Impact Statement is not required because this change, by its nature, will not impose a substantial impact on jobs and employment opportunities.

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

The comment period with respect to the proposal ended on June 20, 2009. The Banking Department received two comments on the proposal, one from an industry association and one from a law firm. The comments will be addressed in the order of the sections of Part 38.

The Department proposed to amend Part 38.1(b) to conform the definition of "application" to the federal definition. One commenter felt that the proposed definition of "application" should be further amended to include language which states that any obligation to issue any disclosures in connection with the taking or acceptance of an "application" shall be based on the acceptance of a "completed application" as that term is defined in Regulation B 202.2(f). After a careful consideration of this comment, the Department has decided not to change this part of the proposal. The Department believes that the result of acceding to the commenter's request would be to effectively eliminate a number of disclosure requirements designed to aid borrowers in making a decision about whether to move forward with a particular lender or broker.

The purpose of incorporating the federal definition in the amendment was to promote consistency in giving consumers pre-application disclosures pertaining to appraisal fees, application fees, credit report fees as well as broker fee arrangements. These disclosures would identify the overall costs to the applicant of making an application. The Department believes that changing the language to provide that the obligation to issue disclosures would attach only at the point at which an application is considered complete would serve to increase costs to the consumer, remove transparency from the credit shopping process and defer disclosure of fees to a stage when the consumer has already invested a considerable amount of time and financial resources in the transaction.

A second comment related to the proposed definition of "branch" in Part 38.1(e). The commenter suggested that the language be changed to state that a branch should be any "physical" location at which loan solic-

itation and/or loan processing takes place "as the primary activities of that physical location", irrespective of whether the only contact with an applicant from that location is by internet, telephone, facsimile or other electronic process. The commenter further suggested that the following additional exclusion from the definition of "branch" be added: "ii) the temporary location where the employee, independent contractor or consultant makes or accepts a telephonic and or electronic communication in connection with loan solicitation and/or loan processing." This commenter expressed concern that absent such an exclusion the proposed amended definition might capture a location, such as a restaurant or employee residence, where an employee might occasionally place a business call relating to loan solicitation and/or loan processing.

After a careful consideration of this comment, the Department has decided not to make any changes to the proposed amendment to Part 38.1(e) or to add the suggested language. While the Department appreciates the commenter's concern, it believes that the level of activity with respect to loan solicitation and/or loan processing would determine if a location would be considered a branch or not. The proposed language should not be read to imply that an isolated, casual instance of making a telephone call at a location regarding solicitation or processing would rise to the level of activity requiring a branch license for that location. Furthermore, this amendment would only apply to mortgage bankers and mortgage brokers licensed and registered under Article 12-D of the Banking Law and not exempt organizations. The Department intends to issue an interpretive industry letter on this subject to provide further clarification.

The next comment concerns the amendment to Part 38.3 which would require the addition of the following statement to a written application, "It is a crime to intentionally falsify information on this application." One commenter pointed out that this would largely duplicate the language set forth in the Federal National Mortgage Association's ("Fannie Mae") (1003) mortgage application and the Federal Home Loan Mortgage Corporation's ("Freddie Mac") application form 65. In that commenter's opinion, the regulation should not prescribe specific language, but instead should permit lenders to make the substance of the disclosure in any reasonable manner. The commenter believes that banks should have the option of providing this disclosure on or with the application in the form of a separate document. Additionally, the commenter expressed concern regarding the expense of reprinting of applications forms for some entities.

The Department has carefully considered this comment. Rather than changing the language of the proposal, it will provide certain clarifications in an interpretive industry letter. The Department is sensitive to the concerns expressed by the commenter regarding duplicative language when a lender is making a loan in which it is also using Fannie Mae/Freddie Mac loan documents and will address this situation in the forthcoming interpretive industry letter. For lenders that are private investors or lenders that hold loans for their own books and do not use Fannie Mae/Freddie Mac loan documents, the Department believes that the cautionary language in the proposed amendment should be a part of the application document.

Both commenters had concerns about the proposed amendment to Part 38.7 which adds "dual employment" to the list of prohibited conduct by mortgage bankers, mortgage brokers and exempt organizations.

The law firm's comment specifically concerned a situation where two affiliated businesses under common control have a high level officer of one also serving as a high ranking officer of the other. For example, the president of a mortgage bank also serving as an officer of an affiliated securities broker-dealer that is registered as a mortgage broker because its employees solicit mortgage loan business from its securities clients on behalf of the mortgage bank. The commenter believes that the proposed amendment will prohibit this arrangement, which it believes occurs with some regularity in the mortgage loan business.

The Department has considered this comment and does not plan to change its proposal in response thereto. One of the reasons why the Department proposed this amendment was to formalize its prohibitions against situations where an individual, especially a higher-level officer, serves as the "qualifier" under Article 12-D of the Banking Law for both commonly-controlled institutions. A qualifier is an individual in an entity who possesses the required amount of experience in mortgage origination and underwriting in order for that entity to be licensed or registered as a mortgage banker or mortgage broker. In the past, the Department has found that situations where two mortgage entities under common control, having one higher-level individual qualifying for both entities, lead to management decisions which negatively impacted pricing in both entities and availability of mortgage products. The entities in the previously described situation were providing similar products and serving the same demographic, for example, two subprime mortgage banks. As a result, while there was an illusion of competition in the market between the entities commonly controlled, in reality, competition was non-existent between the two and thus consumers were negatively impacted.

The industry association's comment states that it believes the language of the proposed amendment is too broad and will prevent the mortgage industry from engaging the services of third parties to perform functions such as quality control, post closing and underwriting that could not be performed by the engaging entity. The commenter further states that the language, in addition to its intended objectives, will prohibit multi-bank holding companies from employing valid strategies to reduce costs and utilize their best talent across the organization. The commenter believes that the language may prevent exempt institutions from sharing senior leadership as well as compliance, audit, and other administrative employees, not only for mortgage products, but also potentially for deposit products, unsecured consumer loans, and commercial leases, for example.

The Department believes that these concerns stem from a misapprehension regarding the scope of the prohibition on dual employment in the proposal. New Part 38.7(a)(16) covers employment or independent contractor relationships with more than one mortgage banker, mortgage broker or exempt organization. As defined in Part 410.7(a) of the Department's regulations, an "independent contractor" is an individual engaged in regulated mortgage banking or mortgage brokering activities. A "consultant" is separately defined, and that definition specifically excludes, among other things, a lawyer, accountant, real estate agent or other licensed professional acting in his or her professional capacity, as well as excluding any "independent contractor" that does not provide mortgage related services.

However, to address the concerns expressed in these comments, to the extent that they may have validity, the Department will add the underlined language to the proposed amendment to Part 38.7: "enter into an employment agreement or otherwise engage any employee or independent contractor who has an employment or independent contractor relationship with any other mortgage banker, mortgage broker or exempt organization, except with the written approval of the superintendent." This addition will serve to give the Department the authority to approve certain dual-employment situations where it is determined that conflict-of-interest issues do not exist and therefore a high level of risk is not present.

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-51-09-00014-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Transportation, by deleting therefrom the position of Deputy Commissioner and by increasing the number of positions of Assistant Commissioner from 6 to 7.

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

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

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

#### Jurisdictional Classification

**I.D. No.** CVS-51-09-00015-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene under the subheading "Office of Mental Retardation and Developmental Disabilities," by decreasing the number of positions of Special Assistant from 19 to 6 and by adding thereto the positions of Client Advocate (13).

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

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

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### Job Impact Statement

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

#### Jurisdictional Classification

**I.D. No.** CVS-51-09-00016-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Homeland Security," by adding thereto the position of Deputy Director.

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

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

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

**Regulatory Impact Statement**

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**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

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

**Jurisdictional Classification**

**I.D. No.** CVS-51-09-00017-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in Westchester County, be and hereby is amended as follows: Department of Law, Deleting Assistant County Attorney (8) (decrease from 52 to 44), Adding Senior Assistant County Attorney (22) (increase from 18 to 22);

Office of the County Executive, Deleting Assistant to the County Executive I (4) (decrease from 11 to 7), Adding Assistant to the County Executive II (7) (increase from 3 to 7), Assistant to the County Executive III (4) (increase from 1 to 4), Senior Assistant to the County Executive I (2) (increase from 1 to 2), Senior Assistant to the County Executive II (2) (increase from 1 to 2).

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

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

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

**Regulatory Impact Statement**

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previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

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**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-51-09-00018-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Education Department under the subheading "New York State Higher Education Services Corporation," by decreasing the number of positions of Secretary from 2 to 1 and by adding thereto the position of Director Public Information.

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

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

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-51-09-00019-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Transportation, by increasing the number of positions of Minority Business Specialist 2 from 1 to 2.

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-51-09-00020-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Civil Service under the subheading "Public Employment Relations Board," by adding thereto the position of Assistant Trial Examiner (1).

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-51-09-00021-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "Workers' Compensation Board," by increasing the number of positions of Workers' Compensation Fraud Investigator 1 from 6 to 8.

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-51-09-00022-P

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

**Proposed Action:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from the exempt class and to delete a position from the non-competitive class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the New York State Teachers' Retirement System, by deleting therefrom the positions of Assistant Counsel (2), Associate Counsel, Chief Real Estate Investment Officer, Counsel to Teachers' Retirement System, Deputy Executive Secretary, Director of Public Information, Executive Assistant, Executive Secretary, Manager of Teachers' Retirement System Accounts, Manager, TRS Benefits, Manager, TRS Member Services, Mortgage Officer, Securities Investment Officer, Senior Investment Officer and Teachers' Retirement System Actuary; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor, by decreasing the number of positions of Secretary 1 from 2 to 1.

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

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

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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## Education Department

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

**Standing Committees of the Board of Regents**

**I.D. No.** EDU-51-09-00023-P

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

**Proposed Action:** Amendment of section 3.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 207 (not subdivided)

**Subject:** Standing Committees of the Board of Regents.

**Purpose:** To provide for the ex-officio membership of a Chancellor Emeritus on Regents standing committees.

**Text of proposed rule:**

Subdivision (b) of section 3.2 of the Rules of the Board of Regents is amended, effective March 31, 2010, as follows:

(b) The chancellor, [and] the vice chancellor, and any chancellor emeritus who is also a current member of the Board of Regents shall be ex-officio members of each standing committee.

**Text of proposed rule and any required statements and analyses may be obtained from:** Chris Moore, State Education Department, Office of Counsel, State Education Bldg., Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Erin M. O'Grady-Parent, Acting Counsel, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

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

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

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**

Education Law section 207 gives the Board of Regents broad authority to adopt rules to carry into effect the laws and policies of the State pertaining to education and the functions, powers and duties conferred upon the University of the State of New York and the State Education Department. Inherent in such authority is the authority to adopt rules concerning the internal management and committee structure of the Board of Regents.

**2. LEGISLATIVE OBJECTIVES:**

Consistent with the above authority, the proposed amendment provides for membership of a Chancellor Emeritus on Standing Committees of the Board of Regents, which will assist the Board in meeting its statutory responsibility to determine the educational policies of the State and to carry out the laws and policies of the State relating to education.

**3. NEEDS AND BENEFITS:**

The proposed amendment is needed to clarify in the Regents Rules that a Chancellor Emeritus, who is also a current member of the Board of Regents, is an ex officio member of each standing committee of the Board of Regents. The Board of Regents has determined that this provision is appropriate and necessary to assist the Board of Regents to effectively meet its responsibilities to govern the University of the State of New York, determine the educational policies of the State and oversee the State Education Department.

**4. COSTS:**

(a) Cost to State government: None.

(b) Cost to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to the regulating agency for implementation and continuing administration of the rule: None.

The proposed amendment relates to the internal organization of the Board of Regents and merely provides for membership of a Chancellor Emeritus on each Standing Committee of the Board of Regents, and will not impose any costs on State and local government, private regulated parties or the State Education Department.

**5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment relates to the internal organization of the Board of Regents and consequently will not impose any program, service, duty or responsibility on local governments.

**6. PAPERWORK:**

The proposed amendment does not impose any reporting, recordkeeping or other paperwork requirements.

**7. DUPLICATION:**

The proposed amendment does not duplicate any existing State or federal requirements.

**8. ALTERNATIVES:**

There are no significant alternatives and none were considered.

**9. FEDERAL STANDARDS:**

The amendment does not exceed any minimum federal standards for the same or similar subject areas, since it relates solely to the internal organization of the Board of Regents of New York State and there are no federal standards governing such.

**10. COMPLIANCE SCHEDULE:**

The proposed amendment relates solely to the internal organization of the Board of Regents and will not impose compliance requirements on local governments or private parties.

**Regulatory Flexibility Analysis**

The proposed amendment relates to the internal organization of the Board of Regents and therefore does not have any adverse economic impact or impose any compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will have no impact on small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

The proposed amendment relates to the internal organization of the Board of Regents and therefore does not have any adverse economic impact or impose any compliance requirements on entities in rural areas. Because it is evident from the nature of the proposed amendment that it will have no impact on entities in rural areas of the State, no further steps were needed

to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The proposed amendment relates to the internal organization of the Board of Regents and will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## New York State Energy Research and Development Authority

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

**Green Residential Buildings Program**

**I.D. No.** ERD-51-09-00024-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 508 to Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1855 and 1872(4)

**Subject:** Green Residential Buildings Program.

**Purpose:** To establish incentives for new and substantially renovated residential buildings meeting green building criteria.

**Substance of proposed rule (Full text is posted at the following State website: [www.nyserda.org](http://www.nyserda.org)):** New Part 508 would establish a Green Residential Building Program. Under Section 508.1, the Part applies to the construction and substantial renovation of residential buildings with less than twelve dwelling units incorporating design and building techniques intended to: (i) promote smart growth and smart site planning; (ii) reduce greenhouse gas emissions; (iii) achieve energy efficiency and reduce energy consumption; (iv) facilitate the incorporation of environmentally responsible products; (v) promote the efficient use of natural resources; (vi) promote the conservation of materials and resources; (vii) reduce waste; and (viii) create a healthy indoor living environment.

The purpose of this Part is to promote the construction and renovation of “green” or “sustainable” residential buildings by providing incentives.

Section 508.2 prescribes definitions for the various technical requirements included in the building standards. In addition, substantial renovations is defined to mean significant improvements or restorations to, or substantial replacement of, materials, systems, or components of, a residential building, which shall include installation or replacement necessary to effect aligned, continuous, and complete air and thermal barriers and must include installation or replacement, of two of the three following building systems: electrical; heating, ventilation, and air conditioning; and plumbing.

Section 508.3 prescribes the eligibility requirements. An Owner is eligible for a Program incentive, upon submission of a complete Application for a structure meeting the green residential building standards and is either a new residential building that has completed construction or an existing residential building that has completed substantial renovation and has received a Certificate of Occupancy or Certificate of Completion, or other comparable documentation, on or after January 1, 2010, but before October 31, 2013.

Section 508.4 prescribes the Green Residential Building Standards. For purposes of the Program, green residential building standards shall mean the use of design and building techniques sufficient: (a) (1) to receive a second level or higher LEED certification using the LEED for Homes Rating System, or using the LEED for New Construction Rating System; or (2) to receive a second level or higher level certification using the NGBS; and (b) (1) to achieve at least 500 kilowatt

hour (kWh) annual electrical savings per dwelling unit, by installing equipment, lighting and household appliances meeting or exceeding the minimum efficiency standards set forth in the regulations and which exceed applicable minimum efficiency standards prescribed in 10 Code of Federal Regulations (CFR) Part 430, for CFLs and other lighting fixtures and lamps in high usage areas, including primary living spaces, finished basements, walk-in closets, and outdoor areas, but excluding non-walk-in closets and unfinished basements; any dishwashers; refrigerators, refrigerator-freezers, and freezers; furnace(s) and heat pumps, and central air conditioners.

Section 508.5 prescribes additional requirements for residential buildings of not more than 3 stories, containing 4 or fewer dwelling units: energy efficiency specifications and performance specifications. Such residential buildings must achieve either an Expanded Home Energy Rating System Score of 86 or higher or a HERS Index of 70 or lower, using a rating software tool that has been approved by the Authority. Minimum efficiency requirements are also prescribed for ceiling fans, light kits, central air conditioners, domestic water heaters, heat pumps, furnaces, and ventilation fans.

Performance specifications are also prescribed with respect to the building envelope, duct leakage, and automatically controlled mechanical ventilation systems.

Section 508.6 prescribes the Program Incentives, subject to the availability of funds:

Program Incentive by Number of Dwelling Units

Number of Dwelling Units	Program Incentive Award/Qualified Occupied Sq. Ft.	Maximum Program Incentive Award
1	\$3.75/sq. ft.	\$5,125
2	\$3.75/sq. ft.	\$6,125
3	\$3.75/sq. ft.	\$7,125
4	\$3.75/sq. ft.	\$8,125
5	\$3.75/sq. ft.	\$8,875
6	\$3.75/sq. ft.	\$9,625
7	\$3.75/sq. ft.	\$10,375
8	\$3.75/sq. ft.	\$11,125
9	\$3.75/sq. ft.	\$11,875
10	\$3.75/sq. ft.	\$12,625
11	\$3.75/sq. ft.	\$13,375

No Owner may receive more than one hundred twenty thousand dollars in Program incentive payments during any calendar year.

Section 508.7 prescribes the inspection and compliance procedures. Inspections are required with respect to combustion boilers and furnaces, that at least 500 kilowatt hour (kWh) annual electrical savings per dwelling unit are achieved or that only equipment, lighting, and household appliances meeting or exceeding the minimum efficiency standards required by Section 508.4 are installed; that for a Technician determines if all minimum LEED or NGBS measures required to be installed prior to installation of drywall or interior wall surfaces or prior to re-enclosure on insulated building cavities have been installed; if air sealing measures are complete, if insulation is aligned properly within the air barrier, and if the air barrier and thermal envelope are continuous; if insulation is installed in the building envelope and uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; and determine the number of LEED or NGBS points attributable to foundation and framing materials; insulation; windows; doors; heating, ventilating, and air conditioning system; plumbing system; and site planning and preparation construction techniques used, including clearing, grading, soils management, and erosion and sedimentation control; and to efficient use of natural resources, conservation of materials and resources, waste reduction, installation of environmentally responsible products, including, but not limited to, interior finish materials and trim, including paints and coatings; cabinets, casework, and carpets; yearly heating, ventilation, and air conditioning and hot

water heating equipment efficiency; household appliances and lighting efficiency; and plumbing fixture efficiency.

For a newly constructed residential building of 3 or fewer stories containing 4 or fewer dwelling units (not including a manufactured home or modular home), after construction of the building envelope is complete and after installation of all heating, ventilating and, if applicable, central air conditioners and associated pipes and ducts, a Technician must inspect such residential building to determine if the energy efficiency specifications and performance specifications prescribed by Section 508.5 have been met.

For all newly constructed residential buildings, a Technician must determine if air sealing measures are complete, the insulation is aligned properly with the air barrier; the air barrier and thermal envelope are continuous; determine if insulation is installed in the building envelope and uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; and determine if factory-installed measures qualify for LEED or NGBS points, including measures prescribed by Section 508.5. At the site of permanent installation of the various types of residential buildings, a Technician must determine if minimum LEED or NGBS requirements and the minimum site development activities with respect to the foundation and field-completed framing materials; heating, ventilating, and air conditioning system; plumbing system; and site preparation construction techniques used, including clearing, grading, soils management, and erosion and sedimentation control have been met; and, for components and seams not inspected at the manufacturing factory, determine if air sealing measures are complete, the insulation is aligned properly with the air barrier, and thermal envelope are continuous; and excluding measures inspected at the manufacturing factory, determine if any additional energy efficiency and performance specifications prescribed by Section 508.5 have been met.

For a substantially renovated residential building, a Technician must, after any removal or replacement of electrical, plumbing, or heating, ventilation, and air-conditioning systems, and after any removal of interior wall surfaces but prior to re-enclosure of insulated building cavities determine if all minimum LEED or NGBS measures required to be installed prior to re-enclosure of insulated building cavities have been met; determine if air sealing measures are complete, the insulation is aligned properly with the air barrier; and the air barrier and thermal envelope are continuous; determine if insulation, if installed in the building envelope, uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; determine if the energy efficiency specifications and performance specifications prescribed by Section 508.5 have been met, if applicable; and determine the number of LEED or NGBS points attributable to, including but not limited to, the following: repair or replacement of foundation and framing materials; windows; doors; and electrical, heating, ventilating, and air conditioning system; or plumbing systems. After re-enclosure of insulated building cavities, and any installation or replacement of flooring, household appliances, heating, ventilation, and air conditioning equipment, plumbing, and electrical wiring, determine if all minimum LEED or NGBS requirements have been met, and the number of LEED or NGBS points attributable to efficient use of natural resources, conservation of materials and resources, waste reduction, installation of environmentally responsible products, including, but not limited to, interior finish materials and trim, including paints and coatings; cabinets, casework, and carpets; and yearly heating, ventilation, and air conditioning and hot water heating equipment efficiency; household appliances and lighting efficiency; and plumbing and irrigation fixture efficiency.

Section 508.8 prescribes builder and Technician training and qualifications. A Technician is an individual who has at least 12 hours of design or installation training by an accredited education institution or a professional builders association or affiliate, or other comparable and Authority approved training course, in one or more of the following: site planning and development for building green; heating systems, cooling systems, creating healthful indoor air quality

environments; building envelopes, building materials; water use reduction techniques, green construction techniques, multi-family green construction techniques, multi-family energy analysis, building energy analysis, energy modeling and building performance testing; has professional experience with respect to the construction or substantial renovation of a residential building meeting these green residential building standards within the last 3 years and has participated, or agrees to participate, in at least 15 hours of training every 2 years since completion of such construction or substantial renovation; has one year management and supervisory builder experience in green residential building construction; or has 5 years of field experience in green or sustainable residential construction, or in a combination of both.

A builder must have 15 hours of green building training by an accredited education institution or a professional builders association or affiliate, or other comparable and Authority-approved training course, which shall include a review of the National Green Building Standard or LEED Rating Systems and one or more of the following: site planning and development for building green, principles of energy, water and resource efficiency; indoor air and environmental quality; building performance and building performance testing; or is the builder of record for constructing residential buildings that have met the green residential building standards meeting this Part for at least 2 years or is the builder of record for constructing a minimum of two residential buildings meeting the requirements of this Part; and has agreed to participate, and participates, in at least 8 additional hours of green building or energy efficiency training by an accredited education institution or a professional builders association or affiliate, or other Authority-approved comparable organization for every 2 years of Program participation.

Section 508.9 prescribes the process for submitting an application in order to receive a Program incentive and requires documentation showing compliance with the regulations.

Section 508.10 lists exceptions to specific requirements contained in this Part that may be obtained from the Authority on a limited and case-by-case basis, if compliance would be inconsistent with public health or safety; would not be in compliance with Federal, State, or local law, rule or regulation, administrative or judicial order, or other such requirement; or, with respect to an historic building eligible for or listed on the State or National Register of Historic Places, would be incompatible or significantly inconsistent with the historic, aesthetic, cultural, or archeological character of the building.

Section 508.11 prescribes the Authority's reporting process on the Program and includes furnishing annual written reports to the Governor, the Temporary President of the Senate, and the Speaker of the Assembly concerning specified activities under this Part.

Section 508.12 lists the regulation's referenced materials and where they may be obtained.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jacquelyn L. Jerry, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203, (518) 862-1090, email: [jlj@nyserda.org](mailto:jlj@nyserda.org)

**Data, views or arguments may be submitted to:** Jacquelyn L. Jerry, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203, (518) 862-1090, email: [jlj@nyserda.org](mailto:jlj@nyserda.org)

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

#### **Summary of Regulatory Impact Statement**

1. Statutory authority: Public Authorities Law (PAL) Section 1872(4) authorizes the Authority to promulgate rules and regulations setting standards for new and substantially renovated residential buildings that will qualify for an incentive to cover a portion of the incremental costs of building "green" and "sustainable"; PAL Section 1855 authorizes the Authority to promulgate rules and regulations; and State Administrative Procedures Act Section 102 generally authorizes the promulgation of rules and regulations.

2. Legislative objectives: The Legislative objectives are to establish standards for "green" and "sustainable" residential building design and construction; and to provide an approximately 3-year incentive program to cover a portion of the incremental costs of incorporating

such construction techniques in new and substantially renovated residential buildings of fewer than twelve dwelling units.

3. Needs and benefits: The U. S. Department of Energy (DOE) estimates that the residential building sector accounts for twenty-two percent of energy consumed, seventy-four percent of water used, and twenty-one percent of carbon dioxide emissions produced in the United States. Construction and renovation of residential buildings that use “green” design and construction techniques can result in lowered energy consumption, conservation of natural resources, promotion of healthy indoor living environments, reduction of pollutants and emissions, and incorporation of products that are environmentally responsible, in comparison to standard design and constructed. The green residential building program (Program) will increase access to green, residential buildings of fewer than 12 dwelling units in New York by providing an incentive to cover a portion of the additional incremental costs of constructing or substantially renovating such residential buildings.

4. Costs: The Authority established an Advisory Committee of representatives from the New York State Department of State, New York State Division of Housing and Community Renewal, New York State Department of Environmental Conservation, New York City Economic Development Corporation, the U.S. Green Building Council (USGBC), the U.S. Department of Housing and Urban Development, and the New York State Builders Association, as well as affordable housing developers, builders, architects, project managers, and engineers with professional experience and expertise in green buildings.

The Program establishes the green residential building standards for residential buildings that are designed and constructed, or substantially renovated, to obtain the second (Silver) or higher level Leadership in Energy and Environmental Design (LEED) certification using either the LEED for Homes Rating System, or the LEED for New Construction Rating System, or obtain a second level (Silver) or higher certification from the National Green Building Standard, International Code Council 700-2008 (NGBS). LEED for Homes and NGBS generally apply to single-family residential buildings of 3 or fewer stories in height (low-rise), and LEED for New Construction applies to multi-family buildings of greater than 3 stories in height (mid-rise and high-rise). NGBS may be used for low-rise to high-rise residential buildings. Owners will be required to demonstrate 500 kilowatt-hours of annual electricity use reduction for each dwelling unit by installing a combination of more energy efficient household appliances and lighting. The incremental cost for achieving the 500 kWh incremental savings is about \$386. A residential building with four or fewer dwelling units and three stories or fewer in height above grade will also be required to demonstrate that it meets or exceeds the minimum energy efficiency and performance specifications of the Authority’s separately administered New York ENERGY STAR® Labeled Homes program, which requires such buildings to demonstrate that they are approximately 30% more efficient than standard construction. As prescribed by the statute, the Program is available to single-family residential buildings and multi-family residential buildings and townhouse structures containing less than 12 dwelling units.

The following cost analysis is based on average additional costs for median-sized and median-priced residential buildings and dwelling units and the New York State average of 2.7 residents per household as determined by the Census Bureau for 2005-2007.

For single-family residential buildings, incremental costs for meeting the minimum energy efficiency requirements and obtaining a LEED-rating for a residential building in a development in New York State averages about \$8,000. Custom-built residential buildings and those undergoing substantial renovation, because of their unique characteristics, incur incremental costs of approximately double this amount.

For single-family residential buildings, based on a March 2008 National Association of Home Builders (NAHB) Research Center report, incremental costs for meeting the minimum energy efficiency requirements and obtaining the second-level NGBS (Silver performance level), an entry-level single-family residential building in a development, using the location adjustment factors provided in the

report, result in incremental costs in the ranges of \$5,250-\$6,700 in the Syracuse, New York metropolitan area and \$6,400-\$8,165 in the White Plains, New York metropolitan area.

With respect to a multi-family residential building, incremental costs for meeting the minimum energy efficiency standards and obtaining a LEED-rating for a duplex total an average increase of \$11,100, incremental costs for a 5 dwelling unit LEED-rated residential building built-for-rent averages \$17,250, and one built-for-sale averages \$18,375. Incremental costs for an eleven unit LEED-rated residential building built-for-rent totals an average on \$27,150, and one built-for-sale totals an average of \$29,625.

For a multi-family residential building when dwelling units are built-to-rent, for LEED-rated residential building achieving the 500 kWh annual electric savings, total additional costs are projected to be \$17,636 for a 5 dwelling unit building, and \$27,536 for an 11 dwelling unit building; for dwelling units built-for-sale, these costs are projected to be \$18,761 for a 5 dwelling unit building and \$30,011 for an 11 dwelling unit building.

Counterbalancing these incremental up-front costs are life-cycle, money-saving benefits due to increased energy and water efficiencies. Average annual household energy costs for a single family residential building in New York State are estimated by the Authority to be \$2,830. A single-family residential building meeting the green building residential standards prescribed by these regulations is projected to yield an average annual energy cost saving of approximately \$720. Water efficiency measures should reduce indoor and outdoor water use by 30%, providing an additional average annual savings of \$100 in water bills for single family residential buildings billed on usage, based on USGBC information. Total annual energy and water cost savings should approach \$820, or \$8,200 over 10 years.

Similar annual energy cost savings of 20% to 30% are projected for the multi-family buildings eligible to participate in this program. Average annual energy costs for a single dwelling unit within a multifamily residential building are projected to be \$1,230 for dwelling units built-for-rent, and \$1,845 for dwelling units built-for-sale. Average annual energy cost savings are projected to be in the range of \$210 to \$315 for dwelling units built-for-rent, and \$315 to \$470 for dwelling units built-for-sale, based on average energy use and occupancy patterns. As with single-family homes, water efficiency measures should reduce overall water use by 30%, providing additional average annual savings of \$50 in water bills, based on USGBC estimates referenced above, and reduced by half to reflect that per household water use for multifamily buildings is about half of the amount for single-family residential buildings, according to EPA data. Coupled with a \$50 annual water bill saving, total annual savings should approach \$260 to \$365 per dwelling unit built-for-rent to \$365 to \$520 per dwelling unit built-for-sale, or an average of \$3,100 to \$4,400 over 10 years, respectively.

The incentive levels are set at roughly 50%-60% of the additional costs associated with meeting the green building performance standards. Since most residential buildings have service lives much longer than this, benefits should continue to accrue for many years thereafter. U.S. Census Bureau statistics show that the average age of residential buildings in the U.S. in 2001 was 32 years.

Anticipated funding for the Program is \$19.3 million. At this funding level, the Program is projected to provide incentives to nearly 3,000 residential buildings during its three years of operations 2010-2013, including approximately 2,200 residential buildings of 1 and 2 dwelling units, 600 of 3 to 5 dwelling unit buildings, and 100 of 6 to 11 dwelling units. Based on this level of funding, the Program could result in the creation of 4,600-8,500 green dwelling units.

Costs to the Agency: The Authority anticipates allocating up to \$19.3 million for the Program. No State appropriations are needed for the Program.

5. Local government mandates: There are no mandates placed directly on local governments. If a local government chooses to build a green residential building, such as affordable housing, and to participate in the Program, it would have to comply with Program requirements.

6. Paperwork: Owners will be required to complete and submit an

Application that includes: a copy of the building owner's notification from the USGBC or NAHB that the residential building has successfully certified at the required minimum level or higher; a copy of the Certificate(s) of Occupancy; documentation showing that inspections pertaining to the applicable green building certification have been completed; and a description of the work performed that qualified the building(s) for the incentive(s), and other required information.

7. Duplication: The Authority has sought to minimize duplication by adopting widely accepted national standards or rating systems as the basis for the Program. To the extent that there are other State and Federal energy efficiency incentive programs that may be available to Owners, if an Owner chooses to participate in those programs, there may be additional incentives available. To the extent that the green building standards also include the minimum requirements of the ECCC, there might be minor duplication.

8. Alternatives: PAL 1872 authorizes the Authority and the Advisory Committee to consider and develop a New York State-specific standard or set of criteria for green residential buildings.

Three main criteria were used to evaluate the suitability of the various existing rating systems and standards for purposes of the Program. The first criterion was whether they could comprehensively and reliably measure green building performance in the areas of building site selection and preparation, energy- and water-efficient design, indoor environmental quality, material selection, and occupant education on green operations and maintenance for residential construction. The second criterion focused on the various standards' relative rigor and the transparency of the certification process, including a requirement that an independent inspector be used to verify compliance. The third was whether the administering entity has sufficient organizational capacity to verify compliance within New York State. The two standards that sufficiently met all of these criteria were the LEED Rating Systems and the National Green Building Standard (NGBS).

After review of the subcategories of certification levels available through LEED and NGBS, the Authority determined that all LEED second (Silver) level or higher certification and the second-or higher level (Silver Performance or higher) NGBS standard certification were to be the green residential building standards that must be met or exceeded to receive an incentive through the program. These certification levels will likely result in both single-family and multi-family residential buildings that achieve energy efficiency improvements of 20% to 30% above ECCC minimum requirements, and address each of the goals of the legislation, while balancing the incremental costs associated with building or renovating a certified green residential building.

Based on projected participation in the Program over its term, residential buildings meeting minimum Program requirements will reduce heating fuel use by over 230,000 million Btus, and electricity consumption by over 5,860 megawatt hours. This translates to reducing greenhouse gas emissions by over 17,000 tons, the equivalent of taking 10,357 passenger cars off the road for a year, according to the EPA. The cost for a builder to meet the training requirements will vary from \$0 for those who already have sufficient green residential building experience, to \$600. The minimum level of training for Technicians would cost \$400-500. Continuing course work for builders will total approximately \$600, biannually.

9. Federal standards: Although the Federal Energy Policy Act (PL 109-58, as amended) provides \$2,000 in tax credits to builders who build homes achieving a 50% improvement in energy efficiency, there are no federal green residential building standards.

10. Compliance schedule: The Authority will begin implementing the regulations as soon as they are made final and funding is available to pay Program incentives. No applications will be accepted after October 31, 2013.

#### **Regulatory Flexibility Analysis**

This program will be available to any small business and any local government which is building a residential building of fewer than twelve dwelling units.

If a small business or a local government chooses to participate in the green residential building program, they will have to meet building standards and criteria of the U.S. Green Buildings Council or the

National Association of Home Builders standards for green residential buildings.

The costs to small businesses and local governments would be the similar as all others who choose to build to the requirements of the Program. Most likely, these organizations would only be involved in building affordable housing. Increased costs are estimated to be around \$17,250 for a five dwelling unit residential building and would have about a 6 year simple payback.

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

The proposed regulations will apply Statewide.

In order to receive an award, Owners of new and substantially renovated residential buildings will have to provide a copy of compliance with green building standards of the U. S. Green Buildings Council and the National Association of Home Builders. Compliance will require use of a qualified builder and inspection by a qualified Technician.

Owners wishing to obtain an award are likely to incur additional capital costs in construction a new building or renovating an existing one. Annual costs for maintaining the residential building will be less than what would have been incurred if the residential building had not met the green standards. There is a ten year simple payback projected for buildings meeting the green building standards, which is much less than the typical useful life of such buildings.

The Authority established an Advisory Committee comprised of representatives from the New York State Department of State, New York State Division of Community Renewal, New York State Builders Association, and the Citizens Environmental Coalition, among others, who represent public and private interests in rural areas, and their comments were considered during the development of the proposed regulations.

#### **Job Impact Statement**

This program will encourage builders and tradesmen to increase use of green building technologies in the construction of residential buildings of fewer than 12 dwelling units.

The regulations could affect all persons in the building trades, which is estimated to be approximately 531,000 New York State residents.

The rule should not have a disproportionate adverse impact on jobs or employment opportunities in any area of the State.

Since this program would provide added funding for building green residential buildings, it should promote the development of builders and trades persons who are knowledgeable in clean-energy and resource conservation practices appropriate for residential buildings. The Authority estimates that an additional 4.50 jobs will be created for each \$1 million spent.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### **Atlantic Ocean Surfclam Management**

**I.D. No.** ENV-40-09-00007-A

**Filing No.** 1349

**Filing Date:** 2009-12-07

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of Subpart 43-2 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 13-0309, subdivision 12

**Subject:** Atlantic Ocean surfclam management.

**Purpose:** To adopt management measures necessary to ensure the long-term sustainability of the surfclam resource and fishery.

**Substance of final rule:** The purpose of this rule making is to amend the

New York State Department of Environmental Conservation’s regulations on Surfclam Management in the New York State (NYS) waters of the Atlantic Ocean (6 NYCRR Subpart 43-2). The proposed regulations are necessary to implement the provisions of Amendment 1 to the Fishery Management Plan (FMP) for the Mechanical Harvest of the Atlantic Surfclam in NYS waters of the Atlantic Ocean.

The only change to the proposed rule making was a non-substantive change to delay the effective date for implementation of the Vessel Monitoring System (VMS) requirements by one year. The effective date for the VMS requirements has been changed from January 1, 2010, as proposed, to January 1, 2011 in the final rule. All VMS requirements will become effective on January 1, 2011.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in section 43-2.9(a).

**Text of rule and any required statements and analyses may be obtained from:** Debra Barnes, NYSDEC, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0483, email: dabarnes@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.

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

The text of the proposed rule contains a non-substantive change in subdivision 43-2.9(a) which will delay the effective implementation date for Vessel Monitoring System (VMS) requirements by one year. The original proposed rule, which was published in the State Register on October 7, 2009, (I.D. Number: ENV-40-09-00007-P) established an effective date for the VMS requirements of January 1, 2010. The final rule would change the effective date for VMS requirements from January 1, 2010, as originally proposed, to January 1, 2011. All other VMS requirements will remain as proposed. This change will not impose any negative impact on surfclam industry participants.

The RIS, RFA, RAFA and JIS that were published with the Notice of Proposed Rule Making remain accurate and do not require revision to address this change.

**Assessment of Public Comment**

The agency received no public comment.

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

**Low Emission Vehicle (LEV) Greenhouse Gas (GHG) Emission Standards**

**I.D. No.** ENV-51-09-00007-P

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

**Proposed Action:** Amendment of Parts 200 and 218 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105; and Federal Clean Air Act, section 177 (42 USC 7507)

**Subject:** Low emission vehicle (LEV) greenhouse gas (GHG) emission standards.

**Purpose:** To incorporate revisions California has made to its LEV program to amend its GHG standards.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., Feb. 10, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY.

**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.

**Text of proposed rule:** (Sections 200.1 through 200.8 remain unchanged)

Section 200.9, Table 1 is amended to read as follows:

218-1.2(d)	Clean Air Act 42 U.S.C. Section 7543 (1988) as amended by Pub. L. 101-549 (1990)	**
	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Pub. L. 101-549 (1990)	**
218-1.2(e)	California Health and Safety Code, Section 39003 (2004)	** †
218-1.2(h)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(j)	California Vehicle Code, Section 165 (2004)	** †
218-1.2(k)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(r)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(s)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(t)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(v)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(w)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(x)	California Code of Regulations, Title 13, Section 1905 (7-3-96)	** ***
218-1.2(z)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(ad)	California Code of Regulations, Title 13, Section 1960.5 (10-16-02)	** ***
218-1.2(ai)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(al)	40 CFR Section 86.1827-01 [(7-1-03)] (2-26-07)	*
218-1.2(aq)	California Code of Regulations, Title 13, Section 2112 [(11-15-03)] (8-15-07)	** ***
218-1.2(at)	California Code of Regulations, Title 13, Section 1962 [(12-19-03) and (3-26-04)] (4-17-09)	** ***
218-1.2(au)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-1.2(av)	California Code of Regulations, Title 13, Section 1900 [(9-24-04) and (9-15-05)] (4-17-09)	** ***
218-2.1(a)	California Code of Regulations, Title 13, Section 1956.8 [(12-04-03)] (1-4-08) and (12-31-08)	** ***
	California Code of Regulations, Title 13, Section 1956.9 (3-6-96)	** ***
	California Code of Regulations, Title 13, Section 1960.1 (3-26-04)	** ***
	California Code of Regulations, Title 13, Section 1960.1.5 (9-30-91)	** ***
	California Code of Regulations, Title 13, Section 1960.5 (10-16-02)	** ***
	California Code of Regulations, Title 13, Section 1961 [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***

	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***		California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***
	California Code of Regulations, Title 13, Section 1961(d) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***		California Code of Regulations, Title 13, Section 1961(d) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***
	California Code of Regulations, Title 13, Section 1962 [(12-19-03) and (3-26-04)] (4-17-09)	** ***	218-4.1	California Code of Regulations, Title 13, Section 1962 [(12-19-03) and (3-26-04)] (4-17-09)	** ***
	California Code of Regulations, Title 13, Section 1962.1 [(12-19-03) and (3-26-04)] (4-17-09)	** ***		California Code of Regulations, Title 13, Section 1962.1 [(12-19-03) and (3-26-04)] (4-17-09)	** ***
	California Code of Regulations, Title 13, Section 1964 (2-23-90)	** ***	218-4.2	California Code of Regulations, Title 13, Section 1962 [(12-19-03) and (3-26-04)] (4-17-09)	** ***
	California Code of Regulations, Title 13, Section 1965 [(12-04-03)] (6-16-08)	** ***	218-5.1(a)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 1968.1 (11-27-99)	** ***		California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1968.2 (11-9-07)	** ***		California Code of Regulations, Title 13, Section 2065 (12-04-03)	** ***
	California Code of Regulations, Title 13, Section 1976 [(11-27-99)] (1-4-08)	** ***		California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1978 [(12-04-03)] (1-4-08)	** ***		California Code of Regulations, Title 13, Section 2107 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2030 (9-25-97)	** ***		California Code of Regulations, Title 13, Article 1.5 (12-04-03)	** ***
	California Code of Regulations, Title 13, Section 2031 (9-25-97)	** ***	218-5.1(b)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 2047 (5-31-88)	** ***		California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2065 (12-04-03)	** ***		California Code of Regulations, Title 13, Section 2065 (12-04-03)	** ***
	California Code of Regulations, Title 13, Section 2235 (9-17-91)	** ***		California Code of Regulations, Title 13, Article 1.5 (12-04-03)	** ***
	California Code of Regulations, Title 13, Article 1.5 (12-04-03)	** ***	218-5.2(a)	California Code of Regulations, Title 13, Section 2065 (12-04-03)	** ***
	Clean Air Act 42 U.S.C. Section 7521 (1988) as amended by Pub. L. 101-549 (1990)	**		California Code of Regulations, Title 13, Section 2109 (12-30-83)	** ***
218-2.1(b)(5)	Clean Air Act 42 U.S.C. Section 7401 'et seq.' (1988) as amended by Pub. L. 101-549 (1990)	**		California Code of Regulations, Title 13, Section 2110 (11-27-99)	** ***
218-2.1(b)(8)	California Health and Safety Code, Section 43656 (2004)	***		California Code of Regulations, Title 13, Article 1.5 (12-04-03)	** ***
218-2.1(d)	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Pub. L. 101-549 (1990)	**	218-5.2(b)(1)	California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
218-2.4	California Health and Safety Code, Section 43656 (2008)	** †	218-5.3(b)	California Code of Regulations, Title 13, Section 2101 (11-27-99)	** ***
218-3.1	California Code of Regulations, Title 13, Section 1960.1 (3-26-04)	** ***	218-6.2	Clean Air Act 42 U.S.C. Section 7401 et seq. (1988) as amended by Pub. L. 101-549 (1990)	**
	California Code of Regulations, Title 13, Section 1961 [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***	218-7.3(a)(1)	California Code of Regulations, Title 13, Section 2221 (11-30-83)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***	218-7.3(a)(2)	California Code of Regulations, Title 13, Section 2224 (8-16-90)	** ***
	California Code of Regulations, Title 13, Section 1961(d) [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***	218-7.4(b)(3)(i)	California Code of Regulations, Title 13, Section 2224(a) (8-16-90)	** ***
218-3.1(a)	California Code of Regulations, Title 13, Section 1960.1 (3-26-04)	** ***	218-7.4(b)(3)(ii)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
218-3.1(b)	California Code of Regulations, Title 13, Section 1960.1 (3-26-04)	** ***	218-7.5(b)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
	California Code of Regulations, Title 13, Section 1961 [(3-26-04) and (9-24-04) and (9-15-05)] (1-4-08) and (6-16-08)	** ***	218-8.1(a)	California Code of Regulations, Title 13, Section 1961.1 [(9-24-04) and (9-15-05)] (9-24-09)	** ***

218-8.1(b)	California Code of Regulations, Title 13, Section 1961.1 [(9-24-04) and (9-15-05)] (9-24-09)	** ***
218-8.2	California Code of Regulations, Title 13, Section 1961.1 [(9-24-04) and (9-15-05)] (9-24-09)	** ***
218-8.3(a)	California Code of Regulations, Title 13, Section 1961.1 [(9-24-04) and (9-15-05)] (9-24-09)	** ***
218-8.3(b)	California Code of Regulations, Title 13, Section 1961.1 [(9-24-04) and (9-15-05)] (9-24-09)	** ***
218-8.4(a)	California Code of Regulations, Title 13, Section 1961.1(e)(2)(a) [(9-24-04) and (9-15-05)] (9-24-09)	** ***
218-8.4(b)	California Code of Regulations, Title 13, Section 1961.1(e)(2)(a) [(9-24-04) and (9-15-05)] (9-24-09)	** ***

Section 218-1.1 through Section 218-8.3(b) remains the same.  
A new Section 218-8.3(c) is added to read as follows:

*(c) For a given model year, manufacturers will be given the voluntary option of demonstrating compliance based on the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles certified to the California exhaust emission standards in California Code of Regulations, title 13, section 1961.1 (see Table 1, section 200.9 of this title), which are produced and delivered for sale in New York, California, and all other states that have adopted California's greenhouse gas emission standards pursuant to Section 177 of the Clean Air Act. If a manufacturer that opts for the voluntary compliance option fails to meet the terms of the voluntary option, the manufacturer will be subject to all applicable penalties, and will be required to comply with the greenhouse gas standards as prescribed in Section 218-8.3(a) of this Subpart.*

Section 218-8.4 remains the same.

Section 218-8.5 is amended to read as follows:

(a) Commencing with the 2009 model-year, each manufacturer must report, to the Department, using the same format used to report this information to CARB, the average greenhouse gas emissions of its fleet delivered for sale in New York. *If the compliance pool option is chosen, manufacturers must report the data for the entire pool as well as the New York specific portion.* Reports must be submitted to the Department by March 1st of the calendar year succeeding the end of the model-year.

(b) Such report shall include the number of greenhouse gas vehicle test groups certified pursuant to section 218-8.4, broken down by model type, delivered for sale in New York. *If the compliance pool option is chosen, manufacturers must report the data for the entire pool as well as the New York specific portion.*

Section 218-9 remains the same.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeff Marshall, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: 218GHG@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

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

**Summary of Regulatory Impact Statement**

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Part 200, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the greenhouse gas (GHG) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program.

By statutory authority of, and pursuant to, Environmental Conservation Law (ECL), the Commissioner of Environmental Conservation is responsible for protecting the air resources of New York State. The Commissioner is authorized to adopt rules and regulations to enforce the ECL. The Legislature bestowed on the Department the power to formulate, adopt, promulgate, amend, and repeal regulations for preventing, controlling, or prohibiting air pollution.

The main purpose of enacting this regulation is to further the goals of reducing criteria and greenhouse gas pollution from motor vehicles by requiring cleaner vehicles be sold in New York. The transportation sector accounts for approximately 39 percent of all greenhouse gas (GHG) emissions in New York State. The Department has the obligation to regulate and mitigate emissions from mobile sources in order to safeguard the health of New York residents and protect the State's environment.

Part 218 is being revised to incorporate California's amendments to the GHG program. The Department is proposing to adopt GHG standards and credit mechanisms that are identical to those adopted by CARB. New York State last updated the GHG requirements in 2005. The proposed amendments would provide vehicle manufacturers with the voluntarily option of demonstrating compliance based on the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles sold in New York, California, and all other states that have adopted California's GHG emission standards under Section 177 rather than the current GHG fleet average requirements in each state. The GHG revisions to Part 218 would apply to all 2009 and subsequent model year passenger cars, light-duty trucks, and medium-duty passenger vehicles.

The proposed amendments to the GHG standards are not expected to have an adverse impact on consumers. The amendments are intended to provide manufacturers with compliance flexibility by providing them with the option of demonstrating fleet average compliance utilizing a larger pool of vehicles. There are no costs associated with this change that would be passed along to consumers in the form of higher prices.

Currently there is no automotive manufacturing in New York involving the final assembly of vehicles. Affiliated businesses, such as dealerships and engineering and design facilities, are local businesses which compete within the state and generally are not subject to competition from out-of-state businesses. New York dealerships will be able to sell California certified vehicles to states bordering New York, as is currently the case. New York residents will not be able to buy noncompliant vehicles out of state since vehicles must be California certified in order to be registered in New York. This is currently the case with the existing LEV program and will not change with the proposed requirements. The proposed GHG regulation applies equally to all large volume manufacturers delivering new vehicles for sale in New York. Several of the surrounding states have adopted, or expect to adopt, similar GHG requirements. Therefore, the proposed regulations are not expected to impose a competitive disadvantage on dealerships.

The proposed GHG amendments should not have an adverse impact on dealerships. As stated previously, the amendments are intended to provide manufacturers with compliance flexibility by providing them with the option of demonstrating fleet average compliance utilizing a larger pool of vehicles. There are no costs associated with this change that would be passed along to dealerships.

The proposed amendments are not expected to cause a noticeable change in New York employment because the state of New York accounts for only a small share of motor vehicle and parts manufacturing employment as mentioned previously. Data obtained from the New York State Department of Labor indicates that approximately 118,000 State residents are employed in auto related jobs including parts manufacturing, research and development, and sales. The proposed GHG regulations are not expected to have a significant adverse impact on business creation, elimination, or expansion.

The proposed GHG regulations are not expected to result in any additional costs for local and state agencies. Agencies will benefit by having access to the same cleaner vehicles as the general public when purchasing new vehicles. No additional paperwork or staffing requirements are expected.

Local governments who own or operate vehicles in New York State are subject to the same requirements as private owners of vehicles. In other words, they must purchase California certified vehicles. The proposed GHG regulations do not impose a local government mandate. No additional paperwork or staffing requirements are expected. This is not a mandate on local governments pursuant to Executive Order 17.

The GHG regulation should not result in any new significant paperwork requirements for New York vehicle suppliers, dealers or government. New York relies on materials submitted to California for certification, while manufacturers must submit to New York annual sales and corporate fleet average reports to show compliance with the fleet average requirements. While dealers must ensure that the vehicles they sell are California certified, the Department believes that most manufacturers currently include

provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. This has been the case since New York first adopted the California LEV program in 1992. The implementation of the proposed GHG regulation is not expected to be burdensome in terms of paperwork to owners/operators of vehicles.

The Department could maintain the current LEV program without adopting CARB's GHG amendments. This option was reviewed and rejected. The primary basis for this decision was that the Department believes this is not permitted under Section 177 due to the identity requirement. Further, the severity of New York State's air quality problems means New York State must maintain compliance with recent improvements in the California standards in order to achieve reductions necessary for the attainment and maintenance of the ozone and carbon monoxide standards, as well as reductions of GHG emissions.

There are no equivalent federal GHG standards available as an alternative for the 2009 through 2011 model years. California's standards are more stringent and protective of public health and the environment than existing federal standards. Federal GHG standards will be available as an alternative for the 2012 through 2016 model years.

This GHG regulatory amendment will take effect for the 2009 model year for passenger cars, light-duty trucks, and medium-duty passenger vehicles.

#### **Regulatory Flexibility Analysis**

##### **1. Effect of rule:**

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Part 200, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the greenhouse gas (GHG) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program. These changes apply to vehicles purchased by consumers, businesses, and government agencies in New York. The proposed changes to the regulations may impact businesses involved in manufacturing, selling, or purchasing passenger cars or trucks.

State and local governments are also consumers of vehicles that will be regulated under the proposed ZEV amendments. Therefore, local governments who own or operate vehicles in New York State are subject to the same requirements as owners of private vehicles in New York State; i.e., they must purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

The changes are an addition to the current LEV standards. The new motor vehicle emissions program has been in effect in New York State since model year 1993 for passenger cars and light-duty trucks, with the exception of the 1995 model year, and the Department is unaware of any adverse impact to small businesses or local governments as a result.

##### **2. Compliance requirements:**

There are no specific requirements in the regulation which apply exclusively to small businesses or local governments. Reporting, record keeping and compliance requirements are effective statewide. Automobile dealers (some of which may be small businesses) selling new cars are required to sell or offer for sale only California certified vehicles. These proposed amendments will not result in any additional reporting requirements to dealerships other than the current requirements to maintain records demonstrating that vehicles are California certified. This documentation is the same documentation already required by the New York State Department of Motor Vehicles for vehicle registration. If local governments are buying new fleet vehicles they should make sure that the vehicles are California certified.

##### **3. Professional services:**

There are no professional services needed by small business or local government to comply with the proposed rule.

##### **4. Compliance costs:**

New York State currently maintains personnel and equipment to administer the LEV program. It is expected that these personnel will be retained to administer the revisions to this program. Therefore, no additional costs will be incurred by the State of New York for the administration of this program.

##### **5. Minimizing adverse impact:**

The GHG requirements are not expected to have adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the proposed GHG regulation is not expected to be burdensome in terms of additional reporting requirements for dealers.

There will be no adverse impact on local governments who own or operate vehicles in the state because they are subject to the same requirements as those imposed on owners of private vehicles. In other words, state and local governments will be required to purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

This regulation contains exemptions for emergency vehicles, and military tactical vehicles and equipment.

##### **6. Small business and local government participation:**

The Department plans on holding public hearings at various locations throughout New York State after the amendments are proposed. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

##### **7. Economic and technological feasibility:**

The GHG requirements are not expected to have adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the proposed GHG regulation is not expected to be burdensome in terms of additional reporting requirements for dealers. As stated previously, there would be no change in the competitive relationship with out-of-state businesses.

The GHG requirements attempt to minimize adverse impacts on automobile manufacturers by increasing compliance flexibility by offering them the voluntarily option of demonstrating compliance based on the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles sold in New York, California, and all other states that have adopted California's GHG emission standards under Section 177 rather than the current GHG fleet average requirements in each state.

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

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

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Section 200.9, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the greenhouse gas (GHG) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program.

There are no requirements in the regulation which apply only to rural areas. These changes apply to vehicles purchased by consumers, businesses, and government agencies in New York. The changes to these regulations may impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks.

The changes are additions to the current LEV standards. The new motor vehicle emission program has been in effect in New York State since model year 1993 for passenger cars as well as light-duty trucks, with the exception of model year 1995, and the Department is unaware of any adverse impact to rural areas as a result. The beneficial emission reductions from the program accrue to all areas of the state.

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

There are no specific requirements in the proposed regulations which apply exclusively to rural areas. Reporting, recordkeeping and compliance requirements apply primarily to vehicle manufacturers, and to a lesser degree to automobile dealerships. Manufacturers reporting requirements mirror the California requirements, and are thus not expected to be burdensome. Dealerships do not have reporting requirements, but must maintain records to demonstrate that vehicles are California certified. This documentation is the same as documentation already required by the New York State Department of Motor Vehicles for vehicle registration.

Professional services are not anticipated to be necessary to comply with the rules.

##### **3. Costs:**

The proposed amendments to the GHG standards are not expected to have an adverse impact on consumers. The amendments are intended to provide manufacturers with compliance flexibility by providing them with the option of demonstrating fleet average compliance utilizing a larger pool of vehicles. There are no costs associated with this change that would be passed along to consumers in the form of higher prices.

##### **4. Minimizing adverse impact:**

The changes will not adversely impact rural areas. As a result of the adoption of the aftermarket catalytic converter requirements, rural areas may benefit by seeing an improvement in the air quality.

##### **5. Rural area participation:**

The Department plans on holding public hearings at various locations throughout New York State once the regulation is proposed. Some of these locations will be convenient for persons from rural areas to participate. Additionally, there will be a public comment period in which interested parties can submit written comments.

#### **Job Impact Statement**

##### **1. Nature of impact:**

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Section 200.9, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to

the greenhouse gas (GHG) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program.

The amendments to the regulations are not expected to negatively impact jobs and employment opportunities in New York State. New York State has had a LEV program in effect since model year 1993 for passenger cars and light-duty trucks, with the exception of model year 1995, and the Department is unaware of any adverse impact to jobs and employment opportunities as a result.

2. Categories and numbers affected:

The changes to this regulation will not adversely impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks. Automobile manufacturers are not expected to incur costs in order to comply with the regulation. Dealerships will be able to sell California certified vehicles to buyers from states bordering New York. Since vehicles must be California certified in order to be registered in New York, New York residents will not be able to buy non-complying vehicles out-of-state, but may be able to buy complying vehicles out-of-state. These businesses compete within the state and generally are not subject to competition from out-of-state businesses. Therefore, the proposed regulation is not expected to impose a competitive disadvantage on affiliated businesses, and there would be no change from the current relationship with out-of-state businesses.

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

The GHG requirements are not expected to have adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the proposed GHG regulation is not expected to be burdensome in terms of additional reporting requirements for dealers. As stated previously, there would be no change in the competitive relationship with out-of-state businesses.

The GHG requirements attempt to minimize adverse impacts on automobile manufacturers by increasing compliance flexibility by offering them the voluntarily option of demonstrating compliance based on the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles sold in New York, California, and all other states that have adopted California's GHG emission standards under Section 177 rather than the current GHG fleet average requirements in each state.

5. Self-employment opportunities:

None that the Department is aware of at this time.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Nitrogen Oxide (NO<sub>x</sub>) Emission Controls for Hot Mix Asphalt Production Plants

I.D. No. ENV-51-09-00008-P

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

**Proposed Action:** Amendment of Part 212 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105

**Subject:** Nitrogen oxide (NO<sub>x</sub>) emission controls for hot mix asphalt production plants.

**Purpose:** To reduce NO<sub>x</sub> emissions from hot mix asphalt production plants to decrease ambient ozone and particulate matter concentrations.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129B, Albany, NY; 2:00 p.m., Feb. 10, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

**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.

**Text of proposed rule:**

Existing section 212.1 is repealed. A new section 212.1 is added as follows:

**Section 212.1 Definitions**

(a) For the purpose of this Part, the general definitions in Part 200 of this Title apply.

(b) For the purpose of this Part, the following definitions also apply:

(1) **Aggregate.** Any hard, inert material used for mixing in graduated particles or fragments. Includes sand, gravel, crushed stone, slag, rock dust or powder.

(2) **Asphalt.** The dark brown to black cementitious material (solid, semisolid or liquid in consistency) of which the main constituents are bitumens which occur naturally or as a residue of petroleum refining.

(3) **Asphalt Cement.** Asphalt specially prepared as to quality and consistency for direct use in the manufacture of asphalt pavements.

(4) **Flue Gas Recirculation.** The recycling of flue gas exhaust from the stack to the combustion chamber, which lowers the flame temperature and dilutes the oxygen content of the combustion air, thereby reducing the formation of nitrogen oxides.

(5) **Hot Mix Asphalt.** Paving material that is produced by mixing hot dried aggregate with heated asphalt cement.

(6) **Large Asphalt Plant Burner.** A burner with a maximum heat input of 25 million Btu per hour or greater.

(7) **Low NO<sub>x</sub> Burner.** A burner designed to reduce flame turbulence by the mixing of fuel and air and by establishing fuel-rich zones for initial combustion, thereby reducing the formation of nitrogen oxides.

(8) **Overall removal efficiency.** The total reduction of volatile organic compound emissions considering the efficiency of both the capture system and of the subsequent destruction and/or removal of these air contaminants by the control equipment prior to their release into the atmosphere.

(9) **Process.** Any industrial, commercial, agricultural or other activity, operation, manufacture or treatment in which chemical, biological and/or physical properties of the material or materials are changed, or in which the material(s) is conveyed or stored without changing the material(s) (where such conveyance or storage system is equipped with a vent(s) and is non-mobile), and which emits air contaminants to the outdoor atmosphere. A process does not include an open fire, operation of a combustion installation, or incineration of refuse other than by-products or wastes from processes.

(10) **Small Asphalt Plant Burner.** A burner with a maximum heat input of less than 25 million tu per hour.

Existing section 212.2 through subdivision 212.10(f) remain unchanged.

A new subdivision 212.10(g) is added as follows:

(g) **Control technology requirements for hot mix asphalt production plants.**

(1) The owner or operator of an existing hot mix asphalt production plant must submit an application to the department to modify its permit to address the requirements set forth below by June 1, 2010. Any new hot mix asphalt production plant will have to account for these requirements with its initial permit application. This application will include the following:

(i) for a small asphalt plant burner, a requirement to perform an annual burner tune-up.

(ii) for a large asphalt plant burner, a control technology assessment that analyzes the technical and economic feasibility of installing a low NO<sub>x</sub> burner and a low NO<sub>x</sub> burner in combination with a flue gas recirculation system. The control technology assessment shall include a description of the projected effectiveness of the technologies considered and the costs for installation and operation of each technology. The assessment shall also include proposed emission limits that reflect the application of the suggested control technology. The justification for technical and economic feasibility, the selection of the control technology, and the proposed emission limits will be reviewed by the department for approval. An annual burner tune-up will be required if all other control equipment is deemed infeasible.

(2) The owner or operator of a hot mix asphalt production plant must install and test any control equipment or other emission reduction methods approved by the department by January 1, 2012.

(3) The owner or operator of a hot mix asphalt production plant is required to maintain control equipment in accordance with manufacturer specifications.

(4) The owner or operator of a hot mix asphalt production plant will be required to maintain records detailing the date of equipment installation and fuel usage. The fuel usage records must be kept on site or in a specified central location for five years and made available to the department upon request.

Existing section 212.11 remains unchanged.

**Text of proposed rule and any required statements and analyses may be obtained from:** Scott Griffin, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 212asph@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

#### Summary of Regulatory Impact Statement

##### STATUTORY AUTHORITY

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources," to include nitrogen oxide (NO<sub>x</sub>) control requirements for hot mix asphalt production plants, which result from combustion during the asphalt drying process.

This NO<sub>x</sub> control strategy was introduced by the Ozone Transport Commission (OTC), of which New York State is a member, as an outgrowth of its ongoing efforts to reduce ground-level ozone to help states fulfill attainment of the national ambient air quality standard (NAAQS). The Department is proposing to revise Part 212 to require NO<sub>x</sub> control equipment or other NO<sub>x</sub> reduction methods consistent with the OTC guidelines. In addition to assisting in attainment of the ozone NAAQS, this rule revision will result in a decrease of fine particulate matter (PM<sub>2.5</sub>) formation from the operation of hot mix asphalt production plants during the non-ozone season, thus aiding in attainment of the PM<sub>2.5</sub> NAAQS. This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. The Department proposed to revise Part 212 further to remove definitions that also exist in Part 200. Doing so increases the clarity of Part 212 and avoids redundancy.

The proposed revision is authorized by Environmental Conservation Law (ECL) Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103, and 71-2105.

##### LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above statutes are directed toward protection of the environment and public health. NO<sub>x</sub> emissions contribute to the formation of both ozone and particulate matter in ambient air. New York State contains nonattainment areas for the primary and secondary ozone and PM<sub>2.5</sub> (both annual and 24-hour) NAAQS.

The proposed NO<sub>x</sub> controls must be installed and operating by January 1, 2012. This rule will benefit any nonattainment area relying on NO<sub>x</sub> reductions in 2012. This includes the 1997 8-hour ozone nonattainment area of New York-Northern New Jersey-Long Island, NY-NJ-CT, which must demonstrate attainment by June 15, 2013 (contingent on approval by the United States Environmental Protection Agency (EPA) of a "bump-up" request submitted by the Department). The Department also expects multiple areas throughout the state to be designated as nonattainment under the more stringent 2008 8-hour ozone NAAQS. EPA must declare their designations for this standard by March 12, 2010. The Department recently recommended to EPA that the New York-Northern New Jersey-Long Island, NY-NJ-CT area be designated as nonattainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS. Because NO<sub>x</sub> acts as a precursor to particulate matter, the reduction in NO<sub>x</sub> resulting from this rule revision will assist in this area meeting its attainment deadline in 2014.

##### NEEDS AND BENEFITS

Regulating hot mix asphalt production plants under Part 212 is primarily for the benefit of the various ozone nonattainment areas throughout the state. NO<sub>x</sub> emissions during the summer months are more inclined to react with volatile organic compounds (VOCs) to form ground-level ozone. The revised Part 212 is being included among the control measures needed for attainment of the 1997 8-hour ozone NAAQS in the State Implementation Plan (SIP) for the New York-N. New Jersey-Long Island, NY-NJ-CT nonattainment area. The updated Part 212 will also prove important in attaining the revised 2008 8-hour ozone standard, for which the Department submitted its designation recommendations to EPA on March 12, 2009.

During paving operations in the cooler months outside of the ozone season, NO<sub>x</sub> emissions are more likely to contribute to ambient particulate levels. The revised Part 212 will be included as a measure needed to help reach attainment of the 2006 24-hour PM<sub>2.5</sub> standard in the SIP for the downstate nonattainment area.

##### Ozone

EPA recently promulgated identical revised primary and secondary ozone standards that specified an eight-hour ozone standard of 0.075 parts per million (ppm).<sup>1</sup> EPA intends to publish the new eight-hour ozone designations by March 12, 2010. New York State is currently obligated to meet the requirements related to the 1997 eight-hour ozone NAAQS.<sup>2</sup> Regulating these hot mix asphalt production plants through the proposed revisions to Part 212 represents an essential component of New York State's SIP. Timely promulgation of this rule is required in order to avoid a finding of SIP disapproval by EPA.

Short-term exposure to elevated ozone concentrations can cause or aggravate many respiratory conditions, while longer-term exposure can lead to permanent changes in lung tissue and irreversible reductions in lung function. Studies have shown a definitive link between short-term exposure and human mortality.<sup>3</sup> Ozone also affects vegetation and ecosystems, leading to reductions in agricultural crop and commercial forest yields, reduced growth and survivability of tree seedlings, and increased plant susceptibility to disease, pests, and other environmental stresses such as harsh weather.

##### Particulate Matter

By action dated July 18, 1997, EPA revised the NAAQS for particulate matter to add new standards for PM<sub>2.5</sub>.<sup>4</sup> EPA established health and welfare-based (primary and secondary) annual and 24-hour PM<sub>2.5</sub> standards. Effective December 18, 2006, EPA revised the 24-hour standard to 35 micrograms per cubic meter, based on the three-year average of the annual 98th percentile of 24-hour concentrations.<sup>5</sup> The Department subsequently recommended that the New York-N. New Jersey-Long Island, NY-NJ-CT area be designated as nonattainment for this standard. New York has the obligation to reach attainment in this area in 2014.

Fine particles are associated with a number of serious health effects related to respiratory and cardiovascular impairment, including premature mortality. More detailed information on the health effects of fine particles can be found on EPA's web site: [http://www.epa.gov/ttn/naaqs/standards/pm/s\\_pm\\_index.html](http://www.epa.gov/ttn/naaqs/standards/pm/s_pm_index.html).

At the time EPA established the PM<sub>2.5</sub> primary NAAQS in 1997, EPA also established welfare-based (secondary) NAAQS identical to the primary standards. The secondary standards are designed to protect against major environmental effects caused by PM such as visibility impairment in Class I areas (which contain national parks and wilderness areas across the country), soiling, and materials damage.

##### Other Air Quality Implications

Reduced levels of NO<sub>x</sub> will lead to visibility improvements in many parts of the U.S. Reductions of NO<sub>x</sub> emissions will also reduce acidification and eutrophication of water bodies in the region.

Acid deposition is formed from NO<sub>x</sub> and SO<sub>2</sub> emissions and causes acidification of lakes and streams. New York State's Adirondack Park has been particularly affected by acid deposition. Approximately 26 percent of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification. Acid deposition has resulted in damage to plant species as well. Tree growth may be impaired by acid deposition through increased susceptibility to winter injury, or from a decline of vital nutrients in soils necessary for forest productivity. The same forest areas directly impacted by the effects of acid deposition are also some of the nation's most pristine wilderness areas (such as the Adirondack Park) and national parks.

National wilderness areas are impacted by nitrates in the atmosphere. NO<sub>x</sub> emissions are precursors to small particles that are formed in the atmosphere through chemical reactions with ammonia to form ammonium nitrate. Under certain conditions, nitrate particles in the atmosphere reduce visibility. Sources in New York State contribute to visibility impairment in nearby Class I areas, such as the Lye Brook Wilderness area in southwest Vermont and the Great Gulf Wilderness area in New Hampshire.

##### COSTS

##### Costs to Regulated Parties and Consumers

Under the proposed requirements of Part 212, hot mix asphalt production plants will incur costs associated with the analysis and installation of control equipment or implementation of other emission reduction methods. The owner or operator of each existing hot mix asphalt production plant will need to submit an application to modify its permit to the Department by June 1, 2010. Any new hot mix asphalt production plant will account for these requirements in its initial permit application.

For a source featuring a large burner, the owner or operator must develop a control technology assessment which investigates the technical and economic feasibility of installing a low NO<sub>x</sub> burner, and alternatively, installing a low NO<sub>x</sub> burner in combination with flue gas recirculation (FGR). Potential NO<sub>x</sub> reductions from the use of such control technologies are 25 to 40 percent with low NO<sub>x</sub> burners alone, and 35 to 50 percent with low NO<sub>x</sub> burners and FGR. The cost effectiveness of these technologies typically range from \$500 to \$1,250 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners, and \$1,000 to \$2,000 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners with FGR.<sup>6</sup> These cost data, which include the costs for equipment and installation and maintenance fees, were provided from several burner manufacturers and installation/maintenance companies.

A small burner will be exempt from this control technology assessment requirement, since low NO<sub>x</sub> burners and FGR will be technically and/or economically infeasible. For these small burners, an annual burner tune-up will be the required control technique. This will reduce NO<sub>x</sub> emissions by approximately 10 percent. Cost effectiveness is estimated to be up to \$1,000 per ton of NO<sub>x</sub> reduced.

The Department will review each control technology assessment and will determine which control method is reasonable. The Department will utilize the cost effectiveness values presently accepted for Reasonably Available Control Technology (RACT), as outlined in Air Guide 20, as the threshold for determining economically feasible controls for these hot mix asphalt plants.<sup>7</sup> Installation and testing of these approved controls must be completed by January 1, 2012. Sources will also incur some ongoing expenses to maintain this equipment in accordance with manufacturer specifications.

#### Costs to State and Local Governments

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities.

#### Costs to the Regulating Agency

The Department will face some initial labor costs associated with reviewing the permit modification application provided by each hot mix asphalt source (which includes the control technology assessment for sources with large burners). Additional costs may be minimal, as these permits are already modified and reviewed periodically. Staff has up to 45 days to review these applications. The actual number of days required for review will vary depending upon the configuration of the source and the completeness of the application. Once this control assessment has been reviewed and a particular control technology or other emission reduction method is approved by staff, there will be labor costs associated with incorporating such determination into the facility's permit, as well as for reviewing and processing the permit. Associated with this is a cost to publish a public notice for the modification of the permit. This cost varies depending on the scope and location of the publication(s) that carries the notice.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities.

#### PAPERWORK

Owners or operators at each plant will be required to submit an application to modify the source's permit, including a control technology assessment for sources with large burners. This assessment will consider the technical and economic feasibility of installing a low NO<sub>x</sub> burner or a low NO<sub>x</sub> burner in combination with flue gas recirculation. This will entail a description of the projected effectiveness of the technologies considered, as well as the costs for the installation and operation of each technology. The permit modification application for sources featuring small burners should include the annual burner tune-up requirement.

Sources will be required to maintain records detailing the equipment installation and fuel usage. Fuel usage records must be maintained for five years and must be made available to the Department upon request.

#### DUPLICATION

Because NO<sub>x</sub> emissions from hot mix asphalt production plants are being controlled for the first time, the Department does not believe that duplication of regulatory requirements will be an issue.

#### ALTERNATIVES

The Department evaluated two possible alternatives to the proposed revisions of Part 212:

1. No action.

2. Implementation of the OTC NO<sub>x</sub> emission guidelines only at major facilities.

1. No action:

The Department has an obligation under the ECL and the Clean Air Act (CAA) to develop programs that protect the air quality in New York State. The CAA requires states to document progress toward and the eventual attainment of the ozone and PM<sub>2.5</sub> NAAQS in each nonattainment area. Progress is measured by the adoption and verification of control programs that will result in appropriate emission reductions in nonattainment areas. If these programs are not implemented, EPA may impose sanctions requisite with a SIP disapproval. These sanctions could include (but are not limited to) a 2-to-1 new source emission offset, followed by the loss of federal highway funds for new projects and the imposition of a Federal Implementation Plan. Failure to make progress or attain the ozone NAAQS within the timeframes designated by the CAA will also result in these areas being reclassified, for which the EPA would impose additional requirements. Controls on minor hot mix asphalt plants have been identified as technologically feasible and cost effective for reducing NO<sub>x</sub> emissions, which will have a positive impact on lowering ambient ozone and PM<sub>2.5</sub> concentrations.

2. Implement the OTC NO<sub>x</sub> emission guidelines only at major facilities:

The partial implementation alternative was rejected because of the insufficient reductions in NO<sub>x</sub> emissions that would have been obtained. The current Section 212.10 NO<sub>x</sub> requirements affect only major facilities. When Section 212.10 was originally promulgated, all asphalt plants capped below the major facility emissions threshold. Thus, if the Department did not regulate minor asphalt plants, NO<sub>x</sub> emissions from this source category would continue to go uncontrolled.

#### FEDERAL STANDARDS

The addition of control requirements for minor hot mix asphalt production plants is necessary to help realize attainment in New York State's ozone and PM<sub>2.5</sub> nonattainment areas by the dates mandated in the CAA.

#### COMPLIANCE SCHEDULE

Owners and operators of hot mix asphalt production plants will be required to submit an application to modify their permit by June 1, 2010, which, for large burners, will additionally include an assessment of potential NO<sub>x</sub> control technologies with their related effectiveness and cost. Control equipment or other emission reduction methods approved by the Department must be installed and tested by January 1, 2012.

<sup>1</sup> 73 FR 16436, March 27, 2008

<sup>2</sup> 62 FR 38856, July 18, 1997

<sup>3</sup> 292 *Journal of the American Medical Assn.* 2372-78 (Nov. 17, 2004); 170 *Am. J. Respir., Crit. Care Med.* 1080-87 (July 28, 2004) (observing significant ozone-related deaths in the New York City Metropolitan Area)

<sup>4</sup> 62 FR 38652, July 18, 1997

<sup>5</sup> 71 FR 61144, October 17, 2006

<sup>6</sup> "Identification and Evaluation of Candidate Control Measures"; Final Technical Support Document. Ozone Transport Commission. February 28, 2007.

<sup>7</sup> Air Guide 20 - Economic and Technical Analysis for Reasonably Available Control Technology. <http://www.dec.ny.gov/regulations/25210.html>.

#### Regulatory Flexibility Analysis

##### EFFECTS ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources," to include control requirements for hot mix asphalt production plants. These control requirements will be specifically aimed at reducing emissions of oxides of nitrogen (NO<sub>x</sub>) resulting from combustion during the asphalt drying process. The Department finds that reducing NO<sub>x</sub> emissions from hot mix asphalt plants is a necessary step in attaining ambient concentrations of ozone and fine particulate matter that are in compliance with the national ambient air quality standards.

All existing hot mix asphalt plants have capped their emissions below the major source threshold in order to avoid the control requirements for major sources under Section 212.10. These new requirements will therefore affect minor sources. The Department recently analyzed its permitting records to establish that approximately 150 hot mix asphalt production plants exist throughout the state, though not all are currently in service. A number of these are represented by small businesses.

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. They will not face any recordkeeping, reporting, or other requirements.

#### COMPLIANCE REQUIREMENTS

Under the proposed requirements, owners and operators of hot mix asphalt production plants must submit an application to modify their permit. This application must be received by the Department by June 1, 2010. For sources with large burners (i.e., greater than or equal to 25 million Btu per hour heat input), the application must include a control technology assessment which investigates the technical and economic feasibility and projected efficiency of installing a low NO<sub>x</sub> burner, or a low NO<sub>x</sub> burner in combination with flue gas recirculation. For sources with small burners (i.e., less than 25 million Btu per hour heat input), an annual burner tune-up will be the required control technique.

The Department will review the permit modification application, along with the technology assessment for large burners, and require the source to install appropriate control equipment or to implement other emission reduction methods such as the annual burner tune-up requirement. NO<sub>x</sub> control equipment approved by the Department must be installed and operating by January 1, 2012. Facilities will be required to maintain their control equipment up to manufacturer specifications.

Records detailing the date of equipment installation and fuel usage must be retained by the subject facilities. These fuel usage records are to be retained for five years, and must be provided to the Department upon request.

#### PROFESSIONAL SERVICES

Outside professional consultants may need to be hired to help the impacted facilities conduct the control technology assessment proposed under Section 212.10. If it is determined that NO<sub>x</sub> control equipment must be installed, design and construction management services will likely be needed.

#### COMPLIANCE COSTS

Under the proposed requirements of Part 212, hot mix asphalt production plants will incur costs associated with the analysis and installation of NO<sub>x</sub> control equipment, or implementation of other NO<sub>x</sub> emission reduction methods. The owner or operator of each existing hot mix asphalt pro-

duction plant will need to submit an application to modify its permit to the Department by June 1, 2010. Any new hot mix asphalt production plant will account for these requirements in its initial permit application.

For a source featuring a large burner, the owner or operator must develop a control technology assessment which investigates the technical and economic feasibility of installing a low NO<sub>x</sub> burner, and alternatively, installing a low NO<sub>x</sub> burner in combination with flue gas recirculation (FGR). Potential NO<sub>x</sub> emission reductions from the use of such control technologies are 25 to 40 percent with low NO<sub>x</sub> burners alone, and 35 to 50 percent with low NO<sub>x</sub> burners and FGR. The cost effectiveness of these technologies typically range from \$500 to \$1,250 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners, and \$1,000 to \$2,000 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners with FGR.<sup>1</sup> These cost data, which include the costs for equipment, installation fees, and annual maintenance fees, were provided from several burner manufacturers and installation and/or maintenance companies.

A small burner will be exempt from this control technology assessment requirement, as low NO<sub>x</sub> burners and FGR would likely be technically and/or economically infeasible. For these small burners, an annual burner tune-up will be the required control technique. This will reduce NO<sub>x</sub> emissions by approximately 10 percent. Cost effectiveness is estimated to be up to \$1,000 per ton of NO<sub>x</sub> reduced. It should be noted that a portion of the cost for an annual burner tune-up would potentially be offset with a resulting increase in fuel efficiency.

#### MINIMIZING ADVERSE IMPACT

Because these proposed requirements are targeted toward minor facilities, a number of small businesses will be affected. The Department plans to perform a case-by-case review in order to avoid unnecessary expenditures that may be inflicted through the imposition of blanket control requirements. In reviewing the control technology assessment submitted by these minor facilities, the Department will consider the technical and economic feasibility of the potential controls. The Department will utilize the cost effectiveness values presently accepted for RACT, as outlined in Air Guide 20, as the threshold for determining economically feasible controls for these hot mix asphalt plants. If emission control technologies are deemed technically or economically infeasible, the Department will consider other reduction methods such as maintenance and operational practices.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The proposed addition of NO<sub>x</sub> control requirements to Part 212 results from a candidate control measure developed by member states of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department will hold a public comment period and a public hearing for the revisions to Part 212, as required by the State Administrative Procedures Act. This will give local governments a chance to voice their concerns with the rule and allow for further stakeholder input prior to promulgation of the revised rule.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The case-by-case review process being utilized by the Department will prevent any businesses from facing harmful compliance costs. All control options reviewed should be technically feasible. The Department believes that the various compliance options come at reasonable cost: from \$500 to \$1,250 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners; from \$1,000 to \$2,000 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners with FGR; and approximately \$1,000 per ton of NO<sub>x</sub> reduced for annual burner tune-ups.

<sup>1</sup> "Identification and Evaluation of Candidate Control Measures," Final Technical Support Document. Ozone Transport Commission. February 28, 2007.

#### Rural Area Flexibility Analysis

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources." The proposed revision will include the addition of nitrogen oxide (NO<sub>x</sub>) control requirements for hot mix asphalt production plants under Section 212.10. The Department recently reviewed its permitting records and determined that approximately 150 hot mix asphalt production plants exist throughout the state, though not all of these are in service. All such plants throughout the state will be affected, regardless of location. Rural areas are not disproportionately affected by these new control requirements under Part 212.

#### COMPLIANCE REQUIREMENTS

The new compliance requirements under Part 212 apply uniformly statewide. Under the proposed requirements, owners and operators of hot mix asphalt production plants must submit an application to modify their permit. This application must be received by the Department by June 1, 2010. For sources with large burners (i.e., greater than or equal to 25 million Btu per hour heat input), the application must include a control technology assessment which investigates the technical and economic feasibility and projected efficiency of installing a low NO<sub>x</sub> burner, and a low NO<sub>x</sub> burner in combination with flue gas recirculation. For sources with small burners (i.e., less than 25 million Btu per hour heat input), an annual burner tune-up will be the required control technique.

The Department will review the permit modification application, along with the technology assessment for large burners, and require the source to install appropriate control equipment or to implement other NO<sub>x</sub> emission reduction methods such as the annual burner tune-up requirement. Control equipment approved by the Department must be installed and operating by January 1, 2012. Facilities will be required to maintain their control equipment up to manufacturer specifications.

Records detailing the date of equipment installation and fuel usage must be retained by the subject facilities. These fuel usage records are to be retained for five years, and must be provided to the Department upon request.

#### COSTS

The owner or operator of each existing hot mix asphalt production plant will need to submit an application to modify its permit to the Department by June 1, 2010. Any new hot mix asphalt production plant will account for these requirements in its initial permit application.

For a source featuring a large burner, the owner or operator must develop a control technology assessment which investigates the technical and economic feasibility of installing a low NO<sub>x</sub> burner, and alternatively, a low NO<sub>x</sub> burner in combination with flue gas recirculation (FGR). Potential NO<sub>x</sub> emission reductions from the use of such control technologies are 25 to 40 percent with low NO<sub>x</sub> burners alone, and 35 to 50 percent with low NO<sub>x</sub> burners and FGR. The cost effectiveness of these technologies typically range from \$500 to \$1,250 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners and from \$1,000 to \$2,000 per ton of NO<sub>x</sub> reduced for low NO<sub>x</sub> burners with FGR.<sup>1</sup> These cost data, which include the costs for equipment, installation fees, and annual maintenance fees, were provided from several burner manufacturers and installation and/or maintenance companies.

A small burner will be exempt from this control technology assessment requirement, as low NO<sub>x</sub> burners and FGR would likely be technically and/or economically infeasible. For these small burners, an annual burner tune-up will be the required control technique. This will reduce NO<sub>x</sub> emissions by approximately 10 percent. Cost effectiveness is estimated to be up to \$1,000 per ton of NO<sub>x</sub> reduced. It should be noted that a portion of the cost for an annual burner tune-up would potentially be offset with a resulting increase in fuel efficiency.

The Department will review each control technology assessment and will determine which control method is reasonable. The Department will utilize the cost effectiveness values presently accepted for RACT, as outlined in Air Guide 20, as the threshold for determining economically feasible controls for these hot mix asphalt plants. Installation and testing of these approved controls would need to be completed by January 1, 2012. Sources will also incur some ongoing expenses to maintain this equipment in accordance with manufacturer specifications.

#### MINIMIZING ADVERSE IMPACT

The Department does not expect any adverse impacts on rural areas. Because the proposed asphalt plant requirements are applicable to sources statewide, no rural area will be affected disproportionately. The Department's interpretation of the control technology assessment will not be influenced by the location of a facility, whether it is in a rural, suburban or urban area.

There will be positive environmental impacts from the regulation in rural areas. Rural areas containing applicable sources, as well as rural areas downwind of such sources, should be subject to a decrease in ground-level ozone, airborne particulate matter, and acid deposition due to the reduction in NO<sub>x</sub> emissions.

#### RURAL AREA PARTICIPATION

The proposed addition of NO<sub>x</sub> control requirements to Part 212 results from a candidate control measure developed by member states of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department will hold a public comment period and a public hear-

ing for the revisions to Part 212, as required by the State Administrative Procedures Act. This will give rural area residents a chance to voice their concerns with the rule and allow for further stakeholder input prior to promulgation of the revised rule.

<sup>1</sup> "Identification and Evaluation of Candidate Control Measures," Final Technical Support Document. Ozone Transport Commission. February 28, 2007.

#### Job Impact Statement

##### NATURE OF IMPACT

The New York State Department of Environmental Conservation (Department) proposes the addition of nitrogen oxide (NO<sub>x</sub>) control requirements for hot mix asphalt production plants under 6 NYCRR Part 212, "General Process Emission Sources." Owners and operators of subject facilities will be required to submit a permit modification application to the Department. For sources featuring a large burner (i.e., a burner with maximum heat input of 25 million Btu per hour or greater), this submittal will include a control technology assessment which will review potential NO<sub>x</sub> emission control equipment. Options include a low NO<sub>x</sub> burner (at an approximate cost effectiveness of \$500 to \$1,250 per ton of NO<sub>x</sub> reduced) and a low NO<sub>x</sub> burner in combination with flue gas recirculation (with approximate cost effectiveness of \$1,000 to \$2,000 per ton of NO<sub>x</sub> reduced). The Department will review the technical and economic feasibility of the different options presented in this assessment to decide upon the appropriate control equipment. The Department will utilize the cost effectiveness values presently accepted for RACT, as outlined in Air Guide 20, as the threshold for determining feasible controls for these hot mix asphalt plants. Owners and operators of sources featuring a small burner (i.e., a burner with maximum heat input less than 25 million Btu per hour) must include in their permit modification application the requirement to perform an annual burner tune-up, which comes at reasonable cost of approximately \$1,000 per ton of NO<sub>x</sub> reduced.

The Department believes that the proposed NO<sub>x</sub> control requirements at hot mix asphalt production plants are necessary components of the ozone and PM<sub>2.5</sub> state implementation plans. This control strategy is an outgrowth of ongoing efforts by the Ozone Transport Commission (OTC) to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six source sectors, including asphalt production plants. OTC member states felt that controlling these sources was an effective strategy for the reduction of NO<sub>x</sub>, and could be done without negatively impacting the success of the industry. The Department's proposed revisions are not expected to have excessive costs resulting in a substantial adverse impact on jobs or employment opportunities in New York State.

##### CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The revisions to Part 212 are not anticipated to have any long-term effects on the number of current jobs or future employment opportunities. In order to comply with the control requirements, subject facilities may be required to purchase and install control equipment, or perform regular burner maintenance. To prevent a source from adopting excessively expensive controls, the planned installation of any control equipment will be reviewed by the Department for economic feasibility.

A short period of increased employment opportunities may occur in jobs associated with air pollution control device installation, including but not limited to construction steel workers, welders, pipe fitters, and electricians. Many hot mix asphalt production plants will be affected by this rule revision. There are approximately 150 such facilities state-wide, though not all are in operation at this time. It is unknown which facilities will find it necessary and feasible to install particular control equipment, and therefore, the department is unable to estimate the actual number of short-term jobs created.

##### REGIONS OF ADVERSE IMPACT

The addition of control requirements for hot mix asphalt production plants to Part 212 apply statewide. Because these sources are not concentrated heavily in any particular part of the state, these new requirements do not impact any region or area of New York State disproportionately in terms of jobs or employment opportunities.

##### MINIMIZING ADVERSE IMPACT

Owners and operators of hot mix asphalt production plants will be required to submit an application to the Department to modify their permit, which will include a control technology assessment for sources with large burners. This assessment must investigate the technical and economic feasibility of installing and operating low NO<sub>x</sub> burners, or low NO<sub>x</sub> burners in combination with flue gas recirculation. By excluding control options it deems economically infeasible, the Department is ensuring that the applicable facility does not undergo any excessive costs which may adversely impact its ability to operate. By reviewing these assessments on

a case-by-case basis, the Department avoids placing uniform standards on all asphalt plants, which could potentially lead to extraneous costs in many instances.

The owner or operator of a source featuring a small burner will be required to perform an annual burner tune-up. This control method is expected to come at reasonable cost, and a portion of this cost would potentially be offset with a resulting increase in fuel efficiency.

##### SELF-EMPLOYMENT OPPORTUNITIES

The revisions to Section 212.10 are not expected to affect self-employment opportunities. The case-by-case nature of the requirements for hot mix asphalt production plants seeks to prevent any excessive expenditure on NO<sub>x</sub> control equipment which would affect such opportunities.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Portland Cement Plants and Glass Plants

I.D. No. ENV-51-09-00009-P

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

**Proposed Action:** Amendment of Parts 200 and 220 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305 and 19-0311

**Subject:** Portland Cement Plants and Glass Plants.

**Purpose:** To reduce nitrogen oxide emissions from portland cement kilns and glass furnaces.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm., 129-B, Albany, NY; and 2:00 p.m., Feb. 10, 2010 Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY.

**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 (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The proposed Part 200 amendments will add definitions for continuous emissions monitoring system (CEMS) certification protocol and continuous emissions monitoring system (CEMS) plan. These definitions are being included under Part 200 for consistency due to their use in multiple regulations. The proposed revisions will also add references in section 200.9, Table 1.

Current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants.

The proposed Subpart 220-1 revisions will include the removal of a definition, the addition of several new definitions, and revisions to the reasonably available control technology (RACT) requirements for emissions of oxides of nitrogen (NO<sub>x</sub>).

Section 220.1 will become section 220-1.1 and will be revised to remove the definition of RACT. RACT is defined in existing Part 200. Also, the revisions will add definitions for clinker, portland cement kiln, and portland cement plant.

Sections 220.2 through 220.5 will become sections 220-1.2 through 220-1.5. These sections contain existing requirements for particulate emissions from existing, new, and modified kilns and clinker coolers, opacity limits for portland cement processes, and particulate emissions from dust dumps.

Section 220.6 will become section 220-1.6 and the existing NO<sub>x</sub> RACT requirements will be replaced with new NO<sub>x</sub> RACT requirements. The proposed revisions require a portland cement kiln owner or operator to perform a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub> from the kiln, establishes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. Approved RACT determinations will be submitted by the Department to the United States Environmental Protection Agency (EPA) for approval as separate State Implementation Plan (SIP) revisions. The proposed revisions include a kiln shut down

option. The owner or operator of a portland cement kiln may opt to comply with the RACT requirements by shutting down the kiln. An owner or operator choosing this option shall submit an application for a federally enforceable permit modification by October 1, 2010 wherein the owner or operator commits to permanently shut down the furnace by July 1, 2012.

Section 220.7 will become section 220-1.7. This section contains existing requirements with minor revisions for startup/shutdown, upset conditions, and malfunctions. These provisions allow the commissioner to excuse a violation of the provisions of this subpart that are caused by startup/shutdown, upset conditions, or malfunctions, as provided in Subpart 201-1 of this Title.

Section 220.8 will become section 220-1.8 and will be revised to require NO<sub>x</sub> emissions from portland cement kilns to be continuously monitored. The proposed revisions include specific continuous emissions monitoring, reporting, and recordkeeping requirements.

Proposed Subpart 220-2 is new. This subpart will require NO<sub>x</sub> RACT for glass furnaces at glass plants. The requirements of this Subpart apply to any glass plant that is a major facility of NO<sub>x</sub> emissions. Definitions of glass melting furnace, glass plants, and glass produced or glass production are included in section 220-2.2.

In section 220-2.3 NO<sub>x</sub> RACT requirements are proposed. The proposed revisions require a glass melting furnace owner or operator to perform a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub> from the furnace, establishes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. Approved RACT determinations will be submitted by the Department to the United States Environmental Protection Agency (EPA) for approval as separate State Implementation Plan (SIP) revisions. The proposed revisions include a glass melting furnace shut down option. The owner or operator of a glass melting furnace may opt to comply with the RACT requirements by shutting down the furnace. An owner or operator choosing this option shall submit an application for a federally enforceable permit modification by October 1, 2010 wherein the owner or operator commits to permanently shut down the furnace by July 1, 2012.

The section 220-2.4 proposed revisions require NO<sub>x</sub> emissions from glass melting furnaces to be continuously monitored. The proposed revisions include specific continuous emissions monitoring, reporting, and recordkeeping requirements.

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert Stanton, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 220cement@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

#### Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Parts 200, General Provisions, and 220, Portland Cement Plants. The current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants. In addition to other requirements, the existing regulation imposes Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO<sub>x</sub>) from portland cement kilns. The Department is proposing to revise Part 220 to require updated NO<sub>x</sub> RACT for cement kilns at portland cement plants, and to require NO<sub>x</sub> RACT for glass furnaces at glass plants. The proposed revisions will apply to major facilities only. Major facilities are those that have a potential to emit NO<sub>x</sub> emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). In addition to the proposed revisions to Part 220, the Department is also proposing to revise to Part 200 by adding two new definitions; continuous emissions monitoring system (CEMS) certification protocol, and CEMS plan.

NO<sub>x</sub> RACT limits are a component of the State Implementation Plan (SIP) for New York State (NYS) directed at attainment of the 1997 ozone national ambient air quality standard (NAAQS) and are expected to be part of the SIP that will be submitted with respect to the 2008 ozone NAAQS<sup>1</sup>. This is a requirement flowing from the State's obligations under the Federal Clean Air Act (CAA). This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

The Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform

a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub>, establishes a NO<sub>x</sub> RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the NO<sub>x</sub> RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. In terms of pollution reductions, the intent of the revisions to Part 220 is to establish NO<sub>x</sub> RACT emission limits at each facility based upon a current RACT evaluation.

#### STATUTORY AUTHORITY

CAA Requirements Concerning RACT for NO<sub>x</sub> Emissions for Purposes of the 1997 Ozone NAAQS NYS is included in the Northeast Ozone Transport Region (OTR) established under CAA Section 184(a), and is a member of the Ozone Transport Commission (OTC) formed pursuant to CAA Sections 184(a) and 176A(b)(1). Under CAA Section 182(f), States must apply the same requirements to major stationary sources of NO<sub>x</sub> as are applied to major stationary sources of volatile organic compounds (VOCs) in ozone NAAQS nonattainment areas<sup>2</sup>. Among these requirements is the imposition of NO<sub>x</sub> RACT statewide in the OTR under CAA Sections 182(b)(2)(C).

The NYS Legislature has accorded the Department the primary authority to formulate and implement the SIP. The provisions of State law treated below, taken together, clearly empower the Department to promulgate and implement the proposed rule provisions as SIP revisions.

Environmental Conservation Law (ECL) section 1-0101 declares it to be the policy of NYS to conserve, improve and protect its natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of NYS and their overall economic and social well being.

ECL section 19-0103 declares that it is the policy of NYS to maintain a reasonable degree of purity of air resources, which shall be consistent with the public health and welfare and the public enjoyment thereof, and the industrial development of the State, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

ECL section 19-0105 declares that it is the purpose of Article 19 of the ECL to safeguard the air resources of NYS under a program which is consistent with the policy expressed in Section 19-0103 and in accordance with other provisions of Article 19.

ECL section 19-0301 declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution and shall include in such regulations provisions prescribing the degree of air pollution that may be emitted to the air by any source in any area of the State.

ECL section 19-0303 provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution and air contamination sources.

ECL section 19-0305 authorizes the Commissioner to enforce the codes, rules and regulations established in accordance with Article 19.

ECL section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA.

#### LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above-referenced statutory authority are essentially directed toward protecting public health and the environment. By promulgating and implementing the proposed revisions to Part 220, the Department will be amending a regulation to impose more stringent emission limits on major stationary sources of NO<sub>x</sub> that contribute to local and regional nonattainment of the 1997 and 2008 ozone NAAQS.

#### NEEDS AND BENEFITS

##### Ozone – Causes and Effects

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NO<sub>x</sub> on hot sunny summer days, can harm humans and plants. The primary ozone NAAQS was established by EPA at a level that is requisite to protect the public health. In the northeastern United States, the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the NAAQS by mid-afternoon on a summer day. The contiguous metropolitan areas of Washington, D.C., Baltimore, Philadelphia, New York, and Hartford are designated ozone nonattainment areas.

In July 2006, EPA recognized a number of epidemiological and controlled human exposure studies that suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctors visits, emergency department visits, and hospital admissions; provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality; and report health effects at ozone concentrations lower than the level of the current standards, as low as 0.04 parts per million (ppm)

for some highly sensitive individuals. 'See Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Nonattainment Area Designations and Classifications for the 1997 and 2008 ozone NAAQS

EPA promulgated nonattainment area designations for the 1997 ozone NAAQS during April 2004. 'See Air Quality Designations and Classifications for the 8-Hour Ozone NAAQS', 69 Fed. Reg. 23,858 (April 30, 2004) (codified at 40 CFR Sections 81.300-356) (the Designations Rule).

Under the Designations Rule, the following areas in NYS were designated as nonattainment: Jefferson County; Poughkeepsie (encompassing Dutchess, Putnam, and Orange counties); NYC metro area (encompassing Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester counties); Albany-Schenectady-Troy (encompassing Albany, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, and Schoharie counties); Essex County (the portion of Whiteface Mountain above 1,900 feet in elevation); Jamestown (Chautauqua County); and Rochester (encompassing Genesee, Livingston, Monroe, Ontario, Orleans, and Wayne counties).

On March 12, 2009, the Department recommended that the NYC metro area, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown areas be designated nonattainment for the 2008 ozone NAAQS of 0.075 parts per million<sup>3</sup>. Ozone pollution is and will likely remain a pervasive problem in much of NYS, particularly in the major population centers.

#### Measures Taken to Reduce Ozone

The Department has promulgated several NO<sub>x</sub> RACT regulations that apply to various other source categories throughout NYS. These categories include stationary combustion installations (6 NYCRR Subpart 227-2), iron and steel process sources (6 NYCRR Part 216), coke oven batteries (6 NYCRR Part 214), and general process NO<sub>x</sub> sources (6 NYCRR Part 212). All of these regulations will assist in bringing all areas in the State into attainment with the NAAQS for ozone. The compilation of these control programs constitutes the NO<sub>x</sub> portion of the ozone NAAQS nonattainment SIP for NYS.

The proposed revisions to reduce NO<sub>x</sub> emissions from portland cement plants and glass plants is an outgrowth of ongoing efforts by the OTC to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six (6) source sectors, including portland cement plants and glass manufacturing plants. The Department is proposing these revisions to require NO<sub>x</sub> controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the OTC and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled 'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC).

The proposed rule revisions will affect three cement plants and four glass plants in NYS. The Department projects that the actual NO<sub>x</sub> emission reductions resulting from the proposal will be approximately 3,400 tons per year or 9.3 tons per day.

#### The Clean Air Interstate Rule (CAIR) is not NO<sub>x</sub> RACT

The Department promulgated the CAIR regulations for emissions of NO<sub>x</sub> (6 NYCRR Part 243) on October 19, 2007. Part 243 (the NO<sub>x</sub> CAIR regulation) is an annual NO<sub>x</sub> budget program. The CAIR regulation is intended to address the ozone transport issue over a large interstate area. The regulation does not require control technologies be applied to existing facilities, or even an evaluation of reasonably available controls, and is not designed to aid in attaining the ozone standards in local ozone nonattainment areas. Therefore, the Department maintains that compliance with CAIR does not constitute compliance with NO<sub>x</sub> RACT.

#### The Best Available Retrofit Technology (BART) Rule

In 1999, EPA promulgated regulations to address a type of visibility impairment known as regional haze. EPA is requiring that States develop and submit regional haze SIPs that include source-specific BART determinations, compliance schedules, and implementation of BART controls by December 17, 2012.

In a separate rulemaking effort, the Department is proposing to determine the appropriate NO<sub>x</sub>, sulfur dioxide (SO<sub>2</sub>), and particulate matter less than ten microns (PM<sub>10</sub>) BART emission controls for sources that cause or contribute to the impairment of visibility in Class I areas. The Department has identified three portland cement plants and one glass plant that may be subject to BART. It is the Department's intention to coordinate the review of NO<sub>x</sub> RACT and BART NO<sub>x</sub> controls to assure that implementation of the two programs do not interfere with each other and to maximize the extent that these programs complement each other. The Department will work with the facilities to see that duplication of effort is minimized or, if possible, eliminated.

#### COSTS

#### Costs to Regulated Parties and Consumers

The proposed NO<sub>x</sub> RACT revisions to Part 220 do not identify specific NO<sub>x</sub> RACT emission limits for affected facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A NO<sub>x</sub> RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The determination of the facility specific NO<sub>x</sub> RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO<sub>x</sub> RACT, currently in the range of \$5,000 to \$5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO<sub>x</sub> control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: \$1,000 - \$2,500 per ton reduced

Glass Manufacturing Plants: \$1,300 - \$2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: \$3,100,000 - \$7,750,000

Glass Manufacturing Plants: \$390,000 - \$780,000

Affected facilities that currently do not utilize CEMS to monitor their NO<sub>x</sub> emissions will experience additional costs associated with the purchase, installation, and operation of a NO<sub>x</sub> CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

#### Costs to State and Local Governments

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. State and local entities will not be affected by the proposed regulation. There are no government owned portland cement plants or glass plants.

#### Costs to the Regulating Agency

The authority and responsibility for implementing Part 220 lies solely with the Department. The proposed rule revisions have been developed to minimize the administrative cost burden to the Department.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. Local entities will not be affected by the proposed regulation and consequently have no compliance obligations.

#### PAPERWORK

The proposed revisions to Part 220 will create additional paperwork for the affected facilities. Affected facilities will be required to perform a RACT analysis, prepare a CEMS certification protocol and a monitoring plan, and submit an application to modify their Title V permit to incorporate the newly applicable requirements. Additionally, affected facilities will be required submit test protocols and test reports. However, all of the affected facilities are currently regulated under the Title V program and are already required to submit a test protocol, perform an emissions compliance test, and submit a test report at least once during the term of their permit.

#### DUPLICATION

Aside from the BART rulemaking discussed above, the proposed revisions to Part 220 do not duplicate, overlap, or conflict with any other State or federal requirements.

#### ALTERNATIVES

The following alternative has been evaluated to address the goals set forth above:

Take no action: The "take no action" alternative is not acceptable because failure to adopt this regulation will seriously impede NYS's ability to attain the ozone NAAQS. The proposed revisions to Part 220, in combination with the implementation of other regulations (concerning NO<sub>x</sub> RACT limits for stationary combustion installations, and asphalt plants), will help New York State achieve compliance with the 1997 ozone NAAQS.

#### FEDERAL STANDARDS

The proposed rule does not exceed any minimum federal standards.

#### COMPLIANCE SCHEDULE

The Department proposes to promulgate the revisions to Part 220 by December 2009. Subject facilities will be required to submit a RACT analysis and an application for a permit or permit modification by no later than October 1, 2010. The RACT analysis will determine RACT for emissions of NO<sub>x</sub>, establish a NO<sub>x</sub> RACT emission limit(s), and identify the procedures and monitoring equipment to be used to demonstrate compliance with the NO<sub>x</sub> RACT emission limit(s). RACT, as approved by the Department, must be implemented by July 1, 2012.

<sup>1</sup> On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm) (the 1997 ozone NAAQS). 'See National Ambient Air Quality Rule for Ozone', 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR section 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm. On March 27, 2008, EPA promulgated revised ozone NAAQS and set the new primary and secondary standards at 0.075 ppm (the 2008 ozone NAAQS). 'See National Ambient Air Quality Standards for Ozone', 73 Fed. Reg. 16436 (March 27, 2008) (codified at 40 CFR section 50.15). Attainment of the 2008 ozone NAAQS is determined in the same manner as with the 1997 ozone NAAQS.

<sup>2</sup> Within the OTR, any source that emits or has the potential to emit at least 50 tons per year of VOCs is considered a "major stationary source" and is subject to the requirements that are applicable to major stationary sources in moderate nonattainment areas under CAA section 184(b)(2). However, under CAA section 302, and section 182(c), (d), and (e), the emission thresholds for major stationary sources of NO<sub>x</sub> in the OTC vary from 100 to 10 tons per year depending on the area's designation and classification. For portions of the OTR that are designated as attainment or unclassifiable, or classified as moderate nonattainment, a major stationary source of NO<sub>x</sub> is one that emits more than 100 tons of NO<sub>x</sub> per year; in portions of the OTC classified a serious nonattainment the emissions threshold is 50 tons of NO<sub>x</sub> per year.

<sup>3</sup> March 12, 2009 letter from Mr. J. Jared Snyder, Assistant Commissioner, Office of Air Resources, Climate Change, & Energy to Mr. George Pavlou, Acting Administrator, EPA Region 2.

#### **Regulatory Flexibility Analysis**

##### **EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:**

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The Department is proposing to revise Part 220 to require updated Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO<sub>x</sub>) for cement kilns at portland cement plants, and to require NO<sub>x</sub> RACT for glass furnaces at glass plants. The Department is also proposing to add two new definitions to Part 200; continuous emissions monitoring system (CEMS) certification protocol, and CEMS plan. The proposed rulemaking will apply statewide. Small businesses are those that are independently owned, located within New York State (NYS), and that employ 100 or fewer persons. This is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on small businesses or local governments. It applies to any entity that owns or operates a subject source.

##### **COMPLIANCE REQUIREMENTS:**

The revisions to Part 220 do not substantially alter the requirements for the permitting of major stationary sources which are currently in effect in NYS. 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 NO<sub>x</sub> RACT requirements. For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub>, establishes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

##### **PROFESSIONAL SERVICES:**

The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking.

##### **COMPLIANCE COSTS:**

The proposed NO<sub>x</sub> RACT revisions to Part 220 will apply to major facilities only. Major facilities are those that have a potential to emit NO<sub>x</sub> emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). The proposal does not identify specific RACT emission limits for these facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The Department is proposing these revisions to require NO<sub>x</sub> controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the Ozone Transport Commission (OTC) and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled

'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC). The costs associated with establishing a RACT standard include the cost of identifying and evaluating the various control options (performing a RACT analysis), preparing a report, and implementing the selected RACT compliance standard. The determination of the facility specific RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO<sub>x</sub> RACT, currently in the range of \$5,000 to \$5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. The OTC cost estimates are based upon the application of selective non-catalytic reduction technology for portland cement plants, and the application of oxy-fuel firing technology for glass manufacturing facilities. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO<sub>x</sub> control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: \$1,000 - \$2,500 per ton reduced

Glass Manufacturing Plants: \$1,300 - \$2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: \$3,100,000 - \$7,750,000

Glass Manufacturing Plants: \$390,000 - \$780,000

Affected facilities that currently do not utilize CEMS to monitor their NO<sub>x</sub> emissions will experience additional costs associated with the purchase, installation, and operation of a NO<sub>x</sub> CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

##### **MINIMIZING ADVERSE IMPACT:**

The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking. The proposed rulemaking revisions as described above are not expected to create adverse impacts on small businesses or local governments and will not create an unfair disadvantage to small businesses or local governments in NYS.

##### **SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

Small businesses and local governments will be given opportunities to participate in the rule making process. The proposed revisions will undergo publication of general notice in both the "Environmental Notice Bulletin" and "State Register". The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities a chance to comment on the proposed regulation.

##### **ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking.

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

##### **TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:**

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The Department is proposing to revise Part 220 to require updated Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO<sub>x</sub>) for cement kilns at portland cement plants, and to require NO<sub>x</sub> RACT for glass furnaces at glass plants. The Department is also proposing to add two new definitions to Part 200; continuous emissions monitoring system certification protocol, and continuous emissions monitoring system plan. The proposed rulemaking will apply statewide and all rural areas of New York State (NYS) will be affected. Rural areas are defined as rural counties in NYS 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.

##### **COMPLIANCE REQUIREMENTS:**

The revisions to Part 220 do not substantially alter the requirements for the permitting of major stationary sources which are currently in effect in NYS. 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 existing NO<sub>x</sub> RACT requirements. For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub>, establishes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The

RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

#### COSTS:

The proposed NO<sub>x</sub> RACT revisions to Part 220 will apply to major facilities only. Major facilities are those that have a potential to emit NO<sub>x</sub> emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). The proposal does not identify specific RACT emission limits for these facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The Department is proposing these revisions to require NO<sub>x</sub> controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the Ozone Transport Commission (OTC) and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled 'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC). The costs associated with establishing a RACT standard include the cost of identifying and evaluating the various control options (performing a RACT analysis), preparing a report, and implementing the selected RACT compliance standard. The determination of the facility specific RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO<sub>x</sub> RACT, currently in the range of \$5,000 to \$5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. The OTC cost estimates are based upon the application of selective non-catalytic reduction technology for portland cement plants, and the application of oxy-fuel firing technology for glass manufacturing facilities. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO<sub>x</sub> control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: \$1,000 - \$2,500 per ton reduced

Glass Manufacturing Plants: \$1,300 - \$2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: \$3,100,000 - \$7,750,000

Glass Manufacturing Plants: \$390,000 - \$780,000

Affected facilities that currently do not utilize CEMS to monitor their NO<sub>x</sub> emissions will experience additional costs associated with the purchase, installation, and operation of a NO<sub>x</sub> CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

#### MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing rural areas. The proposed revisions are consistent with the NO<sub>x</sub> RACT requirements that have been or will be adopted across all of the OTC states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to businesses in NYS.

#### RURAL AREA PARTICIPATION:

Rural areas will be given opportunities to participate in the rule making process. The proposed revisions will undergo a publication of general notice in both the "Environmental Notice Bulletin" and "State Register". The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities located in rural areas a chance to comment on the proposed regulation.

#### Job Impact Statement

##### NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The proposed rulemaking will apply statewide. Two new definitions will be added to Part 200; continuous emissions monitoring system certification protocol, and continuous emissions monitoring system plan. The current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants. In addition to other requirements, the existing regulation imposes Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO<sub>x</sub>) from portland cement kilns. The existing NO<sub>x</sub> RACT requirements for portland cement kilns have been in place since 1995. The Department is proposing to revise Part 220 to require updated NO<sub>x</sub> RACT for cement kilns at portland cement plants (Subpart 220-1), and to require NO<sub>x</sub> RACT for glass furnaces at glass plants (Subpart 220-2). These RACT requirements are a component of New York's State Implementa-

tion Plan (SIP) for attainment of the 1997 8-hour ozone national ambient air quality standard (NAAQS). On March 12, 2008, the United States Environmental Protection Agency (EPA) promulgated a stricter ozone NAAQS<sup>1</sup>. On March 12, 2009, the Department after analyzing measured ozone data for the years 2006 - 2008 recommended that the New York City, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown metropolitan areas be designated nonattainment for the 2008 ozone NAAQS.

The revisions to Part 220 are among a series of sustained actions undertaken by New York State (NYS), in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and VOCs, so that NYS and other States in the Ozone Transport Region (OTR) may attain the ozone NAAQS. In particular, the revisions to Part 220 will be similar to the NO<sub>x</sub> RACT requirements for cement and glass plants in other states throughout the OTR.

For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis that determines RACT for emissions of NO<sub>x</sub>, establishes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that 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 220 no measurable effect on the categories or numbers of jobs, or employment opportunities in any specific category is anticipated. There will be some new jobs or employment opportunities created for consultants for RACT and permit reviews. There will also be employment opportunities created for monitoring and compliance testing. Finally, there will be employment opportunities created for air pollution control companies to install emission control technologies that may be required for facilities to meet the established NO<sub>x</sub> RACT emission limit(s).

#### 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. Through the proposed revisions, the Department is requiring facilities to re-examine their existing NO<sub>x</sub> RACT requirements by conducting an updated RACT analysis.

#### MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or the promotion of the development of any significant new employment opportunities. The proposed revisions are consistent with the NO<sub>x</sub> RACT requirements that have been or will be adopted across all of the Ozone Transport Commission (OTC) states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to businesses in NYS.

#### 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 or conduct emissions monitoring and/or testing at an affected facility. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

<sup>1</sup> On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm) (the 8-hour ozone NAAQS). See National Ambient Air Quality Rule for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR section 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentrations is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

**To Include the Adoption of VOC Emission Limits and Product Content Limits for Commercial and Industrial Adhesives and Sealants**

**I.D. No.** ENV-51-09-00010-P

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

**Proposed Action:** Amendment of Parts 200 and 228 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0105, 19-0107, 19-0301, 19-0305, 71-2103 and 71-2105

**Subject:** To include the adoption of VOC emission limits and product content limits for commercial and industrial adhesives and sealants.

**Purpose:** More stringent emission and product content limits for adhesives and sealants are necessary to meet the 2008 ozone NAAQS.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., Feb. 10, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

**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 (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** 6 NYCRR Part 228 is being renumbered as Subpart 228-1. Internal references in the existing Part are being revised to reflect this renumbering. 6 NYCRR Part 200.9 is being amended to include documents incorporated by reference in new Subpart 228-2 and to reflect the renumbering of existing Part 228.

The addition of 6 NYCRR Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and its associated references in Part 200, General Provisions, apply to any person who sells, supplies, offers for sale, or manufactures commercial or industrial adhesives, sealants and primers on or after January 1, 2010 for use in the State of New York. Subpart 228-2 does not apply to: any commercial or industrial adhesive, sealant or primer manufactured in New York State for shipment and use outside of New York State, or units of any adhesive, sealant or primer product, less packaging, which weigh less than one pound and consist of less than 16 ounces.

The revisions are based on the Ozone Transport Commission (OTC) 2006 model rule for commercial and industrial adhesives and sealants, which, in turn, is based on the reasonably available control technology (RACT) and best available retrofit control technology (BARCT) determination by the California Air Resources Board (CARB) developed in 1998. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. The proposed revisions have the following requirements:

A. Regulates the application of commercial and industrial adhesives, sealants, adhesive primers and sealant primers by providing options for applicators to either to use a product with a VOC content equal to or less than a specified limit or to use add-on controls;

B. Limits the VOC content of aerosol adhesives to 25 percent by weight;

C. Sets forth work practices for mixing and handling operations for adhesives, thinners and adhesive-related waste materials;

D. Establishes a VOC limit for surface preparation solvents;

E. Establishes an alternative add-on control system requirement of at least 85 percent overall control efficiency (capture and destruction efficiency), by weight;

F. Requires that VOC containing materials must be stored or disposed of in closed containers;

G. Prohibits the sale of any commercial or industrial adhesive, sealant, adhesive primer or sealant primer which exceeds the VOC content limits listed in the rule;

H. Establishes that manufacturers must label containers with the maximum VOC content as supplied, as well as the maximum VOC content on an as-applied basis when used in accordance with the manufacturer's recommendations regarding thinning, reducing, or mixing with any other VOC containing material; and

I. Prohibits the specification of any commercial or industrial adhesive, sealant or primer that violates the provisions of the rule.

Several adhesive and sealant applications and products are exempt from this model rule: tire repair, testing and evaluation associated with research and development, solvent welding operations for medical devices, plaque laminating operations, products or processes subject to other New York State rules, low-VOC products (less than 20 g/l), and adhesives subject to

the New York State rules based on the OTC 2001 consumer products model rule. Additionally, the model rule provides an exemption for adhesive application operations at emissions sources that use less than 55 gallons per calendar year of non-complying adhesives and for emissions sources that emit not more than 200 pounds of VOCs per year from adhesives operations.

Until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes and permissible time periods for the manufacture, sale and distribution of the existing adhesives, sealants, and primers.

**Text of proposed rule and any required statements and analyses may be obtained from:** Ralph Itzo, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 228scp@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

#### **Summary of Regulatory Impact Statement**

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Conservation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground-level ozone pollution: nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs). The Department has listed this proposed regulatory revision for commercial and industrial adhesives, sealants and primers as a measure that would help progress toward attainment. The adoption of the proposed Subpart 228-2 amendment, Commercial and Industrial Adhesives and Sealants, and attendant revisions to Part 200, General Provisions, marks the latest action in a sustained series of actions undertaken by New York State, in concert with EPA and other States, in an effort to control emissions of ozone precursors, NO<sub>x</sub> and VOCs, so that the New York State may attain the ozone NAAQS.

Implementation of the proposed Subpart 228-2 amendment and attendant revisions to Part 200 will, in concert with counterpart programs established by other States and Federal Implementation Plans (FIPs) imposed by EPA, lower levels of ozone in New York State and will decrease adverse public health and welfare effects. In enacting the Title I ozone control requirements of the 1990 CAA amendments, Congress recognized the hazards of ozone pollution and mandated that States, especially those in the Northeast U.S. Ozone Transport Region (OTR), implement stringent regulatory programs in order to meet the ozone NAAQS.

The cost of the proposed regulation will affect any person who sells, manufacturers or buys applicable commercial or industrial adhesives, sealants and primers in New York State. The cost per ton of VOC reduced and cost increase per unit will vary, depending on the specific adhesive category and compliance strategy chosen. It should be noted that a number of products already comply with the OTC model rule for VOC content limits, and would not require reformulation. An EPA analysis of the impacts of implementing the recommended levels of controls in its Control Technology Guidelines (CTG) for Miscellaneous Industrial Adhesives, based on CARB developed cost estimates, assumes that all facilities will choose the low-VOC adhesive materials compliance alternate. With the belief that low-VOC adhesives that can meet the recommended CTG control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC contents, the cost effectiveness is estimated to be relatively low, in a range of \$265 to \$2,320 per ton of VOC emission reduction. EPA also anticipates that work practice recommendations will result in a net cost savings, but these savings could not be accurately estimated.

There are no direct costs to state and local governments associated with this proposed regulation. However, state and local governments, like other consumers, will need to pay the increased prices for consumer products that are manufactured using commercial and industrial adhesives, sealants and primers resulting from compliance with the new, more restrictive VOC content limits. No additional record keeping, reporting, or other requirements will be imposed on local governments under the rulemaking. The authority and responsibility for implementing and administering the proposed Subpart 228-2 resides solely with the Department. Requirements

for record keeping, reporting, etc. are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale industrial and commercial adhesives, sealants and primers. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

The OTC workgroup assigned to the adhesives and sealants area source rule development evaluated four alternatives in its model rule. These are:

1. No action taken.
2. VOC content limits by product category.
3. Add-on air pollution control equipment.
4. Work practices to reduce VOC emissions.

Alternatives 2, 3 and 4 are proposed in this rulemaking because these alternatives will allow industrial and commercial users of the regulated adhesives and sealants greater flexibility in reducing VOC emissions. Facilities presently operating control equipment in their operations can continue to use this alternate for compliance with the proposed rules. At the same time, to achieve compliance, affected facilities can also pursue the use of reduced VOC or low-VOC adhesives and sealants, add-on control equipment, as well as adoption of prescribed work practices. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. Facilities using less than 55 gallons of noncompliant commercial or industrial adhesives, sealants, primers and cleanup solvents in a 12-month period are exempt from the product VOC content requirements of the proposed rule.

The compliance schedule for this rulemaking specifies that on and after January 1, 2010, no person shall sell, supply or offer for sale any commercial or industrial adhesive, sealant, adhesive primer or sealant primer manufactured on or after January 1, 2010, or, on or after January 1, 2010, manufacture for sale in the State of New York any commercial or industrial adhesive, sealant, adhesive primer or sealant primer unless such adhesive, sealant, adhesive primer or sealant primer complies with the applicable VOC content limits specified in the rule.

To assure the continuation of the achievement of quality construction in the State of New York until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes and permissible time periods for the manufacture, sale and distribution of the existing adhesives, sealants, and primers.

#### **Regulatory Flexibility Analysis**

1. Effects on Small Businesses and Local Governments. No small businesses or local governments will be directly affected by the proposed amendment to 6 NYCRR Part 228, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to 6 NYCRR Part 200, General Provisions. Small businesses that manufacture affected products must comply with the VOC content limits, labeling and reporting requirements of Subpart 228-2. Since this can represent a small portion of their total business and the burden of reformulation falls on the major manufacturers, the impact on small businesses will be minimal, if any. For any cases where changes are made to products through reformulation, there is the possibility that these same small businesses would be able to provide the required alternative products. After January 1, 2010, small businesses that sell commercial or industrial adhesives, sealants and primers shall only offer for sale, complying products made after January 1, 2010. Small businesses and local governments that purchase affected products will be affected by the increased prices of affected commercial and industrial adhesives, sealants and primers resulting from the Subpart 228-2 amendment.

2. Compliance Requirements. Local governments will not be directly affected by the revisions to 6 NYCRR Part 228. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source. Small businesses directly affected by Subpart 228-2 will need to comply with the provisions of the program, as described below. Small businesses that manufacture commercial or industrial adhesives, sealants and primers generally only manufacture one or a small number of affected products.

Small businesses that manufacture affected products will need to comply with the VOC content limits and regulatory standards of Subpart 228-2. The proposed amendment regulates commercial and industrial adhesives, sealants and primers primarily by imposing reduced VOC content limits. The affected manufacturers, including small businesses, must document that their commercial and industrial adhesive, sealant and primer products comply with the VOC content limits contained in the Subpart 228-2 amendment. This is done through the equations and test methods referenced in the amendment.

Small businesses that manufacture commercial or industrial adhesives, sealants and primers products must comply with the labeling requirements

of Subpart 228-2. This entails displaying the maximum VOC content (as supplied and as applied when used in accordance to the manufacturer's recommendations) on the label, lid or bottom of the container.

Small businesses that use commercial or industrial adhesives, sealants and primers must comply with certain reporting requirements contained in Subpart 228-2. Affected users must maintain a list of each adhesive, sealant, adhesive primer, sealant primer, cleanup solvent and surface preparation solvent in use and in storage, and also record the monthly volume of each adhesive, sealant, adhesive primer, sealant primer, cleanup or surface preparation solvent used.

3. Professional Services. It is not anticipated that small businesses that manufacture or use commercial or industrial adhesives, sealants and primers will need to contract out for professional services to comply with this regulation.

4. Compliance Costs. The California Air Resources Board (CARB) determined that most manufacturers and users of commercial or industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. The available compliance alternatives in the proposed rule are: VOC content limits by product group; add-on control equipment; and work practice procedures. CARB developed cost estimates with the assumption that all facilities will choose the low-VOC adhesive materials alternate. The vast majority of facilities may use low-VOC adhesives that can meet the recommended control levels. These low-VOC adhesives are believed to be already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content. The cost effectiveness of the amended Part 228-2 rule is estimated to be in a range of \$265 to \$2,320 per ton of VOC emission reduction.

There is a limited possibility that some facilities may need to install add-on controls, which is a more costly alternative. Add-on devices include, for example, oxidizers, adsorbers, and concentrators. For some industrial manufacturing applications, low-VOC adhesives do not meet performance requirements, and add-on controls must be employed. Facilities may elect to comply with the proposed rule's requirements by using add-on control equipment. It is expected that most users will not select this option due to the availability of compliant adhesives, especially those that will meet the rule's standards, and due to the high cost of installing and operating the control equipment. At a cost-effectiveness of \$9,000 to \$110,000 per ton of VOC reduced, the use of add-on control equipment to comply with the requirements of the proposed rule may be a cost-effective option for only a few facilities.

A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment, business creation, elimination or expansion, and business competitiveness are not expected.

The Department of Environmental Conservation (Department) undertook no special cost analysis for small business and local government because the costs associated with Subpart 228-2 are not expected to vary for them. Small businesses and local governments will need to pay the increased prices for affected commercial and industrial adhesives, sealants and primers resulting from compliance with the new, more restrictive VOC content limits.

5. Minimizing Adverse Impact. The promulgation of Subpart 228-2 does not particularly affect small business or local government. The regulation has statewide applicability. Therefore, small businesses and local governments are not particularly impacted, adversely or otherwise, by this regulation.

To further mitigate adverse impacts, Ozone Transport Commission (OTC) implementation options were included in Subpart 228-2 to minimize the impact of this regulation on the regulated parties, including manufacturers that are small businesses. In addition, the proposed implementation date allows additional time for manufacturers to reformulate their products to comply with the new VOC content limits. This will be especially helpful to small manufacturers who have limited research and development budgets.

6. Small Business and Local Government Participation. The OTC workgroup that developed the OTC model rule, which the Subpart 228-2 amendment is based, held informal regulatory development meetings with stakeholders and other interested parties, such as the National Adhesive and Sealant Council, the National Paint and Coatings Association, and the EPDM Roofing Association. These associations and its member companies provided the OTC workgroup comments during the development of both the OTC model rules and the individual regulations of participating OTC states. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comment on the draft model rules. Since this regulation does not particularly

affect small businesses and local governments, no special outreach efforts were made. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

7. Economic and Technological Feasibility. As mentioned above, the Department undertook no independent cost analysis. The Department utilized the work performed by EPA in its 'Control Techniques Guidelines for Miscellaneous Industrial Adhesives,' dated September 2008, to identify and incorporate the most cost-effective control technologies and work processes. In the document, EPA concluded that most manufacturers or marketers of commercial and industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. The estimated overall cost-effectiveness of the proposed amendment to Part 228 is relatively low, in a range from \$265 to \$2320/ton of VOC reduced. Nevertheless, not all the potential costs can be captured in any analysis, as economic analyses are inherently imprecise. Also adding to the uncertainty is the potential for pollution control innovations that can occur over time. It is impossible to estimate how much of an impact, if any, emerging technologies may have in lowering compliance costs. There also is the uncertainty regarding future costs that exists due to the flexibility that is allowed under the proposed regulation.

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

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Conservation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground-level ozone pollution: nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs). The Department has listed this regulatory amendment, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to Part 200, General Provisions, as a measure that would help progress toward attainment in SIPs already submitted to EPA for the New York-New Jersey-Long Island, NY-NJ-CT and Poughkeepsie nonattainment areas. This rule revision will also be included in the SIPs for the Jamestown and Buffalo-Niagara Falls nonattainment areas. Additionally, these more stringent requirements for production and use of commercial and industrial adhesives, sealants and primers will provide a necessary component of realizing the recently announced 2008 NAAQS for ozone, which will require that ambient concentrations throughout the state meet a 0.075 ppm standard.

This VOC control strategy is an outgrowth of the Ozone Transport Commission's (OTC) ongoing efforts to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six source sectors, including industrial adhesives, sealants and primers. OTC member states agreed to pursue state rulemakings or other implementation methods to achieve emission reductions consistent with the guidelines. The Department is proposing to develop regulations to require VOC emission reductions consistent with the OTC guidelines for commercial and industrial adhesives, sealants and primers. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. Facilities using less than 55 gallons of noncompliant commercial or industrial adhesives, sealants, primers and cleanup solvents in a 12-month period are exempt from the product VOC content requirements of the proposed rule.

Promulgation of the proposed new Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, is intended to reduce VOC emissions from commercial and industrial adhesives, sealants and primers to address the above emission shortfalls and make progress towards reducing 8-hour ozone levels.

1. Types and estimated number of rural areas: The criteria and procedures in the proposed Subpart 228-2 apply statewide. Rural areas are not particularly affected.

2. Reporting, recordkeeping and other compliance requirements: The criteria and procedures in Subpart 228-2 apply statewide. Reporting requirements are applicable to the company, firm or establishment which is listed on the product's label. If the label lists two or more companies, firms, or establishments, the "Responsible Party" is the party which the product was "manufactured for" or "distributed by," as noted on the label. For recordkeeping, as well as labeling, the responsibility will reside with the manufacturers of commercial and industrial adhesives, sealants and

primers. Other compliance requirements exist as well that are applicable to any person who sells, supplies, offers for sale, or manufactures these products. One such applicable requirement will be for compliance with the VOC content limits for each of the commercial and industrial adhesives, sealants and primers specified in the proposed Subpart 228-2. Although these products are used in rural areas, rural areas are not particularly affected. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: The California Air Resources Board (CARB) determined that most manufacturers and users of industrial adhesives, sealants and primers will be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. EPA adopted and incorporated the CARB developed cost analysis in its 'Control Techniques Guidelines for Miscellaneous Industrial Adhesives' (CTG), September, 2008. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. The available compliance alternatives in the proposed rule are: VOC content limits by product group; add-on control equipment; and work practice procedures. CARB developed cost estimates with the assumption that all facilities will choose the low-VOC adhesive materials alternate. With the belief that low-VOC adhesives that can meet the recommended control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content, the cost effectiveness is estimated to be relatively low, in a range of \$265 to \$2320 per ton of VOC emission reduction.

A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment, business creation, elimination or expansion, and business competitiveness are not expected.

The Department undertook no special cost analysis for rural areas as the costs associated with the proposed Subpart 228-2 are not expected to vary for rural areas. However, small businesses and local governments will need to pay the increased prices for consumer products resulting from compliance with the new, more restrictive VOC content limits. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

4. Minimizing adverse impact: The proposed Subpart 228-2 does not particularly affect rural areas. The regulation has statewide applicability. Therefore, rural areas are not particularly impacted, adversely or otherwise, by this regulation.

5. Rural area participation: The OTC workgroup that developed the OTC model rule (from which the proposed Subpart 228-2 is based) held informal regulatory development meetings with stakeholders and other interested parties, such as the National Adhesive and Sealant Council, the National Paint and Coatings Association, and the EPDM Roofing Association. These associations and its member companies provided the OTC workgroup with comments during the development of both the OTC model rules and the individual regulations of participating OTC states. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comments on the draft model rules. Since this regulation does not particularly affect rural areas, no special rural area outreach efforts were made.

#### **Job Impact Statement**

1. Nature of impact:

The New York State Department of Environmental Conservation (Department) proposes to amend 6 NYCRR Part 228 with a new Subpart 228-2, Commercial and Industrial Adhesives and Sealants, and attendant revisions to 6 NYCRR Part 200, General Provisions. This proposal will not have an adverse impact on job and employment opportunities. The Department expects there to be slightly higher costs associated with the manufacture and/or marketing and the purchase of commercial/industrial adhesives, sealants and primers. Since the proposed Subpart 228-2 reflects the California Air Resources Board (CARB) and the Ozone Transport Commission (OTC) adhesives and sealants products emissions program in most respects, the Department utilized cost information that supported the CARB program. CARB evaluated and quantified the economic impact on affected businesses through the use of three compliance alternatives from their commercial and industrial adhesives and sealants program. A comprehensive analysis was performed by OTC, based on the CARB adhesives and sealants program relating to the proposed Subpart 228-2.

CARB determined that most manufacturers and users of commercial and industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. CARB developed cost estimates, with the assumption that all facilities will choose the low-VOC adhesive materials alternate. With the belief that low-VOC adhesives that can meet the recommended control levels are already avail-

able at a cost that is not significantly greater than the cost of adhesives with higher VOC content, the cost effectiveness is estimated to be in a range of \$265 to \$2,320 per ton of VOC emission reduction.

EPA, in its "Control Techniques Guidelines for Miscellaneous Industrial Adhesives" (CTG), September 2008, adopted and incorporated the CARB developed cost estimates. A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment; business creation, elimination or expansion; and business competitiveness are not expected.

2. Categories and numbers affected: Because of the lack of significant impact on BOE and the small increase in the prices of commercial and industrial adhesives, sealants and primers, the Department does not expect this regulation to have any effect on employment.

3. Regions of adverse impact: There is no adverse employment opportunity impact attributable to this rulemaking.

4. Minimizing adverse impact: Although the Department does not expect this regulation to have any effect on employment, flexibility provisions have been included in the regulation to facilitate compliance. These flexibility provisions, including: VOC content limits by product category; allowing the use of add-on air pollution control equipment for those facilities needing the operational flexibility to use high-efficiency add-on controls instead of low-VOC content adhesives (especially when the use of high VOC adhesives is necessary or desirable for product efficacy); and work practices to reduce VOC emissions, are expected to lower compliance costs and, therefore, mitigate any adverse impacts on employment.

To assure the continuation of the achievement of quality construction in the State of New York until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes; and permissible time periods for the manufacture, sale and distribution of the existing adhesives, sealants, and primers.

5. Self-employment opportunities: Not Applicable.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Stationary Combustion Installations

I.D. No. ENV-51-09-00011-P

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

**Proposed Action:** Amendment of Parts 200 and 201 and Subpart 227-2 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305 and 19-0311

**Subject:** Stationary Combustion Installations.

**Purpose:** Reduce emission limits for all boilers & combustion turbines, redefine the mid-size boiler size, & allow a replacement option.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., Feb. 10, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

**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 (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The proposed Part 200 amendments will add the definitions for the terms boiler, combined cycle combustion turbine, combustion turbine, continuous emissions monitoring system (CEMS) certification protocol, continuous emissions monitoring system plan, emergency power generating stationary internal combustion engine, simple cycle combustion turbine, and very large boiler. These definitions are being included under Part 200 for consistency due to their use in multiple regulations. The proposed revisions will also add a reference in section 200.9, Table 1 under clause 227-2.6(b)(3)(i)'(b)' and streamline the existing reference under subparagraph 227-2.6(b)(3)(v).

The proposed Subpart 201-3 revisions will change the exemptions for

"stationary or portable combustion installations" and "emergency power generating stationary internal combustion engines." In order to qualify for the exemption for stationary or portable combustion installations, the maximum rated heat input capacity limitation for such sources is being reduced from less than 20 mmBtu/hr to less than 10 mmBtu/hr. The provision exempting emergency power generating stationary internal combustion engines is being revised to reflect the change in the citation for the definition of "emergency power generating stationary internal combustion engine."

The following change to Subpart 201-3 is unrelated to the Subpart 227-2 revisions. The reference to Subpart 231-2 in the text of paragraph 201-3.1(c)(2) will be replaced by a reference to Part 231 generally. This revision is meant to align the text of paragraph 201-3.1(c)(2) with the revisions to Part 231 that became effective in early 2009.

The proposed Subpart 227-2 revisions will include the removal of several definitions (to be relocated in Part 200, as stated above) and revision of other definitions, a change in the application and permitting requirements, a change in emission limits for most boiler categories and combined cycle combustion turbines, and revisions to the compliance options.

Section 227-2.2 will be revised to remove the definitions of boiler, combined cycle combustion turbine, combustion turbine, continuous emissions monitoring system (CEMS) certification protocol, emergency power generating stationary internal combustion engine, preliminary continuous emissions monitoring system plan, simple cycle combustion turbine, and very large boiler. These definitions will be moved to Part 200 (preliminary continuous emissions monitoring system plan will be changed to continuous emissions monitoring system plan), as stated above. Also, the revisions will modify the terms mid-size boiler and small boiler. A mid-size boiler will now be defined as "a boiler with a maximum heat input capacity greater than 25 million Btu per hour and equal to or less than 100 million Btu per hour. A small boiler will now be defined as "a boiler with a maximum heat input capacity equal to or greater than one million Btu per hour and equal to or less than 25 million Btu per hour."

Section 227-2.3 will be revised to specifically require that subject facilities must submit an application for a Title V permit or permit modification (depending on the current facility status). The requirement to submit a compliance plan will be removed.

Section 227-2.4 will be revised to change the presumptive RACT emission limits for very large, large, mid-size boilers, and combined cycle combustion turbines. Also, the revisions will remove the 500-hour non-ozone season presumptive emission limit exemption for simple cycle combustion turbines. These turbines will now be required to meet the existing presumptive emission limits on an annual basis.

Section 227-2.5 will be revised to include a shutdown option for any subject emission source. The intent to shut down an emission source must be recorded as part of a permit modification prior to October 1, 2010, wherein the owner or operator commits to permanently shut down the emission source prior to December 31, 2012.

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert Stanton, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 227tract@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

### Summary of Regulatory Impact Statement

#### INTRODUCTION

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 200 and 6 NYCRR Subparts 201-3 and 227-2. 6 NYCRR Part 200, General provisions is being revised to include definitions that were previously only found in 6 NYCRR Subpart 227-2 but are now used in multiple Department regulations. Part 200 is also being revised to include all new citations of federal regulations. The revisions to 6 NYCRR Subpart 201-3, Exempt & Trivial Activities are being made to the emergency power generating stationary internal combustion engines exemption to cite the new location of the definition in Part 200. Also the exemption for stationary or portable combustion installations will be revised by lowering the applicability threshold to 10 million Btu per hour heat input. 6 NYCRR Subpart 227-2, Reasonably Available Control Technology (RACT) for Oxides of Nitrogen imposes RACT limits for emissions of NO<sub>x</sub> from seven categories of stationary combustion installations. These RACT limits are a component of the State Implementation Plan (SIP) for New York State directed at attainment of the 1997 ozone national ambient air quality standard (NAAQS) and are expected to be part of the SIP that will be submitted with respect

to the 2008 ozone NAAQS.<sup>1</sup> In terms of pollution reductions, the revisions to Subpart 227-2 essentially entail the lowering of size thresholds for two categories of sources (to encompass greater numbers of emission sources in each category, however, this does not increase the overall number of emission sources regulated under this Subpart) and increasing the stringency of emissions limits for six of the source categories. The Department is also proposing two revisions that will allow subject sources increased flexibility in achieving compliance. All of the proposed revisions reflect the Department's latest determination of what constitutes RACT for the subject sources. This is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

#### STATUTORY AUTHORITY

Federal Clean Air Act (CAA) Requirements Concerning Reasonably Available Control Technology (RACT) for NO<sub>x</sub> Emissions for Purposes of the 1997 Ozone NAAQS

New York State is included in the Northeast Ozone Transport Region (OTR) established under CAA Section 184(a), and is a member of the Ozone Transport Commission (OTC) formed pursuant to CAA Sections 184(a) and 176A(b)(1). Under CAA Section 182(f), States must apply the same requirements to major stationary sources of NO<sub>x</sub> as are applied to major stationary sources of volatile organic compounds (VOCs) in ozone NAAQS nonattainment areas.<sup>2</sup> Among these requirements is the imposition of NO<sub>x</sub> RACT statewide in the OTR under CAA Sections 182(b)(2)(C).

The New York State Legislature has accorded the New York State Department of Environmental Conservation (Department) the primary authority to formulate and implement the SIP. The provisions of State law treated below, taken together, clearly empower the Department to promulgate and implement the proposed rule provisions as SIP revisions.

Environmental Conservation Law (ECL) section 1-0101 declares it to be the policy of New York State to conserve, improve and protect its natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of New York State and their overall economic and social well being.

ECL section 19-0103 declares that it is the policy of New York State to maintain a reasonable degree of purity of air resources, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the State, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

ECL section 19-0105 declares that it is the purpose of Article 19 of the ECL to safeguard the air resources of New York State under a program which is consistent with the policy expressed in Section 19-0103 and in accordance with other provisions of Article 19.

ECL section 19-0301 declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution and shall include in such regulations provisions prescribing the degree of air pollution that may be emitted to the air by any source in any area of the State.

ECL section 19-0303 provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution and air contamination sources.

ECL section 19-0305 authorizes the Department to enforce the codes, rules and regulations established in accordance with Article 19.

ECL section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA.

#### LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above-referenced statutory authority are essentially directed toward protecting public health and the environment. By promulgating and implementing the proposed revisions to Subpart 227-2, the Department will be amending a regulation to impose more stringent emission limits on major stationary sources of NO<sub>x</sub> that contribute to local and regional nonattainment of the 1997 and 2008 ozone NAAQS.

#### NEEDS AND BENEFITS

##### Ozone – Causes and Effects:

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NO<sub>x</sub> on hot sunny summer days, can harm humans and plants. The primary ozone NAAQS was established by EPA at a level that is requisite to protect the public health. In the northeastern United States, the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the NAAQS by mid-afternoon on a summer day. The contiguous metropolitan areas of Washington, D.C., Baltimore, Philadelphia, New York, and Hartford are designated ozone nonattainment areas.

In July 2006, EPA recognized a number of epidemiological and controlled human exposure studies that suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctors visits, emergency department visits, and hospital admissions; provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality; and report health effects at ozone concentrations lower than the level of the current standards, as low as 0.04 parts per million (ppm) for some highly sensitive individuals. 'See' 'Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Nonattainment Area Designations and Classifications for the 1997 and 2008 ozone NAAQS

EPA promulgated nonattainment area designations for the 1997 ozone NAAQS during April 2004. 'See Air Quality Designations and Classifications for the 8-Hour Ozone NAAQS', 69 Fed. Reg. 23,858 (April 30, 2004) (codified at 40 CFR Sections 81.300-356) (the Designations Rule). EPA designated various areas in New York State as nonattainment and classified the areas under either Subpart 1 or Subpart 2 of Part D of Title 1 of the CAA (Part D of Title 1 sets forth the programmatic SIP requirements applicable to nonattainment areas).

Under the Designations Rule, the following areas in New York State were designated as nonattainment:

1. Jefferson County
2. Poughkeepsie (encompassing Dutchess, Putnam, and Orange counties)
3. New York City metropolitan area (encompassing Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester counties)
4. Albany-Schenectady-Troy (encompassing Albany, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, and Schoharie counties)
5. Essex County (the portion of Whiteface Mountain above 1,900 feet in elevation)
6. Jamestown (Chautauqua County)
7. Rochester (encompassing Genesee, Livingston, Monroe, Ontario, Orleans, and Wayne counties)

On March 12, 2009, the Department recommended the following areas be designated nonattainment with the 2008 ozone NAAQS of 0.075 parts per million:

New York City Metropolitan Area – Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk and Westchester counties;

Poughkeepsie-Newburgh-Kingston Metropolitan Area – Dutchess, Orange, Putnam and Ulster counties;

Albany-Schenectady-Troy-Glens Falls Metropolitan Areas – Albany, Columbia, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington counties;

Rochester Metropolitan Area – Genesee, Livingston, Ontario, Orleans, Monroe and Wayne counties;

Buffalo-Niagara Falls Metropolitan Area – Erie and Niagara counties; and,

Jamestown Metropolitan Area – Chautauqua County.

As can be seen by the above listing, ozone nonattainment is a pervasive problem that exists in areas throughout the State.

##### Measures Taken to Reduce Ozone:

The Department has promulgated several NO<sub>x</sub> RACT regulations that apply to various other source categories throughout New York State. These categories include cement kilns (6 NYCRR Part 220), iron and steel process sources (6 NYCRR Part 216), coke oven batteries (6 NYCRR Part 214), and general process NO<sub>x</sub> sources (6 NYCRR Part 214). All of these regulations will assist in bringing all areas in the State into attainment with the NAAQS for ozone. The compilation of these control programs constitutes the NO<sub>x</sub> portion of the ozone NAAQS nonattainment SIP for New York State.

Through the present rule making, the Department is proposing to require stricter NO<sub>x</sub> emissions limits on 766 boilers and 55 combined cycle combustion turbines of various sizes that will reduce their potential NO<sub>x</sub> emissions from the current level of 225,708 tons per year down to 109,619 tons per year (based on an average 50 percent reduction). The Department projects that the actual reductions of NO<sub>x</sub> will be considerably less. Based on the 2007 NO emissions data from these sources, the boilers and turbines that will be affected by this rule making emitted approximately 58,000 tons. Based on operating and compliance assumptions made by the Department, it is expected that the proposed NO<sub>x</sub> RACT limitations will result in an emission reduction of 28,796 tons per year of NO<sub>x</sub> or a daily reduction of 78.9 tons from 2007 levels.

##### COSTS

##### Costs to Regulated Parties and Consumers:

The cost to install RACT will vary depending on the size and fuel type of the boilers that are affected by this proposed regulation and the type of

control technology used. The following table lists the average RACT costs in dollars per ton of NO<sub>x</sub> reduced for very large, large, and mid-size boilers:

	Gas	Gas/Oil	Distillate	Residual	Solid Fuel
Very Large	5,455	4,824	Not Applicable	Not Applicable	2,741
Large	5,463	5,500	Not Applicable	Not Applicable	4,415
Mid-size	2,617	Not Applicable	3,132	3,200	Not Applicable

The Department proposes to require owners and/or operators of all affected small boilers to conduct an annual tune-up. The average annual tune-up cost will be approximately \$3,500 per ton of NO<sub>x</sub> reduced. Finally, the Department proposes to require owners and/or operators of combined cycle combustion turbines to conduct a case-by-case RACT analysis. The control technologies that are now available are far more advanced than the control technologies that were considered when the Department established the presumptive RACT emissions limits in the current version of Subpart 227-2 for combined cycle combustion turbines. Currently, there are several retrofit control technologies commercially available for these turbines. This list includes selective catalytic reduction, selective non-catalytic reduction, increased water or steam injection, dry low NO<sub>x</sub> technology, and other possible combustion canister modifications. Given the various ages, sizes, and types of combustion turbines that will be affected, it was not possible to determine a cost for retrofitting based on a single prescribed RACT limit. Therefore, the Department has determined that it would be better to have each individual facility conduct a case-by-case RACT analysis (this is a top down analysis that would require a facility to list then price each control technology that is technically available). The facility will apply the most stringent retrofit controls, based on the results of this analysis, which are economically feasible (on a dollars per ton of NO<sub>x</sub> removed basis) for that particular combustion turbine.

#### Costs to State and Local Governments:

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Some State and local entities will be affected by this proposed regulation. The Department estimates that the cost for municipally owned facilities to install NO<sub>x</sub> RACT is approximately \$3,774 per ton of NO<sub>x</sub> reduced. The total tons of NO<sub>x</sub> reduced from the 26 municipally owned facilities are projected to be 1,770 tons annually. The NO<sub>x</sub> tonnage to be reduced was calculated by multiplying the percent reductions for each control technology by the current potential to emit (these potential emissions are based on currently permitted NO<sub>x</sub> emission rates for the 26 facilities). Therefore, the total estimated cost of this rule revision to the subject municipal facilities will be approximately \$6,679,000. The cost estimate for NO<sub>x</sub> reductions from the combined cycle turbine at the Jamestown owned facility must be calculated on a case-by-case basis, so no cost estimate has been included in this analysis.

#### Costs to the Regulating Agency:

The authority and responsibility for implementing Subpart 227-2 lies solely with the Department. The proposed rule revisions have been developed to minimize the administrative cost burden to the Department. Each subject facility is required to have a Title V facility permit under 6 NYCRR Subpart 201-6. Permit revisions will be necessary to account for the changes to Subpart 227-2 and the revised permit conditions will be incorporated into each relevant permit by Department staff.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. No additional requirements beyond compliance with the proposed regulation will be put on local governments.

#### PAPERWORK

The proposed revisions to Subpart 227-2 will create little additional paperwork for affected facilities. Depending on the type of affected source there may be application submission requirements, minimal additional recordkeeping and reporting, and the requirement to submit testing protocols and test results.

#### DUPLICATION

The proposed revisions to Subpart 227-2 do not duplicate, overlap, or conflict with any other State or federal requirements.

#### ALTERNATIVES

The following alternative has been evaluated to address the goals set forth above:

Take no action: The "take no action" alternative is not acceptable because failure to adopt this regulation will seriously impede New York State's ability to attain the ozone NAAQS. The proposed revisions to Subpart 227-2, in combination with the implementation of other regula-

tions (concerning NO<sub>x</sub> RACT limits for cement kilns, glass manufacturing facilities, and asphalt plants), will help New York State achieve compliance with the 1997 ozone NAAQS. On February 8, 2008, the Department submitted an attainment demonstration to EPA that documents how the State will attain the 1997 ozone NAAQS. While the Department expects the Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown nonattainment areas to come into attainment by 2009, the Department believes that it will take until 2012 for the New York City metro and Poughkeepsie-Newburgh-Kingston nonattainment areas to achieve attainment.

#### FEDERAL STANDARDS

The proposed rule does not exceed any minimum federal standards.

#### COMPLIANCE SCHEDULE

The Department proposes to promulgate the revisions to Subpart 227-2 by December 2009. Any facility that contains a source that becomes newly subject to the regulation will be required to complete and submit an application for a permit or permit modification by no later than January 1, 2011. Any facility that is subject to new or revised control requirements under section 227-2.4 must be in compliance with the relevant requirements by July 1, 2012.

<sup>1</sup> On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm) (the 1997 ozone NAAQS). 'See National Ambient Air Quality Rule for Ozone', 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR section 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm.

On March 27, 2008, EPA promulgated revised ozone NAAQS and set the new primary and secondary standards at 0.075 ppm (the 2008 ozone NAAQS). 'See National Ambient Air Quality Standards for Ozone', 73 Fed. Reg. 16436 (March 27, 2008) (codified at 40 CFR section 50.15). Attainment of the 2008 ozone NAAQS is determined in the same manner as with the 1997 ozone NAAQS.

<sup>2</sup> Within the OTR, any source that emits or has the potential to emit at least 50 tons per year of VOCs is considered a "major stationary source" and is subject to the requirements that are applicable to major stationary sources in moderate nonattainment areas under CAA section 184(b)(2). However, under CAA section 302, and section 182(c), (d), and (e), the emission thresholds for major stationary sources of NO<sub>x</sub> in the OTC vary from 100 to 10 tons per year depending on the area's designation and classification. For portions of the OTR that are designated as attainment or unclassified, or classified as moderate nonattainment, a major stationary source of NO<sub>x</sub> is one that emits more than 100 tons of NO<sub>x</sub> per year; in portions of the OTC classified a serious nonattainment the emissions threshold is 50 tons of NO<sub>x</sub> per year.

#### Regulatory Flexibility Analysis

##### EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 200 and 6 NYCRR Subparts 201-3 and 227-2. The proposed rulemaking will apply statewide. Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons. The proposed revisions to the RACT requirements of Subpart 227-2 flow from the State's obligations under the federal Clean Air Act. Therefore, the proposed revisions do not constitute a mandate on local governments. RACT requirements apply equally to every entity that owns or operates a subject source.

##### COMPLIANCE REQUIREMENTS:

The revisions to Part 200 and Subparts 201-3 and 227-2 do not substantially alter the current requirements for the permitting of major stationary sources in New York State. 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 that are currently required to comply with NO<sub>x</sub> RACT requirements. In terms of pollution reductions, the revisions to Subpart 227-2 essentially entail the lowering of size thresholds for two categories of sources (to encompass greater numbers of emission sources in each category; however, this does not increase the overall number of emission sources regulated under this Subpart) and increasing the stringency of emissions limits for six of the source categories. The Department is also proposing two revisions that will allow subject sources increased flexibility in achieving compliance.

The existing compliance options which include fuel switching, system wide averaging (this compliance option will be expanded to allow multiple owners to combined their facilities under a system wide average), and the allowance of an alternative emissions limit will also remain. The proposed regulation will include a "shut down" compliance option. This option

will allow a facility to permit the shut down of any combustion source regulated by this Subpart (by a specific date). The proposed revisions will change the definitions of small boiler and mid-size boiler by expanding the size thresholds downward for both size categories of boilers (for small boilers the definition will be changed from a heat input range of greater than or equal to 20 mmBtu/hr to less than 50 mmBtu/hr to a heat input range of greater than or equal to one mmBtu/hr to less than 25 mmBtu/hr, and for mid-size boilers the definition will be changed from a heat input range of greater than or equal to 50 to less than 100 mmBtu/hr to a heat input range of greater than or equal to 25 to less than 100 mmBtu/hr). The proposed regulations will also lower the prescribed emission limits for mid-size boilers, large boilers, very large boilers, and require a case-by-case RACT analysis for combined cycle combustion turbines. The proposed revisions will also eliminate the emission limit exemption for simple cycle combustion turbines that operate for less than 500 hours per year during the non-ozone season. These turbines will be required to meet their prescribed emission limits all year long. All of the proposed revisions reflect the Department's latest determination of what constitutes RACT for the subject sources. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

**PROFESSIONAL SERVICES:**

The professional services for any small business or local government that is subject to Subpart 227-2 are not anticipated to significantly change from the type of services which are currently required to comply with the existing NO<sub>x</sub> RACT requirements. The need for consulting engineers to address NO<sub>x</sub> RACT applicability and permitting requirements and to perform compliance testing for any affected sources proposed by a small business or local government will continue to exist.

**COMPLIANCE COSTS:**

The cost to install RACT will vary depending on the size and fuel type of the boilers that are affected by this proposed regulation and the type of control technology used. The following table lists the average RACT costs in dollars per ton of NO<sub>x</sub> reduced for very large, large, and mid-size boilers:

	Gas	Gas/Oil	Distillate	Residual	Solid Fuel
Very Large	5,455	4,824	Not Applicable	Not Applicable	2,741
Large	5,463	5,500	Not Applicable	Not Applicable	4,415
Mid-size	2,617	Not Applicable	3,132	3,200	Not Applicable

The Department proposes to require owners and/or operators of all affected small boilers to conduct an annual tune-up. The average annual tune-up cost will be approximately \$3,500 per ton of NO<sub>x</sub> reduced. Finally, the Department proposes to require owners and/or operators of combined cycle combustion turbines to conduct a case-by-case RACT analysis. The control technologies that are now available are far more advanced than the control technologies that were considered when the Department established the presumptive RACT emissions limits in the current version of Subpart 227-2 for combined cycle combustion turbines. Currently, there are several retrofit control technologies commercially available for these turbines. This list includes selective catalytic reduction, selective non-catalytic reduction, increased water or steam injection, dry low NO<sub>x</sub> technology, and other possible combustion canister modifications. Given the various ages, sizes, and types of combustion turbines that will be affected, it was not possible to determine a cost for retrofitting based on a single prescribed RACT limit. Therefore, the Department has determined that it would be better to have each individual facility conduct a case-by-case RACT analysis (this is a top down analysis that would require a facility to list then price each control technology that is technically available). The facility will apply the most stringent retrofit controls, based on the results of this analysis, which are economically feasible (on a dollars per ton of NO<sub>x</sub> removed basis) for that particular combustion turbine.

**MINIMIZING ADVERSE IMPACT:**

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing small businesses or local governments. The new emission limits proposed in this regulation will also be adopted across all of the Ozone Transport Commission (OTC) states, and are required by all major sources of NO<sub>x</sub> in nonattainment areas and the Ozone Transport Region under the federal Clean Air Act. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to small businesses or local governments in New York State.

**SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

The Department held a stakeholder meeting on May 31, 2008 for facili-

ties subject to Subpart 227-2 and environmental groups. The Department gave a presentation that outlined the proposed changes and accepted comments from the stakeholders that attended the presentation (the attendees included small business owners and local governments). Based on the comments received the department made some changes to the proposed revisions to Subpart 227-2. The most significant change was to raise the proposed very large coal fired boiler limit from 0.08 pounds per million Btu (lb/mmBtu) for all firing configurations, to 0.12 lb/mmBtu for wall and tangentially fired coal boilers, and to 0.20 lb/mmBtu for cyclone fired coal boilers.

On March 9, 2009 the Department met with the Department of Public Service (DPS) to discuss the proposed changes to Subpart 227-2. DPS had two concerns, first the affect of the rule on reliability. Their second concern focused on the rules affected on local government owned utilities. The Department accepted comments from DPS and made changes to the proposed regulations based on these comments.

The Department hosted a Business Council of New York meeting on June 29, 2009. The list of attendees included both subject small business owners and local governments. During this meeting Department staff outlined the progress of the Subpart 227-2 rulemaking and answered questions of the attendees. There were no substantial comments or questions regarding the proposed revisions to Subpart 227-2 raised during this question and answer session.

Finally, small businesses and local governments will be given additional opportunities to participate in the rule making process. The proposed revisions will undergo publication of general notice in both the "Environmental Notice Bulletin" and "State Register". The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities owned by small businesses and local governments a chance to comment on the proposed regulation.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Some State and local entities will be affected by this proposed regulation. Twenty-six of the affected facilities are owned by local municipalities and contain 117 affected sources that may be subdivided as: 25 small boilers; 76 mid-size boilers; six large boilers; one very large boiler; eight simple cycle combustion turbines, and one combined cycle combustion turbine. The Department estimates that the cost for municipally owned facilities to install NO<sub>x</sub> RACT is approximately \$3,774 per ton of NO<sub>x</sub> reduced. The total tons of NO<sub>x</sub> reduced from the 26 municipally owned facilities are projected to be 1,770 tons annually. The NO<sub>x</sub> tonnage to be reduced was calculated by multiplying the percent reductions for each control technology by the current potential to emit (these potential emissions are based on currently permitted NO<sub>x</sub> emission rates for the 26 facilities). Therefore, the total estimated cost of this rule revision to the subject municipal facilities will be approximately \$6,679,000. The cost estimate for NO<sub>x</sub> reductions from the combined cycle turbine at the Jamestown owned facility must be calculated on a case-by-case basis, so no cost estimate has been included in this analysis.

**Rural Area Flexibility Analysis**

**TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:**

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 200 and 6 NYCRR Subparts 201-3 and 227-2. The proposed rulemaking will apply statewide and all rural areas of New York State will be 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.

**COMPLIANCE REQUIREMENTS:**

The revisions to Part 200 and Subparts 201-3 and 227-2 do not substantially alter the requirements for the permitting of major stationary sources which are currently in effect in New York State. 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 NO<sub>x</sub> RACT requirements. In terms of pollution reductions, the revisions to Subpart 227-2 essentially entail the lowering of size thresholds for two categories of sources (to encompass greater numbers of emission sources in each category, however, this does not increase the overall number of emission sources regulated under this Subpart) and increasing the stringency of emissions limits for six of the source categories. The Department is also proposing two revisions that will allow subject sources increased flexibility in achieving compliance.

The existing compliance options which include fuel switching, system wide averaging (this compliance option will be expanded to allow multiple owners to combined their facilities under a system wide average), and the

allowance of an alternative emissions limit will also remain. The proposed regulation will include a "shut down" compliance option. This option will allow a facility to permit the shut down of any combustion source regulated by this Subpart (by a specific date). The proposed revisions will change the definitions of small boiler and mid-size boiler by expanding the size thresholds downward for both size categories of boilers (for small boilers the definition will be changed from a heat input range of greater than or equal to 20 mmBtu/hr to less than 50 mmBtu/hr to a heat input range of greater than or equal to one mmBtu/hr to less than 25 mmBtu/hr, and for mid-size boilers the definition will be changed from a heat input range of greater than or equal to 50 to less than 100 mmBtu/hr to a heat input range of greater than or equal to 25 to less than 100 mmBtu/hr). The proposed regulations will also lower the prescribed emission limits for mid-size boilers, large boilers, very large boilers, and require a case-by-case RACT analysis for combined cycle combustion turbines. The proposed revisions will also eliminate the emission limit exemption for simple cycle combustion turbines that operate for less than 500 hours per year during the non-ozone season. These turbines will be required to meet their prescribed emission limits all year long. All of the proposed revisions reflect the Department's latest determination of what constitutes RACT for the subject sources. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

#### COSTS:

The cost to install RACT will vary depending on the size and fuel type of the boilers that are affected by this proposed regulation and the type of control technology used. The following table lists the average RACT costs (based on technologies that are at or below \$5,550 per ton) in dollars per ton of NO<sub>x</sub> reduced for very large, large, and mid-size boilers:

	Gas	Gas/Oil	Distillate	Residual	Solid Fuel
Very Large	5,455	4,824	Not Applicable	Not Applicable	2,741
Large	5,463	5,500	Not Applicable	Not Applicable	4,415
Mid-size	2,617	Not Applicable	3,132	3,200	Not Applicable

The Department proposes to require owners and/or operators of all affected small boilers to conduct an annual tune-up. The average annual tune-up cost will be approximately \$3,500 per ton of NO<sub>x</sub> reduced. Finally, the Department proposes to require owners and/or operators of combined cycle combustion turbines to conduct a case-by-case RACT analysis. The control technologies that are now available are far more advanced than the control technologies that were considered when the Department established the presumptive RACT emissions limits in the current version of Subpart 227-2 for combined cycle combustion turbines. Currently, there are several retrofit control technologies commercially available for these turbines. This list includes selective catalytic reduction, selective non-catalytic reduction, increased water or steam injection, dry low NO<sub>x</sub> technology, and other possible combustion canister modifications. Given the various ages, sizes, and types of combustion turbines that will be affected, it was not possible to determine a cost for retrofitting based on a single prescribed RACT limit. Therefore, the Department has determined that it would be better to have each individual facility conduct a case-by-case RACT analysis (this is a top down analysis that would require a facility to list then price each control technology that is technically available). The facility will apply the most stringent retrofit controls, based on the results of this analysis, which are economically feasible (on a dollars per ton of NO<sub>x</sub> removed basis) for that particular combustion turbine.

#### MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing rural areas. The new emission limits proposed in this regulation will also be adopted across all of the Ozone Transport Commission (OTC) states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to rural areas in New York State.

#### RURAL AREA PARTICIPATION:

Rural areas will be given opportunities to participate in the rule making process. The proposed revisions will undergo a publication of general notice in both the "Environmental Notice Bulletin" and "State Register". The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities located in rural areas a chance to comment on the proposed regulation.

#### Job Impact Statement

##### NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 200 and 6 NYCRR Subparts 201-3 and 227-2. The proposed rulemaking will apply statewide.

This regulation imposes RACT limits for emissions of nitrogen oxides (NO<sub>x</sub>) from seven categories of stationary combustion installations. These RACT limits are a component of New York's State Implementation Plan (SIP) for attainment of the 1997 8-hour ozone national ambient air quality standard (NAAQS).<sup>1</sup> On March 12, 2008, EPA promulgated a stricter ozone NAAQS. On March 12, 2009, the Department after analyzing measured ozone data for the years 2006 – 2008 recommended that the New York City, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown metropolitan areas be designated nonattainment for the 2008 ozone NAAQS.

The revisions to Part 200 and Subparts 201-3 and 227-2 are among a series of sustained actions undertaken by New York State, in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and VOCs, so that New York State and States in the OTR may attain the ozone NAAQS. In particular, the revisions to Subpart 227-2 will be consistent with the NO<sub>x</sub> RACT regulations in other states throughout the OTR.

In terms of pollution reductions, the revisions to Subpart 227-2 essentially entail the lowering of size thresholds for two categories of sources (to encompass greater numbers of emission sources in each category, however, this does not increase the overall number of emission sources regulated under this Subpart) and increasing the stringency of emissions limits for six of the source categories. The Department is also proposing two revisions that will allow subject sources increased flexibility in achieving compliance.

The existing compliance options which include fuel switching, system wide averaging (this compliance option will be expanded to allow multiple owners to combined their facilities under a system wide average), and the allowance of an alternative emissions limit will also remain. The proposed regulation will include a "shut down" compliance option. This option will allow a facility to permit the shut down of any combustion source regulated by this Subpart (by a specific date). The proposed revisions will change the definitions of small boiler and mid-size boiler by expanding the size thresholds downward for both size categories of boilers (for small boilers the definition will be changed from a heat input range of greater than or equal to 20 mmBtu/hr to less than 50 mmBtu/hr to a heat input range of greater than or equal to one mmBtu/hr to less than 25 mmBtu/hr, and for mid-size boilers the definition will be changed from a heat input range of greater than or equal to 50 to less than 100 mmBtu/hr to a heat input range of greater than or equal to 25 to less than 100 mmBtu/hr). The proposed regulations will also lower the prescribed emission limits for mid-size boilers, large boilers, very large boilers, and require a case-by-case RACT analysis for combined cycle combustion turbines. The proposed revisions will also eliminate the emission limit exemption for simple cycle combustion turbines that operate for less than 500 hours per year during the non-ozone season. These turbines will be required to meet their prescribed emission limits all year long. All of the proposed revisions reflect the Department's latest determination of what constitutes RACT for the subject sources. 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 Subpart 227-2, as discussed above, no measurable effect on the categories or numbers of jobs, or employment opportunities in any specific category is anticipated. There will be some new jobs or employment opportunities created for consultants for RACT and permit reviews. There will also be employment opportunities created for monitoring and compliance testing. Finally, there will be employment opportunities created for air pollution control companies to install control technologies that will be required for facilities to meet the proposed RACT limits.

#### 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. Also, the proposed NO<sub>x</sub> RACT 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 the promotion of the development of any significant new employment opportunities. The new emission limits proposed in this regulation will also be adopted across all of the Ozone Transport Commission (OTC) states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to businesses in New York State.

#### 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 or

conduct monitoring and/or testing of an affected facility's sources. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

<sup>1</sup> On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm)(the 8-hour ozone NAAQS). See National Ambient Air Quality Rule for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR § 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentrations is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Graphic Arts Facilities Engaged in Rotogravure, Flexographic, Offset Lithographic, and Letterpress Printing

I.D. No. ENV-51-09-00012-P

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

**Proposed Action:** Amendment of Parts 200, 201 and 234 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305; and Federal Clean Air Act, sections 172(c)(1), 182(b)(2)(A), and (b)(1)(B)

**Subject:** Graphic arts facilities engaged in rotogravure, flexographic, offset lithographic, and letterpress printing.

**Purpose:** To reduce VOC emissions from graphic arts facilities by requiring reasonably available emission control technology.

**Public hearing(s) will be held at:** 2:00 p.m., Feb. 8, 2010 at Department of Environmental Conservation, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Feb. 9, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., Feb. 10, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

**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 (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The Department of Environmental Conservation (Department) is proposing revisions to Part 200, General Provisions, Part 201, Permits and Certificates, and Part 234, Graphic Arts of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York. Part 234 establishes Reasonably Available Control Technology (RACT) for volatile organic compounds (VOCs) emitted by graphic arts processes in an effort to control the formation of ground level ozone.

Proposed revisions to Part 200 will update two references in Table 1 of section 200.9. The publication date and page numbers of the referenced documents will be updated to the 2006 Code of Federal Regulations.

The Proposed amendments to Part 201 revise the criteria for a graphic arts process to obtain an exemption at 6 NYCRR 201-3.2(c)(13). In order to qualify for the exemption, graphic arts processes must be located outside a severe ozone non-attainment area and have facility-wide VOC emissions less than three tons per year on a 12-month rolling basis. Also amended is a trivial activity listed at 6 NYCRR 201-3.3(c)(23) to read Proof Press Operations.

The proposed Part 234 revisions expand the regulation's applicability to include letterpress printing and establish RACT requirements on facilities that engage in flexographic, offset lithographic and rotogravure printing; they also impose requirements for graphic arts coating and adhesive, and cleaning solution used in letterpress and offset lithographic printing.

The language of proposed section 234.1, General applicability and Exemptions, will be revised to expand the applicability of the regulation. Any graphic arts facility that is located in a severe ozone non-attainment area, or that is located outside a severe ozone non-attainment area with annual VOC emissions greater than three tons on a rolling 12-month basis, is subject to all the requirements of this Part. Facilities that are located outside a severe ozone non-attainment area with annual VOC emissions less than three tons on a rolling 12-month basis are only subject to the requirements of sections 234.5, 235.6, 234.7 and 234.8 of this Part.

Unless they are inconsistent with Part 234, the definitions of 6 NYCRR Part 200 apply to graphics arts facilities. Additionally, section 234.2 outlines definitions specific to this Part. Several new definitions are proposed, including new definitions for various types of printing equipment and processes, control equipment, and cleaning materials.

Section 234.3 deals with the emission control requirements for graphic arts printing processes. These requirements have been revised to establish RACT for graphic arts printing processes and follow the Control Techniques Guidance (CTG) published by EPA. The proposed emission control requirements outline minimum control efficiencies for reducing the amount of VOCs emitted by graphic arts printing processes. Operators may choose to use compliant materials with limited VOC content in lieu of installing and operating emission control equipment.

Section 234.4 outlines the testing and monitoring requirements for graphic arts facilities that choose to comply with Part 234 by installing and operating emission control equipment. This section defines acceptable test methods used to demonstrate the emission control efficiency of the equipment. It also lists several continuous control equipment monitors that must be installed and operated on all printing process emission control equipment at graphic arts facilities.

Section 234.5 prohibits the sale or specification of any coating, ink or adhesive that is specifically prohibited by any provision of Part 234. Use or specification of such material is allowed only when Part 234 compliant emission control equipment has been installed, or the material has been granted a variance by the Department. This section also requires that coating, ink and adhesive vendors provide product specifications to the buyer upon request.

Section 234.6 deals with the handling, storage and disposal of VOCs. Owners and operators of graphic arts printing processes are prohibited from storing ink, coating, adhesive, cleaning material, and cloths or papers that contain any amount of VOCs in open containers.

Recordkeeping requirements are listed in section 234.7. Owners and operators of graphic arts printing processes must retain purchase and use records of ink, coating, adhesive, VOCs, solvent, fountain solution, cleaning material and any other information required to determine compliance with this Part at the facility for a period of five years. This section also allows a Department representative to obtain a sample of any material containing VOC in order to determine compliance with Part 234. Facilities that meet any of the exemption criteria in Part 234 must retain records that demonstrate their qualification for the exemption.

Section 234.8 limits the opacity from any emission source subject to Part 234 to no more than ten percent.

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert Stanton, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 234arts@gw.dec.state.ny.us

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

**Public comment will be received until:** February 17, 2010.

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

### Regulatory Impact Statement

#### STATUTORY AUTHORITY AND LEGISLATIVE OBJECTIVES

New York State (NYS) faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, NYS has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, NYS promulgated 6 NYCRR Part 234 in 1981 to: (1) limit VOC emissions from printing processes; (2) limit the VOC content of printing process ink and fountain solution; and (3) increase the efficiency of emission control technologies used in the graphic arts industry. Part 234 applies to flexographic, offset lithographic, screen, and rotogravure printing, and was last revised in April 1993. The proposed Part 234 revision and attendant revisions to Parts 200 and 201 expand the regulation's applicability to include letterpress printing and imposes more stringent control requirements on facilities that engage in flexographic, offset lithographic and rotogravure printing; it also imposes requirements for graphic art coatings and adhesives, and cleaning solutions used in letterpress and offset lithographic printing. The proposal is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

Promulgation of the proposed Part 234 and attendant revisions are authorized by the following sections of the Environmental Conservation Law (ECL) which clearly empower the Department to establish and implement the regulation:

Section 1-0101. This Section declares it to be the policy of NYS to conserve, improve and protect its natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of NYS and their overall economic and social well being. Section 1-0101 further expresses, among other things, that it is the policy of NYS to coordinate the State's environmental plans, functions, powers and programs with those of the federal government and other regions and manage air resources so that the State may fulfill its responsibility as trustee of the environment for present and future generations. This Section also provides that it is the policy of NYS to foster, promote, create and maintain conditions by which man and nature can thrive in harmony by providing that care is taken for air resources that are shared with other States.

Section 3-0301. This Section states that it shall be the responsibility of the Department to carry out the environmental policy of the State. In furtherance of that mandate, Section 3-0301(1)(a) gives the Commissioner authority to "[c]oordinate and develop policies, functions, planning and programs related to the environment of the state and regions thereof..." Section 3-0301(1)(b) directs the Commissioner to promote and coordinate management of, among other things, air resources "to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the State and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion." Pursuant to ECL Section 3-0301(1)(i), the Commissioner is charged with promoting and protecting the air resources of NYS including providing for the prevention and abatement of air pollution. Section 3-0301(2)(a) permits the Commissioner to adopt rules and regulations to carry out the purposes and provisions of the ECL. Section 3-0301(2)(m) gives the Commissioner authority to "adopt such rules, regulations, and procedures as may be necessary, convenient, or desirable to effectuate the purposes of this chapter."

Section 19-0103. This Section declares that it is the policy of NYS to maintain the purity of air resources and to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

Section 19-0105. This Section declares that it is the purpose of Article 19 of the ECL to safeguard the air resources of NYS under a program which is consistent with the policy expressed in Section 19-0103 and in accordance with other provisions of Article 19.

Section 19-0301. This Section authorizes the Department to adopt regulations to prevent and control air pollution in such areas of the State that are affected by air pollution, develop a general comprehensive plan for the control and abatement of existing air pollution and for the control and prevention of new air pollution and cooperate with government agencies and other States or interstate agencies with respect to the control of air pollution.

Section 19-0305. This Section authorizes the Department to enforce the codes, rules and regulations established in accordance with Article 19.

Clean Air Act (CAA) section 172(c)(1) provides that state implementation plans (SIPs) for non-attainment areas must include "reasonably available control technology" (RACT) for sources of emissions. CAA section 182(b)(2)(A) provides that for certain non-attainment areas, States must revise their SIPs to include RACT for sources of emissions of volatile organic compounds (VOCs) covered by a control techniques guidelines (CTG) document issued after November 15, 1990 and prior to the area's date of attainment. CAA section 184(b)(1)(B) requires implementation of RACT statewide in a state that is located within an ozone transport region (OTR), such as NYS. In September 2006, EPA issued CTGs covering flexible packaging printing, offset lithographic printing, and letterpress printing. Therefore, the Department must adopt revisions to 6 NYCRR Part 200, General Provisions, Part 201, Permits and Certificates, and Part 234, Graphic Arts – the regulation that imposes RACT requirements on the graphic arts industry that are consistent with the CTGs.

The proposed Part 234 revision and attendant revisions to Parts 200 and Part 201 are part of a series of sustained actions undertaken by NYS to control emissions of VOCs so that NYS and States in the OTR may attain the ozone National Ambient Air Quality Standards (NAAQS). NYS's attainment date under the eight-hour ozone standard is 2009, so it is necessary to implement measures to achieve emission reductions in ozone precursor pollutants as expeditiously as possible.

#### NEEDS AND BENEFITS

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NO<sub>x</sub> on hot sunny summer days, can harm humans and plants. Ozone is a secondary pollutant - not emitted directly but formed in the atmosphere by a variety of photochemical reactions involving VOCs and other compounds in the presence of sunlight. EPA

established the primary ozone NAAQS to protect public health. In the northeastern United States the ozone non-attainment problem is pervasive as concentrations of ozone often exceed the NAAQS by mid-afternoon on a summer day.

Ground-level ozone causes a host of major health problems. 'See generally' Senate Committee on Environment and Public Health, S. Rep. No. 101-228 (1990), 'reprinted in' 1990 U.S.C.C.A.N. 3385. The United States Senate has recognized scientific evidence that indicates long term, chronic exposure to ozone may produce accelerated aging of the lung analogous to that produced by cigarette smoke exposure. 'Id.' In 1995, EPA recognized that "[m]uch of the ozone inhaled reacts with sensitive lung tissues, irritating and inflaming the lungs, and causing a host of short-term adverse health consequences including chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections." 60 Fed. Reg. 4712-13 (Jan. 24, 1995). Moreover, two recent studies have shown a definitive link between short-term exposure to ozone and human mortality. 'See' 292 'Journal of the American Medical Assn.' 2372-78 (Nov. 17, 2004); 170 'Am. J. Respir. Crit. Care Med.' 1080-87 (July 28, 2004) (observing significant ozone-related deaths in the NYCMA). Even exercising healthy adults can experience a 15 to 20 percent reduction in lung function from exposure to low levels of ozone over several hours.

Children and outdoor workers are especially at risk from exposure to ozone. A child's developing respiratory system is more susceptible than an adult's. Additionally, ozone is a summertime phenomenon; Children are outside playing and exercising more often during the summer which results in greater exposure to ozone than many adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone during the summer months.

In 2006, EPA reaffirmed the serious public health consequences of ozone. EPA recognized a number of epidemiological and controlled human exposure studies that suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctor and emergency room visits, and hospital admissions; provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality; and report health effects at ozone concentrations lower than the level of the current standards, as low as 0.04 parts per million (ppm) for some highly sensitive individuals. 'See Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Ground level ozone also interferes with the ability of plants to produce and store food. This compromises growth, reproduction and overall plant health. By weakening sensitive vegetation, ozone makes plants more susceptible to disease, pests and environmental stresses. Ozone has been shown to reduce yields for many economically important crops (e.g., corn, kidney beans, soybeans). Ozone damage to long-lived species such as trees (by killing or damaging leaves) can significantly decrease the natural beauty of an area, such as the Adirondacks.

Implementation of the Part 234 revision and attendant revisions to Parts 200 and Part 201 will help to lower levels of ozone in NYS and decrease the adverse public health and welfare effects described above.

The Department has implemented many other programs to help bring all areas of the State into attainment with the NAAQS for ozone. Examples of VOC controls include RACT on major sources, Stage I and Stage II gasoline vapor recovery, maximum volatility requirements for gasoline, limits on auto body and architectural paints, limits on consumer products such as hair sprays and deodorants, and controls on small industrial facilities such as bakeries. The low emission vehicle program and the enhanced inspection and maintenance program control emissions of both VOCs and NO<sub>x</sub>. These and other control programs constitute the ozone NAAQS nonattainment SIP for NYS.

#### COSTS

##### Costs to Regulated Parties and Consumers

There are no added costs expected for the estimated 148 facilities which will become subject to reporting, recordkeeping, housekeeping and prohibition of sale requirements. The estimated costs associated with the new cleaning solution requirements is \$855 per ton of VOC removed. The new fountain solution requirements are expected to reduce costs. There are no significant increases in costs to consumers.

##### Costs to State and Local Governments

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. State and local entities are not expected to be affected by the proposed revisions. There are no expected direct costs to State and local governments associated with this proposed regulation. No record keeping, reporting, or other requirements will be imposed on local governments. The authority and responsibility for implementing and administering Parts 200, 201 and 234

resides solely with the Department. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who conducts the graphic art processes described.

#### Costs to the Regulating Agency

Administrative costs to the regulating agency will not increase.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Local entities are not expected to be affected by the proposed revisions.

#### PAPERWORK

No additional paperwork will be imposed on the graphic arts industry.

#### DUPLICATION

No other regulations address the specific requirements to reduce VOC emissions from the affected industry.

#### ALTERNATIVES

The following alternatives have been evaluated to address the goals set forth above. These are:

1. Take no action. The "no action" alternative does not comply with the CAA. Failure to comply with the CAA will result in an EPA imposed Federal implementation plan (CAA section 110(c)), sanctions in the form of an increase in the new source review offsets ratio to 2 to 1, and the loss of Federal highway funding (CAA section 179).

2. No other reasonable alternative exists. The CAA requires the SIP to reduce VOC emissions from subject sources. Adopting revisions to 6 NYCRR Part 234, Graphic Arts, and attendant revisions to Part 200 and Part 201 that are consistent with the September 2006 CTGs is the preferred option because it helps NYS achieve necessary VOC emission reductions.

#### FEDERAL STANDARDS

The revisions are designed to comply with the requirements outlined in the CTGs.

#### COMPLIANCE SCHEDULE

In accordance with the CTGs and the CAA, States should submit SIP revisions within one year of the date of issuance of these final CTGs.

#### Regulatory Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various graphic art processes.

The Department of Environmental Conservation (the Department) proposes to amend 6 NYCRR Part 200, General Provisions; Part 201, Permits and Certificates; and Part 234, Graphic Arts (Part 234). Clean Air Act (CAA) section 182(b)(2) requires New York State to revise their State implementation plan (SIP) to include reasonably available control technology (RACT) for emission sources of volatile organic compound (VOC) covered by a control techniques guidelines (CTG) document. In September of 2006, EPA issued final CTGs for offset lithographic printing, letterpress printing and flexible packaging printing. The Department initiates this rulemaking to revise the SIP to reflect these newly issued CTGs.

1. Effects on Small Businesses and Local Governments. The proposed rulemaking will apply statewide. This is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on small businesses or local governments. It applies to any entity that owns or operates a subject source. All graphic art facilities will become subject to Part 234. Facilities outside severe ozone non-attainment areas that emit less than three tons per year of total annual VOC process emissions need only comply with sections: 234.5 Prohibition of sale or specification; 234.6 Handling storage and disposal of VOCs; 234.7 Recordkeeping; and 234.8 Opacity. These record keeping, prohibitions of sale and VOC housekeeping requirements currently apply to facilities in the NYC metro area and do not have any added costs associated with them. Graphic art facilities which emit three tons per year or more of total annual VOC process emissions on a twelve month rolling basis will also be required to obtain an air permit or registration. Additionally, the proposed Part 234 revision expands the regulation's applicability to include letterpress printing and imposes more stringent control requirements on facilities that engage in flexographic, offset lithographic and rotogravure printing; it also imposes requirements for graphic art coatings and adhesives, and cleaning solutions used in letterpress and offset lithographic printing.

2. Compliance Requirements. Local governments are not expected to be directly affected by the revisions to Part 234 or attendant revisions to Parts 200 and 201. Graphic art facilities which emit less than three tons per year of total annual VOC process emissions will be required to comply with: 234.5 Prohibition of sale or specification; 234.6 Handling storage and disposal (housekeeping) of VOCs; 234.7 Recordkeeping; and 234.8 Opacity.

Facilities which emit three tons per year or more of total annual VOC process emissions will also be required to obtain a 6 NYCRR Part 201 air

permit (air registration). Additionally, the proposed Part 234 and attendant revisions to Parts 200 and 201 expand the regulation's applicability to include letterpress printing and imposes more stringent control requirements on facilities that engage in flexographic, offset lithographic and rotogravure printing; it also imposes requirements for graphic art coatings and adhesives, and cleaning solutions used in letterpress and offset lithographic printing.

3. Professional Services. Small Businesses and Local Governments are not expected to need professional services to comply with the revisions to Part 234 and attendant revisions to Parts 200 and 201. In the few cases where small facilities do not already have compliant formulations or materials, such products are available from the raw material suppliers to this industry.

4. Compliance Costs. There are no added costs expected for the facilities which will become subject to the reporting, recordkeeping, housekeeping and prohibition of sale requirements. The estimated costs associated with the new cleaning solution requirements for the letterpress and offset lithographic printing processes is \$855 per ton of VOC removed. The new fountain solution requirements for offset lithographic printing processes are expected to reduce costs.

5. Minimizing Adverse Impact. No adverse impacts to the environment or regulated industry are expected. The proposed revisions are intended to reduce VOC emissions to the environment. Local governments are not expected to be directly affected by the revisions to Part 234 or the attendant revisions to Parts 200 and 201.

6. Small Business and Local Government Participation. Since local governments are not expected to be directly affected by the proposed revisions, the Department did not contact local governments directly. A stakeholders meeting was held March 22, 2007; comments were taken and most suggestions incorporated into this amendment.

7. Economic and Technological Feasibility. As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Compliant products are available for all ink, coating, adhesive, fountain, and cleaning formulations. Compliant products are affordable.

#### Rural Area Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various graphic arts processes. See 6 NYCRR Part 234.

Clean Air Act (CAA) section 172(c)(1) provides that state implementation plans (SIPs) for non-attainment areas must include "reasonably available control measures," including "reasonably available control technology" (RACT) for sources of emissions. CAA section 182(b)(2)(A) provides that for certain non-attainment areas, States must revise their SIPs to include RACT for sources of emissions of volatile organic compounds (VOCs) covered by a control techniques guidelines (CTG) document issued after November 15, 1990 and prior to the area's date of attainment. CAA section 184(b)(1)(B) requires implementation of RACT statewide in a state located within an ozone transport region. New York State is located within an ozone transport region. In September 2006, EPA issued CTGs covering flexible packaging printing, offset lithographic printing, and letterpress printing. Therefore, the Department must adopt revisions to 6 NYCRR Part 200, General Provisions; Part 201, Permits and Certificates; and Part 234, Graphic Arts, – the regulation that imposes RACT requirements on the graphic arts industry – that are consistent with the CTGs.

1. Types and estimated number of rural areas: Rural areas are not particularly affected by the revisions.

2. Reporting, recordkeeping and other compliance requirements: Studies have shown that the graphic arts industry is distributed proportionately with population. Rural areas are not particularly affected by the revisions. Outside the New York City metropolitan area a total estimated 148 facilities will become subject to recordkeeping, and VOC handling requirements. These requirements have been required at all facilities in the NYC metro area; and are essentially unchanged since April 1993 when Part 234 was last revised. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: There are no added costs expected for the estimated 148 facilities which will become subject to reporting, recordkeeping, housekeeping and prohibition of sale requirements. The estimated costs associated with the new cleaning solution requirements is \$855 per ton of VOC removed. The new fountain solution requirements are expected to reduce costs.

4. Minimizing adverse impact: Revisions to Parts 200, 201 and 234 are not anticipated to have an adverse effect on rural areas. To date, the Department is unaware of any particular adverse impacts experienced by

rural areas as a result of the regulation. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants.

5. Rural area participation: Rural areas are not particularly affected by the revisions. Consequently, the Department did not see a need to reach out to rural communities individually.

#### **Job Impact Statement**

1. Nature of impact: These proposed revisions to 6 NYCRR Part 200, General Provisions; Part 201, Permits and Certificates; and Part 234 (Part 234) are not expected to have an adverse impact on jobs or employment opportunities in the State. Part 234 has been applied statewide since it took effect in 1981.

2. Categories and numbers affected: The proposed revisions to Parts 200, 201 and 234 affect the owner/operators of packaging and publication rotogravure, offset lithographic, letterpress, flexographic or screen printing processes. Statewide, an estimated one-hundred and forty (140) letterpress units (currently not subject to permitting or Part 234) will become affected; one-hundred and twenty (120) of these are expected to be in the New York City metropolitan area. For the remaining categories, a total estimated one-hundred and twenty-eight (128) additional facilities will become subject to Part 234; 14 of these are expected to need an air permit (registration). No additional State or Title V Facility permits are expected to be necessary.

3. Minimizing adverse impact: The Department of Environmental Conservation is providing advance notice of these rule revisions to the regulated community so that companies have sufficient time to take the necessary steps to come into compliance with Parts 200, 201 and 234.

4. Self employment opportunities: Not applicable.

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## Environmental Facilities Corporation

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### EMERGENCY RULE MAKING

#### **The Proposed Regulations Are for the DWSRF Co-Administered by EFC and the NYS Department of Health (DOH)**

**I.D. No.** EFC-39-09-00002-E

**Filing No.** 1344

**Filing Date:** 2009-12-04

**Effective Date:** 2009-12-04

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

**Action taken:** Amendment of Part 2604 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1284(5) and 1285-m(4)

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

**Specific reasons underlying the finding of necessity:** The New York State Environmental Facilities Corporation ("EFC") has determined that the attached amendment to the Drinking Water State Revolving Fund ("DWSRF") Regulations, Part 2604 of Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is in the public interest and necessary for the preservation of the general welfare throughout the State of New York and that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act ("SAPA"), effective immediately upon filing with the Department of State.

This amendment was adopted as an emergency measure for an initial emergency period of 90 days pursuant to a Notice of Emergency Adoption and Proposed Rulemaking, such initial emergency period being effective upon filing with the Department of State on September 9, 2009 and is being readopted as an emergency rule for an additional 60-day period as it is in the public interest to expeditiously use funds made available pursuant to the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants ("ARRA") to create jobs and stimulate the economy and thus, time is of the essence. The immediate promulgation and adoption of these amended regulations is necessary for the protection and preservation of life, health,

property and natural resources due to the severe economic downturn, the possible destabilization of State and local government budgets, the prospect of reduction of essential services and counterproductive local tax increases which will exacerbate the current economic conditions. The expected duration of such emergency is expected to last through the 60-day extension of such emergency period while EFC concludes formal rulemaking procedures for the amended regulations. Certain regulatory provisions need to be changed in order to streamline provisions as well as to provide the flexibility and provisions specific to and necessitated by ARRA in order for the State Revolving Fund ("SRF") to obtain ARRA funds and provide the same to SRF applicants. In order to meet the tight timeframes of ARRA, these regulations need to be readopted expeditiously. Therefore, compliance with the rule making requirements of section 202(1) of the SAPA would be contrary to the public interest and, as such, the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in section 202(1) of SAPA.

These revisions conform the current SRF regulations with the requirements and objectives set forth in the ARRA, which are to preserve and create jobs, promote economic recovery and invest in environmental protection and to provide short and long-term economic benefits.

ARRA requires that SRF funds be provided to projects on a State's intended use plan that are ready to proceed with construction within 12 months of the date of enactment of ARRA. Further, the Environmental Protection Agency Administrator is directed to reallocate funds where projects are not under contract or construction within 12 months of the date of enactment of ARRA.

In an effort to stimulate the economy and create or retain jobs, ARRA requires that at least 50 percent of the funds be provided as additional subsidization in the form of forgiveness of principal, negative interest loans, or grants. ARRA also provides that to the extent there are sufficient applications for eligible projects not less than 20 percent of the funds are to be provided for projects that address green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The amendments to the regulatory provisions will allow EFC to fund these types of projects.

With the downturn in the financial markets, residents have seen a dramatic decrease in home values as well as in other assets. Through out the State, businesses are retrenching and closing. Home foreclosure rates in the State have increased. State unemployment levels have risen to 9.0 percent as of October, 2009.

The need to address drinking water infrastructure and to reduce operational costs has become more pressing as the economy trends downwards. Compliance with ARRA requirements will provide additional Federal funds to accomplish these purposes.

A potential stimulus package was widely discussed and broadcast on all major networks, television, radio, newspapers and on the web. The details and adoption of ARRA were similarly widely disseminated, as well as the State's interest in utilizing such funds.

The readoption of these emergency regulations is consistent with EFC's statutory mission, which is to provide financial assistance for essential environmental infrastructure projects for the benefit of the people of New York State.

**Subject:** The proposed regulations are for the DWSRF co-administered by EFC and the NYS Department of Health (DOH).

**Purpose:** To set forth rules implementing the statutory provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA") P.L. 111-5.

**Substance of emergency rule:** I. SUBJECT:

The proposed revised regulations are for the New York Drinking Water State Revolving Fund ("DWSRF"), Section 1285-m of the Public Authorities Law ("PAL"), co-administered by the New York State Environmental Facilities Corporation ("EFC") and the New York State Department of Health ("DOH"), pursuant to Chapter 413 of the Laws of 1996.

II. PURPOSE:

The proposed regulations set forth rules and procedures whereby EFC and DOH implement the requirements and objectives of the

American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) to enable the State Revolving Fund (“SRF”) to accept and expend Federal funds to stimulate the economy and retain and create jobs for the benefit of the people of the State.

Among the changes, EFC is expanding the definition of eligible project to include green infrastructure, water or energy efficiency improvements or other environmentally innovative activities as required by ARRA. DOH is creating an additional category G list for such green infrastructure projects in 10 NYCRR Section 53.5(c)(5). Through these changes, DWSRF funds may be made available to a variety of recipients (public and private) carrying out these types of projects.

### III. GENERAL SUBSTANCE:

EFC is proposing to amend the DWSRF regulations found within 21 NYCRR Part 2604 in the following manner (Companion regulations found within 10 NYCRR Part 53 will also be modified):

The proposed regulatory amendments serve to incorporate provisions required by or necessitated by ARRA. The term of additional subsidization in the form of forgiveness of principal, a negative interest loan or a grant is added to allow the SRF to provide principal forgiveness or grants, as required by ARRA. Modifications are made to provide flexibility in certain financial terms and products to meet the objectives of ARRA to stimulate the economy and help initiate projects. In addition, the definition of project is expanded to incorporate green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The proposed amendments will also permit financing of pre-design planning costs prior to completion to further stimulate project development. The provisions regarding project bypassing are also clarified to meet the objectives of ARRA as to project readiness. The proposed regulations will also clarify disbursements and that if certain requirements, including those mandated by ARRA, are not met that the SRF may decline to disburse funds, and if released, recover said funds. Similarly, the remedies provisions are clarified.

Certain definitions are amended within the regulations to expand the types of financial products available. EFC is proposing to add a new definition of “direct interest rate” and other definitions be modified to allow the SRF to address current and changing market conditions. The hardship assistance program is simplified, and clarified to indicate that in the event of a shared municipal project, hardship eligibility will be based upon a municipality’s allocable portion of the shared project.

In addition, there are proposed administrative-oriented changes to EFC’s regulations. The following definitions, among others, will be changed for the purposes of providing flexibility to address changing market conditions and increase funding opportunities for recipients: “Interest rate subsidy”, “Leveraged financing”, “Market rate of interest”, and “Reduced interest rate.” Grammatical changes will include the consistent use of capitalized terms, such as “Corporation”, “Department”, “Commissioner”, “Comptroller” and “Administrator.”

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EFC-39-09-00002-EP, Issue of September 30, 2009. The emergency rule will expire February 1, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Judith A. Avent, Deputy General Counsel, New York State Environmental Facilities Corporation, 625 Broadway, 7th Floor, Albany, New York 12207-2997, (518) 402-6969, email: Avent@nysefc.org

### Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY

When the Legislature enacted Chapter 413 of the Laws of 1996, it created the New York State Drinking Water Revolving Fund (“DWSRF”) and, in part, amended the State’s Public Authorities Law (“PAL”), creating Section 1285-m, which sets forth the provisions of the DWSRF. Under Section 1285-m of the PAL, the New York State Environmental Facilities Corporation (“EFC”) is given the statutory authority to administer the DWSRF. Pursuant to Section

1285-m(4), the Legislature provided that “Moneys in the drinking water revolving fund shall be applied by the corporation in accordance with this section and title four of article eleven of the public health law to provide financial assistance to recipients for construction of eligible projects and upon consultation with the director of the division of the budget, for such other purposes permitted by the federal safe drinking water act, as amended...” PAL Section 1284, which sets forth the general powers of the corporation, provides that EFC has the power “...to make and alter by-laws for its organization and internal management, and rules and regulations governing the exercise of its powers and fulfillment of its purposes under this title...” PAL Section 1284(5). In addition, the federal Safe Drinking Water Act (“SDWA”) provided for the establishment, by each state, of a revolving fund, for certain identified drinking water projects. During the last year, the economy has weakened significantly and the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) was signed into law amending the SDWA in an effort to stimulate the economy through building environmental infrastructure.

#### 2. LEGISLATIVE OBJECTIVES

In creating the DWSRF under the PAL, the Legislature directed EFC and the New York State Department of Health (“DOH”) to provide assistance in support of the planning, development and construction of drinking water projects and other types of projects permitted by the SDWA. ARRA provides federal funds through the DWSRF to create and retain jobs, to stimulate the economy and to promote green infrastructure. EFC and DOH are amending the DWSRF regulations in order to comply with the objectives and requirements of ARRA in order to accept and utilize these Federal funds for projects within New York State. Certain regulatory provisions need to be changed in order to streamline provisions as well as to provide the flexibility and provisions specific to and necessitated by ARRA in order for the SRF to obtain ARRA funds and provide the same to DWSRF applicants.

These revisions conform the current DWSRF regulations with the requirements set forth in ARRA to more effectively carry out the legislative objectives, which are to preserve and create jobs, promote economic recovery, invest in environmental protection and to provide short and long-term economic benefits. ARRA requires that SRF funds be provided to projects on a State’s intended use plan that are ready to proceed with construction within 12 months of the date of enactment of ARRA.

In an effort to stimulate the economy and create or retain jobs, ARRA requires that at least 50 percent of the funds be provided as additional subsidization in the form of forgiveness of principal, negative interest loans, or grants. ARRA also provides that to the extent there are sufficient applications for eligible projects not less than 20 percent of the funds are to be provided for projects that address green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The amendments to the regulatory provisions will allow EFC to provide the same.

EFC is proposing to amend the DWSRF regulations found in 21 NYCRR Part 2604 and as appropriate, the 10 NYCRR Part 53 companion regulations of DOH to: (i) add a new definition of “additional subsidization” that will allow the provision of forgiveness of principal, a negative interest loan or a grant, as either financial assistance or hardship assistance; (ii) amend the definition for “project” to incorporate green infrastructure, water or energy efficiency improvements or other environmentally innovative activities; (iii) permit financing of pre-design planning costs prior to completion to further stimulate project development; (iv) clarify provisions regarding project bypassing to meet the objectives of ARRA as to project readiness; and (v) other administrative-oriented changes, including the changing of various definitions in the regulations for purposes of increasing flexibility in DWSRF financial terms and products to address current market conditions and meet the objectives of ARRA to stimulate the economy and help initiate projects.

#### 3. NEEDS AND BENEFITS

As set forth above, PAL Section 1284(5), gives EFC the authority to make and alter regulations to fulfill its purposes under its enabling

statutes. PAL Section 1285-m(4) gives EFC the power to provide assistance for such other purposes permitted by the SDWA, as amended. Compliance with ARRA objectives and requirements will provide substantial additional Federal funds to the DWSRF to construct eligible drinking water infrastructure projects and to reduce operational costs.

The proposed regulations allow for DWSRF funding to be extended to green infrastructure, water or energy efficiency improvements or other environmentally innovative activities projects, and in the form of forgiveness of principal, a negative interest loan or a grant as set forth in the Intended Use Plan (IUP). Other provisions will allow EFC to bypass projects based upon project readiness to meet the requirements of ARRA and address changing market conditions through the provision of additional financial products as well as providing funds for pre-design planning prior to completion in order to facilitate project initiation. These changes will provide greater access to funding for DWSRF recipients and stimulate environmental projects.

The use of ARRA funds in New York State will create and retain jobs, and stimulate the construction of critical environmental infrastructure throughout New York State.

With the changes outlined above being made to the current DWSRF regulations, certain regulatory definitions will need to be revised to reflect these changes. For example, the following definitions, among others, will be changed for the purposes of providing flexibility to address changing market conditions and increase funding opportunities for recipients: "Interest rate subsidy", "Leveraged financing", "Market rate of interest", and "Reduced interest rate."

#### 4. COSTS

Participation in the DWSRF program is voluntary. The proposed amendments will not result in any additional costs to recipients other than those with respect to meeting ARRA requirements.

#### 5. LOCAL GOVERNMENT MANDATES

None. Participation in the DWSRF program is voluntary. Anyone choosing to apply for financial assistance from the DWSRF would be responsible for compiling the documentation necessary to submit a complete application to EFC for its consideration and review, and meet the requirements of ARRA.

#### 6. PAPERWORK

The proposed amendments do not require any additional paperwork. Participation in the DWSRF program is voluntary. Anyone choosing to apply for financial assistance from the DWSRF would have to submit the documentation required for a complete application to EFC for its consideration, and meet the reporting requirements of ARRA.

#### 7. DUPLICATION

The proposed amendments to 21 NYCRR Part 2604 will be consistent, as applicable, with the DOH DWSRF regulations found in 10 NYCRR Part 53.

#### 8. ALTERNATIVES

Upon review of the current regulations and the programmatic changes sought to be implemented, the proposal outlined above is the most efficient means by which the DWSRF regulations can be updated and the programmatic changes implemented.

#### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal government standards.

#### 10. COMPLIANCE SCHEDULE

There is no relevant compliance schedule to consider with respect to the rule. However, ARRA imposes specific requirements including project readiness in order for a project to qualify for funding.

### **Regulatory Flexibility Analysis**

#### 1. EFFECT OF RULE

Small businesses and local governments throughout New York State will be affected in a positive manner as a result of the promulgation of this rule. The American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants ("ARRA") will provide over \$86 million dollars in additional funding for New York State Drinking Water State Revolving Fund ("DWSRF") projects intended to improve

drinking water facilities. In addition, ARRA mandates that at least twenty percent of the funds be distributed for green infrastructure projects, water or energy efficiency or other environmentally innovative activities.

The infusion of these DWSRF funds into the New York State economy will preserve and create a significant number of jobs, primarily via funding for drinking water construction projects. This will have a commensurate positive effect on small businesses and consultants involved in the construction of these environmental infrastructure projects, in particular engineering firms, financial consulting firms and attorneys. Small businesses are actively involved in the drinking water construction industry in New York State. The rule will also expand the types of projects eligible to receive funding under the DWSRF to include green infrastructure projects, thereby creating additional opportunities for small businesses engaged in these types of projects. This will in turn provide an economic stimulus to localities, including additional tax revenues for local governments.

The types of local governments to be affected by this rule may include cities, towns, villages, and counties throughout New York State as they are considered eligible borrowers under the DWSRF. This rule will have a positive effect on local governments which maintain their own engineering and/or public works departments and are primarily responsible for the engineering, planning, design and construction of drinking water projects. This additional funding will allow such local governments to preserve and create jobs in connection with these types of projects.

#### 2. COMPLIANCE REQUIREMENTS

Participation in the DWSRF by small businesses and local governments is entirely voluntary. Any reporting or recordkeeping imposed by this rule would solely be the result of their decision to participate in the DWSRF program. Such participation would require compliance with existing DWSRF reporting and recordkeeping requirements and any reporting and recordkeeping requirements imposed by the ARRA.

#### 3. PROFESSIONAL SERVICES

Small businesses and local governments who voluntarily participate in the DWSRF program may need to retain professional services for green infrastructure projects to be authorized under the proposed rule. Otherwise, no new professional services will be required by this rule.

#### 4. COMPLIANCE COSTS

No initial capital costs will be incurred by a regulated business or industry or local government to comply with the rule. Initial or continuing compliance costs for reporting and recordkeeping should not vary depending on the size of such small business or local government. However, these reporting and recordkeeping requirements for small businesses and local governments will vary depending on the type, size and complexity of the project and the number of applicable local, state and federal approvals required. These initial or continuing compliance costs, however, only occur when the small business or local government voluntarily elects to participate in the DWSRF program.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

There are no anticipated economic or technological feasibility compliance requirements on small businesses or local governments as a result of this rule. The purpose of this rule is to provide funds to stimulate the economy of the New York State, to preserve and protect jobs and to stabilize local tax bases. Participation in the DWSRF program is entirely voluntary and any direct or indirect compliance requirements will result from small businesses and local governments applying for and seeking DWSRF assistance.

#### 6. MINIMIZING ADVERSE IMPACT

The proposed rule will not have any adverse economic impact. The rule is designed to implement the statutory provisions and objectives of the ARRA, which are to preserve and create jobs, to promote economic recovery, to invest in environmental protection infrastructure and to stabilize State and local government budgets in order to minimize reductions in essential services and counterproductive local tax increases. In addition, the New York State Environmental Facilities Corporation ("EFC") considered whether there were any feasible ap-

proaches for minimizing any conceivable adverse economic impacts pursuant to State Administrative Procedure Act section 202-b(1). Due to the nature and purpose of the proposed rule and the fact that there are no adverse economic impacts, EFC came to the conclusion that there were no feasible alternatives to promulgating the provisions of the rule on an emergency basis.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

With respect to this rulemaking, EFC will publish this Notice of Emergency Adoption and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also intends to provide notice to the appropriate business councils, trade groups or other associations which represent small businesses and local governments to ensure that small businesses and local governments will be given an opportunity to participate in the rulemaking process.

*Rural Area Flexibility Analysis*

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS

The proposed rule will affect all types of rural areas throughout all of New York State, particularly those in need of drinking water facilities to be funded under the Drinking Water State Revolving Fund (“DWSRF”).

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

Participation in the DWSRF by any recipient within a rural area is entirely voluntary. Any reporting, recordkeeping or other compliance requirements would solely be the result of their deciding to participate in the DWSRF program. Such participation would require compliance with existing DWSRF reporting and recordkeeping requirements and any reporting and recordkeeping requirements imposed by the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”). However, the provisions of the proposed rule, in and of themselves, will not require any additional reporting or recordkeeping by rural areas.

3. COSTS

No initial capital or annual costs will be incurred by public or private entities in rural areas as a result of this rule. Initial capital costs and any annual costs to comply with the rule will vary depending upon the size and complexity of the project and the number of applicable local, state and federal approvals required. However, any initial capital or annual compliance costs occur only when public or private entities in rural areas voluntarily elect to participate in the DWSRF program.

4. MINIMIZING ADVERSE IMPACT

The proposed rule will not have any adverse economic impact. The rule is designed to implement the statutory provisions and objectives of the ARRA, which are to preserve and create jobs, to promote economic recovery, to invest in environmental protection infrastructure and to stabilize State and local government budgets in order to minimize reductions in essential services and counterproductive local tax increases. In addition, the New York State Environmental Facilities Corporation (“EFC”) considered whether there were any feasible approaches for minimizing any conceivable adverse economic impacts pursuant to State Administrative Procedure Act section 202-bb(7). Due to the nature and purpose of the proposed rule and the fact that there are no adverse economic impacts, EFC came to the conclusion that there were no feasible alternatives to promulgating the provisions of the rule on an emergency basis.

5. RURAL AREA PARTICIPATION

With respect to this rulemaking, EFC will publish this Notice of Emergency Adoption and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also intends to provide notice to the appropriate organizations and other associations which represent rural areas to ensure that public and private entities will be given an opportunity to participate in the rulemaking process.

*Job Impact Statement*

1. NATURE OF IMPACT

The rule will have a positive impact on jobs and employment

opportunities. A primary goal of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) is job preservation and creation. The infusion of over \$86 million dollars into the New York State Drinking Water State Revolving Fund (“DWSRF”) will preserve and create a significant number of jobs, in particular those involving construction of water supply facilities intended to improve drinking water facilities. The rule will also provide jobs and employment opportunities for consultants involved with DWSRF projects, including engineers, attorneys and financial advisors. The rule will also create additional job opportunities for private and public entities interested in green infrastructure, water or efficiency improvements or other environmentally innovative activities.

2. CATEGORIES AND NUMBERS AFFECTED

The categories of jobs most directly affected will be those of engineers, attorneys, financial advisors and construction related trades in the planning, design, construction and the obtaining of the necessary government permits and approvals regarding these projects.

3. REGIONS OF ADVERSE IMPACT

None. This rule will have a positive impact on jobs and employment opportunities throughout all regions of New York State.

4. MINIMIZING ADVERSE IMPACT

The provisions of the rule will have no unnecessary adverse impacts on existing jobs, but will promote the development of new employment opportunities. Therefore, no measures to minimize adverse impacts needed to be taken.

5. SELF-EMPLOYMENT OPPORTUNITIES

The proposed rule will have a positive effect on self-employment opportunities related to the construction field and consultants therein.

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## Department of Health

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### EMERGENCY RULE MAKING

**Ambulatory Patient Groups (APGs) Methodology**

**I.D. No.** HLT-51-09-00002-E

**Filing No.** 1346

**Filing Date:** 2009-12-04

**Effective Date:** 2009-12-04

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

**Action taken:** Amendment of Subpart 86-8 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807(2-a)

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulation on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009, related to altering the phase-in schedule for health care providers to transition to the Ambulatory Patient Groups (APGs) reimbursement methodology for outpatient and clinic services, implementing cardiac rehabilitation as a Medicaid reimbursable service, and amending the listing of APG reimbursable and non-reimbursable services. Further, the regulation prescribes a methodology for reimbursement of out-of-state providers.

There is a compelling interest in enacting these amendments immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these provisions. APGs represent the cornerstone to health care reform. Their continued refinement is necessary to assure access to preventive services for all Medicaid recipients.

**Subject:** Ambulatory Patient Groups (APGs) Methodology.

**Purpose:** Makes refinements to APG methodology, including provisions for reimbursement of out-of-state providers.

**Substance of emergency rule:** The amendments to Part 86 of Title 10 (Health) NYCRR are required to update the Ambulatory Patient Groups

(APGs) methodology, implemented on December 1, 2008, which governs reimbursement for certain ambulatory care fee-for-service (FFS) Medicaid services. APGs group procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

#### 86-8.1 - Scope of services and effective dates

Section 86-8.1 of Title 10 (Health) NYCRR defines the categories of facilities subject to APGs and the time frames for implementation. The revision to subdivision (a) clarifies that ambulatory services provided by diagnostic and treatment centers and ambulatory surgery services provided by free-standing ambulatory surgery centers will be reimbursed on APGs commencing September 1, 2009. The revision to subdivision (b) deletes language that prohibits APG payments to out-of-state facilities.

#### 86-8.2 - Definitions

The proposed amendments to section 86-8.2 of Title 10 (Health) NYCRR provide revised definitions for “discounting”, “packaging”, and “visit”. Additionally, two new subdivisions, (p-1) and (p-2), are proposed to be created to define what constitutes an episode payment and when it is appropriate to use.

#### 86-8.6 - Rates for new facilities during the transition period

The proposed revision to section 86-8.6 of Title 10 (Health) NYCRR stipulates that the operating component of rates shall reflect:

- for general hospital outpatient clinics, effective for the period December 1, 2008 through November 30, 2009, 75% of the historical 2007 average payment per visit as calculated by the department, and 25% of APG rates as computed in accordance with this Subpart, and effective December 1, 2009 through December 31, 2010, 50% of the historical 2007 average payment per visit as calculated by the department, and 50% of APG rates as computed in accordance with this Subpart;
- for diagnostic and treatment centers, effective for the period September 1, 2009 through November 30, 2009, 75% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart, and effective for the period December 1, 2009 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;
- for free-standing ambulatory surgery centers, effective for the period September 1, 2009 through November 30, 2009, 75% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart, and for the period December 1, 2009 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;

#### 86-8.10 Exclusions from payment

The proposed amendment to section 86-8.10 of Title 10 (Health) NYCRR removes the following APGs from the list of services that are not eligible for reimbursement pursuant to this subpart: APG 094 - Cardiac Rehabilitation; APG 371 - Level 1 orthodontics; and APG 372 level II Orthodontics.

#### 86-8.13 Out-of-State Providers

The proposed amendment adds a new section 86-8.13, which stipulates how out-of-state providers will be reimbursed for services under this subpart.

#### 86-8.14 Non-APG Payments

The proposed amendment adds a new section 86-8.14, which stipulates that the following services will be reimbursed based on specified rates and fees established by the Department: psychotherapy services; wheelchair evaluation services; and eyeglass dispensing services.

**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 March 3, 2010.

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

#### Regulatory Impact Statement

##### Statutory Authority:

Authority for the promulgation of these regulations is contained in section 2807(2-a)(e) of the Public Health Law, section 79(u) of part C of chapter 58 of the laws of 2008 and section 129(l) of part C of Chapter 58 of the laws of 2009, which authorizes the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

Further, part C of Chapter 58 of the laws of 2009, amended Public Health Law section 2807(2-a). Amendments pertinent to these proposed regulations include: (1) section 14 of part C of chapter 58 of the laws of 2009 alters the schedule under which providers' reimbursement transitions fully to APG reimbursement (2) section 15 of part C of chapter 58 of the laws of 2009 provides authority for the commissioner of health to promulgate regulations establishing alternative payment methodologies, or utilize existing payment methodologies, when the APG methodology is not, or is not yet, appropriate or practical for specified services; and (3) sections 27 and 16-a of part C of chapter 58 of the laws of 2009 provides authority for APG reimbursement of cardiac rehabilitation services and for the commissioner of health to promulgate regulations establishing alternative payment methodologies for certain psychotherapy services.

##### Legislative Objective:

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through APGs.

##### Needs and Benefits:

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs. This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

##### COSTS

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

There will be no additional costs to providers as a result of these amendments.

##### Costs to Local Governments:

There will be no additional costs to local governments as a result of these amendments.

##### Costs to State Governments:

There will be no additional costs to NYS as a result of these amendments. All expenditures under this regulation are fully budgeted in the SFY 09/10 enacted budget.

##### Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

##### Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

These regulations are in conformance with Public Health Law section 2807(2-a). Alternatives would require statutory amendments.

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 Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals, diagnostic and treatment centers, and free-standing ambulatory surgery centers. Based on recent data extracted from providers' submitted cost reports, seven hospitals and 245 DTCs were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to further reform the outpatient/ambulatory care fee-for-service Medicaid payment system, which is intended to benefit health care providers, including those with fewer than 100 employees.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that this reimbursement system is mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, and June 10, 2009.

**Rural Area Flexibility Analysis**

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster

Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the reimbursement system is mandated in statute.

Opportunity for Rural Area Participation:

Rural areas were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009 and June, 10, 2009.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulations, that they will not have a substantial adverse impact on jobs or employment opportunities.

**EMERGENCY  
RULE MAKING**

**Hospital Inpatient Reimbursement**

**I.D. No.** HLT-51-09-00003-E

**Filing No.** 1347

**Filing Date:** 2009-12-04

**Effective Date:** 2009-12-04

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

**Action taken:** Amendment of Subpart 86-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2803(2), 2807(3) and (4)

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009 related to implementing a new hospital inpatient reimbursement system based on All-Patient-Refined-Diagnosis-Related-Groups (APR-DRGs). The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of

the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute hospital inpatient rates in accordance with the new methodology by December 1, 2009.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of this new reimbursement system that is a cornerstone to health care reform.

**Subject:** Hospital Inpatient Reimbursement.

**Purpose:** Modifies current reimbursement for hospital inpatient services due to the implementation of APR DRGs and rebasing of hospital inpatient rates.

**Substance of emergency rule:** The amendments to sections 86-1.2 through 86-1.89 of Title 10 (Health) NYCRR are required to implement a new payment methodology for certain hospital inpatient fee-for-service Medicaid services based on All Patient Refined-Diagnostic Related Groups (APR-DRGs). The new payment methodology proposed by these amendments provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. It develops one statewide operating base rate using an updated and more reliable cost base rather than current regional and peer group operating base rates, of which were determined by using extremely outdated costs. The APR-DRG payment system will incorporate patient severity of illness and risk of mortality subclasses to better match patient resource utilization and provide a more precise method for equitable reimbursement.

**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 March 3, 2010.

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

#### Regulatory Impact Statement

##### Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Public Health Law. In addition, section 2807-c(4)(e-2) of the Public Health Law requires new per diem rates of reimbursement be implemented for certain exempt units and hospitals based on updated reported operating costs. Section 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv) and (v) requires schedules of payment to be set forth in regulations for supplemental indigent care distributions made to certain eligible hospitals.

##### Legislative Objectives:

After numerous discussions between the Executive, Legislature, hospital associations and other key stakeholders, the Legislature chose to create a new, modernized reimbursement methodology for the State's Medicaid hospital inpatient system. Pursuant to statute, the APR-DRG methodology was chosen as the new reimbursement system for these services.

##### Needs and Benefits:

The proposed regulations implement the provisions of Public Health Law section 2807-c(35) which requires a new hospital inpatient reimbursement system based on APR-DRGs and rebased costs. This methodology provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. This new payment methodology will also allow the Department to publish hospital rates more timely, and provide hospitals with greater predictability of their income streams.

The current reimbursement system for hospital inpatient services is extremely outdated, and does not effectively serve the interests of patients, providers, or the Medicaid system. Not only does the system's overall reimbursement greatly exceed the cost of providing such services, the methodology for allocating payments does not appropriately reflect the acuity of the patient, the quality of service, or the efficiency of the hospital. Over the years the current system has accrued numerous groupings, weightings, adjustments, and add-ons that have ultimately distorted the health care delivery system.

Per diem rates of payment by governmental agencies for inpatient services provided by a general hospital or a distinct unit of a general hospital for services in accord with physical medical rehabilitation and chemical dependency rehabilitation; services provided by critical access hospitals; inpatient services provided by specialty long term acute care hospitals; and services provided by facilities designated by the federal department of health and human services as exempt acute care children's hospitals are also developed using an outdated cost base which does not properly reflect current costs incurred for providing such services.

The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Utilizing an updated and more precise cost base will have the effect of reducing the total amount of Medicaid reimbursement paid to hospitals for inpatient services, which is found to be significantly overpaid. Accordingly, the State would be able to, consistent with budgetary constraints, reinvest these savings in primary and preventive care and other traditionally under-paid ambulatory care services in order to improve the quality of patient care, ensure adequate access to these services, and avoid more costly inpatient admissions.

##### COSTS:

##### Costs to State Government:

Section 2807-c(35) of the Public Health Law requires that the rates of payment for hospital inpatient services result in a net state wide decrease in aggregate Medicaid payments of no less than \$75 million for the period December 1, 2009 through March 31, 2010 and no less than \$225 million for the period April 1, 2010 through March 31, 2011. Effective for annual periods beginning January 1, 2010, distributions to hospitals for indigent care pool DSH payments will be made as follows: \$269.5 million will be distributed to hospitals, excluding major public hospitals, on a regional basis and within the amounts available for each region, to compensate each eligible hospital's proportional share of unmet need for calendar year 2007; \$25 million will be distributed to hospitals, excluding major publics, having Medicaid discharges of 40% or greater as determined from data reported in the 2007 Institutional Cost Report. The distributions will be proportionately distributed based on each eligible facility's uninsured losses to such losses of all the eligible facilities; \$16 million will be proportionately distributed to non-teaching hospitals based on each eligible facility's uninsured losses to such losses for all non-teaching hospitals statewide.

##### Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments because local districts' share of Medicaid costs is statutorily capped.

##### Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

##### Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

##### Duplication:

These regulations do not duplicate existing State and Federal regulations.

##### Alternatives:

No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(4)(e-2) and (35); 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv), and (v) to promulgate implementing regulations.

##### 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 establishes the new APR-DRG reimbursement methodology for discharges on or after December 1, 2009; there is no period of time necessary for regulated parties to achieve compliance.

#### Regulatory Flexibility Analysis

##### Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

In aggregate, health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding, but this is not anticipated for all affected providers.

This rule will have no direct effect on Local Governments.

##### Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. Some billing rate codes will change, but this will have a minimal impact on providers.

The rule should have no direct effect on Local Governments.

##### Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

##### Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are techno-

logically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of these amendments to 86-1.2 through 86-1.89 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services. Revenues will shift among individual hospitals.

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid hospital inpatient reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

**Small Business and Local Government Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing hospitals and comments were solicited from all affected parties. Informational briefings were held with such associations.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chemung	Livingston	Seneca
Chenango	Madison	Steuben
Clinton	Montgomery	Sullivan
Columbia	Ontario	Tioga
Cortland	Orleans	Tompkins
Delaware	Oswego	Ulster
Essex	Otsego	Warren
Franklin	Putnam	Washington
Fulton	Rensselaer	Wayne
Genesee	St. Lawrence	Wyoming
Greene	Saratoga	Yates

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services:**

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid fee-for-service reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

**Rural Area Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include members from rural areas.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the reimbursement system for inpatient hospital

services. The proposed regulations have no implications for job opportunities.

**NOTICE OF ADOPTION**

**Temporary Residences and Mass Gatherings**

**I.D. No.** HLT-31-09-00003-A

**Filing No.** 1345

**Filing Date:** 2009-12-04

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of Subpart 7-1 and addition of Subpart 7-4 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225(5)

**Subject:** Temporary Residences and Mass Gatherings.

**Purpose:** Amend Subpart 7-1 which includes removal of requirements for mass gatherings & relocates these requirements in new Subpart 7-4.

**Text or summary was published** in the August 5, 2009 issue of the Register, I.D. No. HLT-31-09-00003-P.

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

**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

**Assessment of Public Comment**

The agency received no public comment.

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**Insurance Department**

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

**Public Retirement Systems - Reporting of Supplementary Data Related to the Reserve Liabilities**

**I.D. No.** INS-51-09-00001-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 135 of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 307(a); Retirement and Social Security Law, sections 15, 315; Education Law, section 523; Administrative Code of the City of New York, sections 13-183, 13-266, 13-378, 13-562; and the Rules and Regulations of the Retirement Board of the Board of Education of the City of New York, section 25

**Subject:** Public Retirement Systems - Reporting of Supplementary Data related to the Reserve Liabilities.

**Purpose:** To eliminate requirements relating to a previous annual statement that no longer is in use.

**Text of proposed rule:** 11 NYCRR 135 (Regulation 67) is hereby repealed.

**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 Kreuter, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5330, email: pkreuter@ins.state.ny.us

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

**Consensus Rule Making Determination**

The regulation requires reporting of certain financial transactions and reserve liabilities by public retirement systems maintained by the City of New York and the State of New York. The regulation refers to items in an obsolete annual statement form that was replaced in 2007 by a completely new form. Those reporting requirements, along with filing instructions, are now included in the new annual statement form.

The repeal eliminates requirements relating to a previous annual statement form that no longer is in use, and eliminates regulatory provisions that are no longer applicable to any person.

#### **Job Impact Statement**

The proposed repeal should have no impact on jobs and employment opportunities in New York State.

A new annual statement form has been in use for public retirement systems maintained by the City of New York and the State of New York since 2007. The regulation has been of no force and effect since that time. The repeal eliminates unneeded computation based on an annual statement form that is no longer in use.

There would be no impact on jobs or employment opportunities in New York State.

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## Commission of Judicial Nomination

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

#### **Procedures of the Commission on Judicial Nomination**

**I.D. No.** JDN-31-09-00004-RP

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

**Proposed Action:** Amendment of Part 7100 and section 7101.4 of Title 22 NYCRR.

**Statutory authority:** Judiciary Law, section 65

**Subject:** Procedures of the Commission on Judicial Nomination.

**Purpose:** To update the Commission's procedures to best implement the Commission's constitutional and statutory mandates.

**Substance of revised rule:** As revised in response to public comments received after publication of the Commission's original proposal in the August 5, 2009 issue of the *New York State Register*.

Section 7100.0. Preamble.

This new section of the Commission's rules sets out the Commission's understanding of its constitutional and statutory mandates – i.e., to fill vacancies on the Court of Appeals, the Commission will vigorously seek out, carefully evaluate, and then nominate to the Governor well-qualified candidates from the extraordinary, diverse community of lawyers admitted to practice in New York State.

The Commission has not substantially revised this section since its original proposal.

Section 7101.1. Chairperson.

This section of the Commission's rules has been amended to provide that if the Commission's chairperson is unable to fulfill the duties of office, or if the position of chairperson becomes vacant, the longest-serving commissioner able to fulfill the duties of chairperson will act as chairperson. This section of the Commission's rules has also been amended to provide that the chairperson may designate another member of the Commission or the Commission's counsel as spokesperson.

This section of the Commission's rules has also been edited for stylistic clarity.

The Commission has revised this section to provide that the chairperson and other commissioners should attempt to attend legal functions that allow them to discuss the selection process.

7100.2. Counsel.

This section of the Commission's rules has been amended, consistent with Section 64(6) of the Judiciary Law, to provide explicitly that the Commission may appoint, remove, and fix the compensation of its counsel and staff at the Commission's pleasure.

This section of the Commission's rules has also been edited for stylistic clarity.

The Commission has revised this section to provide that Commission counsel will conduct orientation sessions for new commissioners.

7100.3. Commission Vacancies.

This new section of the Commission's rules provides that, 30 days prior to the occurrence of an expected vacancy on the Commission, the Commission shall notify the public, press, and appropriate appointing authority of such imminent vacancy, together with a statement that the ultimate objectives of wide diversity and broad outreach in the nomination of well-qualified candidates for the Court of Appeals are best served by a Commission that itself reflects the diversity of New York's communities.

The Commission has revised this section to provide that notices of Commission vacancies will be distributed to bar associations, and will note that appointing authorities should consider appointing individuals from a variety of backgrounds.

7100.4. Meetings.

This section of the Commission's rules has been amended to allow the Commission to call a meeting through the use of electronic notice. This section of the Commission's rules has also been amended to repeal a provision allowing for a meeting of the Commission to be held without notice whenever the Commission, at a previous meeting, has designated the time and place for the meeting.

This section of the Commission's rules has also been renumbered and edited for stylistic clarity.

The Commission has not substantially revised this section since its original proposal.

7100.5. Quorum for meetings.

This section of the Commission's rules has been renumbered and edited for stylistic clarity.

The Commission has not substantially revised this section since its original proposal.

7100.6. Solicitation of candidates.

This section of the Commission's rules has been amended to formalize the Commission's protocol for making broad outreach across the legal profession in order to enable the Commission to identify qualified candidates from a wide range of New York's diverse communities. Such amendments include:

(a) dissemination of the procedure to be followed by the public to bring qualified candidates to the attention of the Commission;

(b) requiring Commissioners to disclose to the full Commission that they have recruited particular candidates under consideration;

(c) allowing the Chairperson to appoint a search committee to solicit recommendations from the legal community to enhance candidate outreach;

(d) dissemination of notices of vacancy through certain specified channels, including the media, bar associations, deans of New York law schools, members of the public, the Commission's website, and relevant political actors, including the Governor, Unified Court System, Attorney General, Speaker of the New York State Assembly and the President Pro Tempore of the New York State Senate;

(e) posting the applicant questionnaire on the Commission's website;

(f) conducting at the Commission's discretion informational meetings in the State's four Judicial Departments to discuss the requirements for Court of Appeals and the Commission's procedures and rules for submitting recommendations of qualified candidates for vacancies, at which time, the public may be heard about community needs, the general qualifications for judicial office and the nominating process; and

(g) posting on the Commission's website answers to frequently asked questions about the requirements for the position and the Commission's procedures for the public to bring qualified candidates to its attention.

This section of the Commission's rules has also been renumbered and edited for stylistic clarity.

The Commission has revised this section by deleting the previously proposed sub-section (b), which provided that the Commission would request a meeting with the Governor to discuss vacancies and efforts to recruit candidates.

The Commission has revised sub-section (d) (previously proposed as sub-section (e)) to provide that:

(i) The Commission will request that notice of upcoming vacancies be posted on the websites of the New York State Senate and New York State Assembly, rather than providing the notice to the Speaker of the Assembly and the President Pro Tempore of the Senate;

(ii) The Commission will send notice of vacancies to the Presiding Justices of the Appellate Divisions, the Administrative Judges for each Judicial District and the Chief Administrative Judge for the State of New York; and

(iii) The Commission will send notice of upcoming vacancies to organizations that are registered with the Commission.

The Commission has revised sub-section (f) (previously proposed as sub-section (g)) to provide that, as practicable, the Commission should convene at least two informational meetings, at least one of which will be in New York City.

The Commission has further substantially revised this section by proposing a new sub-section (g), as detailed above.

7100.7. Investigation of candidates.

This section of the Commission's rules has been renumbered and edited for stylistic clarity.

The Commission has not substantially revised this section since its original proposal.

7100.8. Consideration of candidates.

(a) This subdivision of the Commission's rules has been amended to set

forth the Commissioners' duty of impartiality in the consideration of candidates, and to provide that no Commissioner may individually communicate with an applicant to the Commission about the application or the nomination process, from the time the application is submitted until completion of the Commission's final vote on the nominations.

(b) This subdivision of the Commission's rules has been amended to provide for a two-step initial application process, wherein a candidate for the Court may first submit a short-form questionnaire, resume, and statement of interest, and only after the Commission has determined whether that candidate merits an interview must the candidate complete the Commission's full application questionnaire.

(c) This subdivision of the Commission's rules has been amended to set forth the objectives of the Commission's nomination procedure – i.e., (i) to ensure that the commission thoroughly considers and evaluates each candidate; (ii) to ensure that the commission is impartial in its deliberations; (iii) to promote consensus in the selection of nominees; and (iv) to ensure that each nominee receives at least eight affirmative votes from the commissioners, as required by Section 63(3) of the Judiciary Law.

(d) This new subdivision of the Commission's rules sets forth the Commission's non-discrimination policy.

(e) This new subdivision of the Commission's rules sets forth the Commission's commitment to diversity.

The portion of this section of the Commission's rules that details the voting procedures to be used by the Commission for consideration of candidates has been relocated to Appendix I to Section 7100 of Title 22, N.Y.C.R.R., and further edited, as below.

This section of the Commission's rules has also been renumbered and edited for stylistic clarity.

The Commission has revised sub-section (b) to provide that:

(i) if the number of qualified applicants appears to be inadequate, the Commission may extend the deadline for submission of applications;

(ii) candidates shall be considered for the final nomination process upon their nomination by two commissioners, unless the Commission determines otherwise; and

(iii) the Commission presumably will employ a two-step application procedure for all vacancies, unless circumstances make the two-step process impracticable.

The Commission has revised sub-section (c) to provide that candidate interviews will be conducted by a quorum of the Commission, and that the Commission's counsel will inform the commissioners of the outcome of each round of voting, regardless of the result.

The Commission has revised sub-section (e) to provide that candidates' community service and legal or professional background shall be considered as part of the Commission's commitment to diversity.

7100.9. Report to the Governor.

This section of the Commission's rules has also been amended to require that the Commission's report to the Governor will set forth (a) the relevant accomplishments of each nominee, and include major legal matters in which the nominee participated, as well as other notable professional qualities that the Commission considered important in determining that each was well-qualified and fit to serve as the Chief Judge or an Associate Judge of the Court of Appeals, as the case may be; and (b) the efforts made by the Commission and counsel to publicize each vacancy and to solicit applications from the broadest group of well qualified candidates, provided that the report will not compromise the confidentiality of Commission proceedings, as mandated by Section 66 of the Judiciary Law.

This section of the Commission's rules has also been renumbered and edited for stylistic clarity.

The Commission has revised this section to provide that the Commission's report will encourage the public to submit comments to the Governor.

7100.10. Amendment or waiver of rules.

This section of the Commission's rules has been renumbered and edited for stylistic clarity.

The Commission has not substantially revised this section since its original proposal.

7100.11: Website.

This new section of the Commission's rules establishes a protocol for the Commission's website, to be used to communicate with the public and to aid in soliciting candidates.

The Commission has revised this section to provide that the Commission's website will contain frequently asked questions and answers concerning the Commission and its processes, and sample ballots and examples of balloting; and that the Commission will encourage members of the public and organizations to register to receive Commission press releases by email.

Part 7100 Appendix I. Voting procedures.

This section of the Commission's rules, formerly a portion of Section 7100.7 of Title 22, N.Y.C.R.R., has been amended to provide that the default number of candidates to be ranked by the Commissioners when

voting on candidates – assuming no nominations have been made by consensus – will be 15. The voting process will henceforth be conducted such that candidates to be nominated must be a candidate receiving the greatest number of "points," as well as the affirmative votes of eight Commissioners, as required by Section 63(3) of the Judiciary Law.

This section of the Commission's rules has also been edited for stylistic clarity.

The Commission has revised this section to include a Statement of Purpose; to define an "affirmative vote"; to establish that a consensus vote of the Commission means eight commissioners' votes; to clarify the Commission's voting procedures, and to provide that the Commission will place on its website an illustration of the voting process.

Section 7101.4: Rules for public access to records of the State of New York Commission on Judicial Nomination: Location.

This section of the Commission's rules has been amended to provide that the Commission's point of contact for all information requests pursuant to the State Freedom of Information Law will be the office of the Commission's current Counsel.

The Commission has not substantially revised this section since its original proposal.

Full text of the revised rules is available at the Commission's website, <http://nysegov.com/cjn>.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 7100.1, 7100.2, 7100.3, 7100.6, 7100.8, 7100.9, 7100.11 and Appendix I.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Stephen P. Younger, Counsel, Commission on Judicial Nomination, 1133 Avenue of the Americas, New York, New York 10036, (212) 336-2685, email: [spyounger@pbwt.com](mailto:spyounger@pbwt.com)

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

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

#### **Revised Regulatory Impact Statement**

None of the proposed revisions change the Commission's previous analysis contained in its prior Regulatory Impact Statement, as published in the *New York State Register* of August 5, 2009.

#### **Revised Regulatory Flexibility Analysis**

None of the proposed revisions change the Commission's previous conclusion, as published in the *New York State Register* of August 5, 2009, that a regulatory flexibility analysis is not required.

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

None of the proposed revisions change the Commission's previous conclusion, as published in the *New York State Register* of August 5, 2009, that a rural flexibility analysis is not required.

#### **Revised Job Impact Statement**

None of the proposed revisions change the Commission's previous conclusion, as published in the *New York State Register* of August 5, 2009, that a job impact statement is not required.

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

In July of this year, the Commission published for public comment its initial draft of proposed revisions to its rules. The Commission received and carefully considered a number of comments on these proposed revisions from private and public individuals and organizations, including the New York State Bar Association, the City Bar Association, the New York County Lawyers' Association and The Fund for Modern Courts. These comments dealt with almost every aspect of the proposed rules, and the revised draft of the rules incorporates many of the comments received.

The substantive changes contained in the republished rules include: clarification of the duty of an interim chairperson; a provision for orientation sessions for new members; broadening the outreach for candidates to include notice to civic and public interest organizations who register with the Commission; establishing the two-step application procedure as the Commission's preferred procedure for nomination; and further clarification of the Commission's voting procedure.

The changes contained in the republished rules are described in more complete detail in the Summary of the Revised Rules, above.

## Office of Medicaid Inspector General

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

#### Withholding of Payments

**I.D. No.** MED-51-09-00013-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 518.7(c) and add section 518.9 to Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 32(20)

**Subject:** Withholding of payments.

**Purpose:** To conform to federal regulations requiring certain information to be set forth in notices of withholdings.

**Text of proposed rule:** Subdivision (c) of section 518.7 is amended to read as follows:

(c) The notice of withholding must:

(1) state that the payments are being withheld in accordance with 42 C.F.R. 455.23 and this section;

(2) state that the withholding is for a temporary period only and recite the circumstances under which the withholding will be terminated;

(3) specify whether the withholding applies to all or only some claims and identify which claims if not all claims are involved; and

(4) advise of the right to submit written arguments and documentation in opposition to the withholding and how to submit them.

A new section 518.9 is added to read as follows:

518.9. *Incorporation by reference.*

*The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled: Code of Federal Regulations, title 42, Parts 455.23, revised as of October 1, 2008, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated by reference may be examined at the Office of the Department of State, 99 Washington Ave., Albany, NY 12231 at the law libraries of the New York State Supreme Court and the New York State, and at the Office of the Medicaid Inspector General, Office of Counsel, 800 N. Pearl Street, Albany, New York 12204. They may also be purchased from the Superintendent of Documents, Government Printing Office Washington, DC 20402. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Erin C. Morigerato, Esq., Senior Attorney, Office of the Medicaid Inspector General, 400 N. Pearl Street, Albany, New York 12204, (518) 408-0508, email: ecm03@omig.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

The Office of the Medicaid Inspector General (OMIG) was created within the Department of Health under Chapter 442 of the Laws of 2006 as the entity responsible for coordinating and implementing state-wide initiatives related to fraud and abuse within the medical assistance program.

Public Health Law § 32(20) specifically authorizes the OMIG to implement and amend, as needed, rules and regulations related to the prevention, detection, investigation and referral of fraud and abuse within the medical assistance program and the recovery of improperly expended medical assistance program funds.

The OMIG is submitting the proposed rulemaking as a consensus rule pursuant to SAPA 202(1)(b)(i) as no person is likely to object to the adoption of this rule as written. The basis for the OMIG's determination is that the proposed rulemaking merely conforms to non-discretionary statutory provisions and makes technical changes that are required by those statutory provisions.

Federal regulations require the State Medicaid agency to set forth in

their notice of withholding of program payments certain information including a statement that the payments are being withheld in accordance with 42 C.F.R. § 455.23 This consensus rule amends 18 NYCRR § 518.7 to conform to the federal regulation.

#### Job Impact Statement

**Nature of Impact:**

This proposed rulemaking will not have any impact on jobs and employment opportunities.

**Category and Numbers Affected:**

There are no categories of jobs or employment opportunities expected to be affected by the rule.

**Regions of Adverse Impact:**

Enactment of this proposed regulation would not have an adverse impact on jobs or employment opportunities. As such, there is no area of the state disproportionately affected.

**Minimizing Adverse Impact:**

There will be no adverse impact on existing jobs.

## Office of Mental Health

### NOTICE OF ADOPTION

#### Medical Assistance Payment for Outpatient Programs

**I.D. No.** OMH-41-09-00006-A

**Filing No.** 1352

**Filing Date:** 2009-12-07

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of Part 588 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, sections 364 and 364-a

**Subject:** Medical Assistance Payment for Outpatient Programs.

**Purpose:** To modify the current reimbursement methodology for continuing day treatment programs and restore funding for certain programs.

**Text or summary was published** in the October 14, 2009 issue of the Register, I.D. No. OMH-41-09-00006-EP.

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

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

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth

**I.D. No.** OMH-41-09-00007-A

**Filing No.** 1353

**Filing Date:** 2009-12-07

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of Part 578 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02

**Subject:** Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth.

**Purpose:** To reduce the growth rate of Medicaid reimbursement associated with residential treatment facilities for children and youth.

**Text or summary was published** in the October 14, 2009 issue of the Register, I.D. No. OMH-41-09-00007-EP.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Motor Vehicles

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### NOTICE OF ADOPTION

**Safety Hearing Notice**

**I.D. No.** MTV-18-09-00006-A

**Filing No.** 1357

**Filing Date:** 2009-12-07

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of Part 127 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 469-a(1), (2) and 471-a

**Subject:** Safety Hearing Notice.

**Purpose:** Clarify that only hearing notices initiated through the Division of Vehicle Safety requires mailing to be done by certified mail.

**Text or summary was published** in the May 6, 2009 issue of the Register, I.D. No. MTV-18-09-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heidi A. Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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

**Driver License Qualifications After Loss of Consciousness**

**I.D. No.** MTV-51-09-00005-P

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

**Proposed Action:** Amendment of Part 9 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 502(1) and 510(3)(b)

**Subject:** Driver license qualifications after loss of consciousness.

**Purpose:** Authorizes nurse practitioners to evaluate motorists ability to safely operate a vehicle after a loss of consciousness episode.

**Text of proposed rule:** Section 9.1 is amended to read as follows:

Section 9.1 Introduction and scope. Section 502 of the Vehicle and Traffic Law requires an applicant for a driver license to submit proof of fitness. This Part establishes procedures and standards to be applied by the Commissioner with respect to the licensing of persons who have experienced loss of consciousness. The Part shall be applicable to an applicant for an original license in this state who has ever suffered loss of consciousness, to an applicant for renewal of a license in this state who has suffered loss of consciousness since his last license was issued in this state, to a person who is required to submit physicians' or nurse practitioners' statements as a condition for continuing licensing, and to licensees concerning whom the Commissioner has received evidence of loss of consciousness.

Section 9.3 is amended to read as follows:

9.3 Standards of fitness. A person to whom this Part is applicable will be deemed to be fit for licensing insofar as this Part is concerned if:

(a) such person has not experienced a loss of consciousness within the previous twelve month period, and such person submits a physician's or nurse practitioner's statement confirming such fact; or

(b) such person has experienced loss of consciousness within the

previous twelve month period, if such loss of consciousness was due solely to a directed change in medication by a physician or nurse practitioner, and such person submits a physician's or nurse practitioner's statement confirming such fact and the Commissioner acting after recommendation of his medical consultant finds no grounds to disagree with or to question the physician's or nurse practitioner's statement; or

(c) such person has experienced loss of consciousness within the previous twelve month period, if such person submits a physician's or nurse practitioner's statement confirming the physician's or nurse practitioner's awareness of any or all such incidents and notwithstanding such history, the physician or nurse practitioner recommends licensing by making a positive statement that, in his or her opinion, the condition will not interfere with such person's safe operation of a vehicle on the public highway, and the Commissioner acting after recommendation of his or her medical consultant finds no grounds to disagree with or to question the physician's or nurse practitioner's statement.

Subdivisions (a), (c) and (d) of section 9.4 are amended to read as follows:

(a) Upon receipt of an application for an original driver license, or for renewal of a driver license, or upon a scheduled review of a required physician's or nurse practitioner's statement, or upon receipt of evidence confirmed by a departmental hearing or investigation that a licensee has experienced loss of consciousness, if the Commissioner has not received an acceptable physician's or nurse practitioner's statement as defined in subdivision (d) of this section, or, if such a statement is received but the Commissioner's medical consultant finds grounds to disagree with or to question a recommendation of such physician or nurse practitioner made in accordance with the provisions of Section 9.3 of this part, the Commissioner shall, unless he or she deems such person's operation of a motor vehicle on a public highway to be an immediate hazard, send to such person a proposed denial or suspension of license, whichever is appropriate, with an offer to withhold such action until after a department hearing, if such hearing is requested by such person. The failure of such person to reply to the Commissioner, either accepting the denial or suspension or requesting a hearing, within thirty days of the date of such notice shall result in the imposition of the denial or suspension.

(c) For the purposes of this section, a person's operation on the public highway shall be deemed to constitute an immediate hazard if the Commissioner has received evidence from a physician or nurse practitioner that the person's condition does, in the opinion of the physician or nurse practitioner, create an immediate hazard if such person were to operate a vehicle on the public highway or, if the Commissioner has received evidence that such person's loss of consciousness has caused or contributed to a motor vehicle accident.

(d) In order for a physician's or nurse practitioner's statement to be acceptable, such statement must be submitted by a licensed physician or nurse practitioner who has attended or examined the patient within 120 days of the date of such statement, and if required by the Commissioner, may be required to be submitted by a physician licensed in a specialty appropriate to the condition in question.

Section 9.5 is amended to read as follows:

9.5 Submission of physician's or nurse practitioner's statements as a condition for licensing. The Commissioner may require the submission of physicians' or nurse practitioner's statements on a scheduled basis as a condition of licensing in those cases in which a person has experienced loss of consciousness, but meets standards of fitness as set forth in this Part, and the physician's or nurse practitioner's statement indicates that medication is being taken to meet such standards and, in the opinion of either the submitting physician, or nurse practitioner or the medical consultant to the Commissioner, the submission of such scheduled physician's or nurse practitioner's statements is considered necessary or desirable. However, this requirement shall not be applicable in any case where an individual has been seizure free without medication for a minimum period of one year and submits a physician's or nurse practitioner's statement.

Subdivision (b) of section 9.6 is amended to read as follows:

(b) Judicial review of a determination made by the Commissioner

after a hearing held pursuant to this part may be had without an administrative appeal being made pursuant to Article [3-B] 3-A of the Vehicle and Traffic Law.

**Text of proposed rule and any required statements and analyses may be obtained from:** Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.state.ny.us

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.state.ny.us

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

#### Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 502(1) provides that an applicant for a driver's license shall provide proof of fitness as may be required by the Commissioner. VTL section 510(3)(b) provides that the Commissioner may suspend or revoke a driver's license due to a physical or mental disability of the licensee. Section 6902(3) of the Education Law authorizes nurse practitioners to perform diagnostic and treatment procedures as part of a written practice agreement with a supervising physician.

2. Legislative objectives: The proposed rule achieves two legislative objectives. First, it accords with section 502(1) of the Vehicle and Traffic Law, which requires driver license applicants to meet fitness standards established by the Commissioner. By allowing nurse practitioners, as well as physicians under the current practice, to review a licensee's physical condition where a licensee has experienced loss of consciousness within the previous twelve months, the Department would be substantially expanding the pool of qualified medical professionals who may evaluate whether such license holders pose a highway safety risk. Second, in accordance with Education Law section 6902(3), the Department is authorizing nurse practitioners to engage in diagnostic procedures permitted by such statute, in relation to loss of consciousness assessments.

3. Needs and benefits: This proposed regulation is necessary to permit nurse practitioners to evaluate drivers who have suffered a loss of consciousness within the previous twelve months and who seek to retain their license or have their license reinstated. Currently, the Department learns that a motorist has suffered a loss of consciousness from the licensee or license applicant, a treating physician or a law enforcement entity after an accident. Thereafter, the Department requires the motorist to present proof of his or her fitness to safely operate a motor vehicle, if he or she has had an episode of loss of consciousness within the previous twelve months, by having the motorist's physician submit the MV-80U.1 form, "Physician's Statement for Medical Review Unit." The Department's medical consultant may accept or reject the physician's conclusion, and if rejected, the Department may permissively suspend the motorist's license, pursuant to VTL section 510(3)(b), after affording the motorist an opportunity to be heard.

Under the proposed regulation, a nurse practitioner would also be authorized to conduct the examination of the motorist and evaluate whether he or she could safely operate a motor vehicle. As with a physician's assessment, our medical consultant may accept or reject the conclusion of the nurse practitioner, or the consultant may require that a specialist, such as a neurologist, also evaluate the motorist.

Since Education Law section 6902(3) provides that a nurse practitioner is authorized to perform diagnostic procedures as part of a written agreement with a supervising physician, this rule is consistent with the intent of this provision. This rule will serve to expand the pool of medical professionals who are qualified to perform loss of consciousness evaluations without diminishing the Department's commitment to highway safety.

Costs:

a. Cost to regulated parties and customers: There are no costs to regulated parties or customers.

b. Costs to the agency and local governments: There is no cost to

local governments. The Department will revise the MV-80U.1 Form, "Physician's Statement for Medical Review" to include references to nurse practitioners where appropriate. This shall be done at a cost of about \$500.00.

5. Local government mandates: There are no local government mandates.

6. Paperwork: The Department will revise the MV-80U.1 Form, "Physician's Statement for Medical Review" to include references to nurse practitioners where appropriate. As currently required, the person seeking licensing will have to have the MV-80U.1 filled out and filed with the Department. This form is available on the Department's website or at any local Department of Motor Vehicles Office.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: Historically, the Department has only permitted a physician to complete the MV-80U.1 Form, "Physician's Statement for Medical Review." After a review of Education Law section 6902(3), however, and in consultation with the Nurse Practitioner Association of New York State, the Department concluded that nurse practitioners are both qualified and authorized to evaluate loss of consciousness cases. A no action alternative was considered but was rejected due to the reasons cited above.

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

10. Compliance schedule: The Department will be able to modify the MV-80U.1 form prior to final adoption of the rule, so that compliance would begin immediately.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not attached, because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

#### Job Impact Statement

A Job Impact Statement is not submitted with this rule, because it will not have an adverse impact on job creation or job development in New York State.

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## Public Service Commission

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Major Gas Rate Filing

I.D. No. PSC-51-09-00025-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 Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service — P.S.C. No. 16.

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

**Subject:** Major gas rate filing.

**Purpose:** To consider a proposal to increase annual gas delivery revenues by approximately \$62.9 million.

**Public hearing(s) will be held at:** 10:30 a.m., March 3, 2010 at Department of Public Service, 3rd Fl. Hearing Rm., Three Empire State Plaza, Albany, NY.\*

\* On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent

scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-E-0717 and/or Case 09-G-0718.

**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 Rochester Gas and Electric Corporation (RG&E) which would increase its annual gas delivery revenues by about \$62.9 million or 47.1%. The statutory suspension period for the proposed filing runs through August 13, 2010. The Commission may adopt in whole or in part or reject terms set forth in RG&E's proposal, a multi-year rate plan, and/or other negotiated proposals.

**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](mailto: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: [Secretary@dps.state.ny.us](mailto:Secretary@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.

(09-G-0718SP1)

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Major Electric Rate Filing

**I.D. No.** PSC-51-09-00027-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 New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service — P.S.C. Nos. 119, 120 and 121.

**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 \$169.7 million.

**Public hearing(s) will be held at:** 10:30 a.m., March 3, 2010 at Department of Public Service, Third Fl. Hearing Rm., Three Empire State Plaza, Albany, NY.\*

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-E-0715 and/or Case 09-G-0716.

**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 New York State Electric & Gas Corporation (NYSEG) which would increase its annual electric delivery revenues by about \$169.7 million or 26.4%. The statutory suspension period for the proposed filing runs through August 13, 2010. The Commission may adopt in whole or in part or reject terms set forth in NYSEG's proposal, a multi-year rate plan, and/or other negotiated proposals.

**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](mailto: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: [Secretary@dps.state.ny.us](mailto:Secretary@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.

(09-E-0715SP1)

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Major Electric Rate Filing

**I.D. No.** PSC-51-09-00028-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 Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service — P.S.C. Nos. 18 and 19.

**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 \$87.4 million.

**Public hearing(s) will be held at:** 10:30 a.m., March 3, 2010 at Department of Public Service, Third Fl. Hearing Rm., Three Empire State Plaza, Albany, NY.\*

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-E-0717 and/or Case 09-G-0718.

**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 Rochester Gas and Electric Corporation (RG&E) which would increase its annual electric delivery revenues by about \$87.4 million or 23.9%. The statutory suspension period for the proposed filing runs through August 13, 2010. The Commission may adopt in whole or in part or reject terms set forth in RG&E's proposal, a multi-year rate plan, and/or other negotiated proposals.

**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](mailto: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: [Secretary@dps.state.ny.us](mailto:Secretary@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.

(09-E-0717SP1)

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

**Major Gas Rate Filing**

**I.D. No.** PSC-51-09-00032-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 New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedules for Gas Service — P.S.C. Nos. 87, 88 and 90.

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

**Subject:** Major gas rate filing.

**Purpose:** To consider a proposal to increase annual gas delivery revenues by approximately \$63.4 million.

**Public hearing(s) will be held at:** 10:30 a.m., March 3, 2010 at Department of Public Service, Third Fl. Hearing Rm., Three Empire State Plaza, Albany, NY.\*

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-E-0715 and/or Case 09-G-0716.

**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 New York State Electric & Gas Corporation (NYSEG) which would increase its annual gas delivery revenues by about \$63.4 million or 39.5%. The statutory suspension period for the proposed filing runs through August 13, 2010. The Commission may adopt in whole or in part or reject terms set forth in NYSEG's proposal, a multi-year rate plan, and/or other negotiated proposals.

**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](mailto: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: [Secretary@dps.state.ny.us](mailto:Secretary@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.

(09-G-0716SP1)

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

**The New York State Reliability Council's Establishment of an Installed Reserve Margin of 18%**

**I.D. No.** PSC-51-09-00026-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 adopt, modify, or reject, in whole or in part, an Installed Reserve Margin of 18% established by the New York State Reliability Council for the Capability Year beginning May 1, 2010, and ending April 30, 2011.

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

**Subject:** The New York State Reliability Council's establishment of an Installed Reserve Margin of 18%.

**Purpose:** To adopt an Installed Reserve Margin for the Capability Year beginning May 1, 2010, and ending April 30, 2011.

**Substance of proposed rule:** The Public Service Commission (PSC) is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin (IRM) of 18% established by the New York State Reliability Council for the Capability Year beginning May 1, 2010, and ending April 30, 2011. The IRM is based on the Technical Study Report entitled "New York Control Area Installed Capacity Requirements for the Period May 2010 Through April 2011" (Report), dated December 4, 2009.

The Report is available on the internet at: <http://www.nysrc.org/pdf/MeetingMaterial/ECMeetingMaterial/ECagenda128/2010%20IRM%2012%201%2009%20Draft%20Report.pdf> [http://www.nysrc.org/NYSRC\\_\\_NYCA\\_\\_ICR\\_\\_Reports.asp](http://www.nysrc.org/NYSRC__NYCA__ICR__Reports.asp)

**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](mailto: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: [Secretary@dps.state.ny.us](mailto:Secretary@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-E-0088SP4)

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

**Rules and Guidelines for the Exchange of Retail Access Data between Jurisdictional Utilities and Eligible ESCOs**

**I.D. No.** PSC-51-09-00029-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 proposed revisions to the New York EDI standards and other related documents necessary to implement a contest period submitted by Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, section 5(2)

**Subject:** Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCOs.

**Purpose:** To revise the uniform Electronic Data Interchange Standards and business practices to incorporate a contest period.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, proposed revisions in the New York EDI standards and other related documents necessary to implement a contest period submitted by Consolidated Edison Company of New York, Inc.

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

(98-M-0667SP59)

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

**Waiver or Modification of Capital Expenditure Condition of Merger**

**I.D. No.** PSC-51-09-00030-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 the request of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to waive certain Capital Expenditure requirements imposed on their mergers with Iberdrola, S.A.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 70

**Subject:** Waiver or modification of Capital Expenditure condition of merger.

**Purpose:** To allow the companies to expend less funds for capital improvement than required by the merger.

**Substance of proposed rule:** In approving the merger of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation with Iberdrola, S.A., (the companies) the Commission imposed on the companies a minimum amount of capital expenditures to be made over a two-year period. The Companies have requested a waiver, or some other modification, of such condition. The Commission may grant, deny, or modify, in whole or in part, such a waiver or modification of the condition.

**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: Secretary@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-M-0906SP4)

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

**Authorization of a Change in the Eligible Biomass Rules for the RPS Program**

**I.D. No.** PSC-51-09-00031-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 adoption of a November 6, 2009 petition of Niagara Generation, LLC to allow eligible biomass from construction debris to be separated at Material Reclamation Facilities, rather than solely biomass that is "source separated."

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

**Subject:** Authorization of a change in the eligible biomass rules for the RPS Program.

**Purpose:** To encourage the deployment of renewable electric generation resources.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program, specifically the Biomass Guidebook as proposed by petition of Niagara Generation, LLC, dated November 6, 2009, to allow clean wood separated from construction and demolition waste at material Reclamation facilities (MRFs) to be eligible for use as biomass fuel in the RPS program. Currently, eligible biomass wood from construction and demolition waste must be source separated. (See NYS RPS Biomass Guidebook at p. 4.)

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

(09-E-0843SP1)

**State University of New York**

**NOTICE OF ADOPTION**

**Amendments to the Traffic and Parking Regulations of the University at Albany, State University of New York**

**I.D. No.** SUN-35-09-00002-A

**Filing No.** 1341

**Filing Date:** 2009-12-02

**Effective Date:** 2009-12-23

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

**Action taken:** Amendment of section 561.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Amendments to the traffic and parking regulations of the University at Albany, State University of New York.

**Purpose:** To increase parking fines, establish late fees, and authorize an exemption for veterans attending the University at Albany.

**Text or summary was published in** the September 2, 2009 issue of the Register, I.D. No. SUN-35-09-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Janet M. Thayer, Associate Counsel, University at Albany, 1400 Washington Ave., UNH 104, Albany, NY 12222, (518) 956-8050, email: jthayer@uamail.albany.edu

**Assessment of Public Comment**

The agency received no public comment.

**Urban Development  
Corporation**

**EMERGENCY  
RULE MAKING**

**Economic Development and Job Creation Throughout New York State and Preservation of Public Health and Public Safety**

**I.D. No.** UDC-51-09-00006-E

**Filing No.** 1348

**Filing Date:** 2009-12-04

**Effective Date:** 2009-12-04

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

**Action taken:** Addition of Part 4245 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); and L. 1968, ch. 174; L. 2006, ch. 109

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

**Specific reasons underlying the finding of necessity:** Effective provision of economic development assistance in accordance with the enabling legislation (including recent amendments thereto) requires the creation of the Rule to address dangers posed by vacant, abandoned, surplus or condemned buildings.

**Subject:** Economic development and job creation throughout New York State and preservation of public health and public safety.

**Purpose:** The Rule provides the framework for administration of the Restore New York's Communities Initiative.

**Text of emergency rule:** RESTORE NEW YORK'S COMMUNITIES INITIATIVE

#### Section 4245.1 Purpose

These regulations set forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the Urban Development Corporation Act (the "Act"). The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing financial assistance to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

#### Section 4245.2 Definitions

For purposes of these regulations, the terms below will have the following meanings:

(a) "deconstruction" shall mean the careful disassembly of buildings of architectural or historic significance with the intent to rehabilitate, reconstruct the building or salvage the material disassembled from the building;

(b) "economically distressed community" shall mean communities determined by the Commissioner of Economic Development based on criteria that are indicative of economic distress including numbers of persons receiving public assistance, poverty rates, unemployment rates, rate of employment decline, population loss, per capita income change, decline in economic activity and private investment to the extent that they are measurable at the municipal level and such other criteria indicators as the Commissioner deems appropriate to be in need of economic assistance;

(c) "municipality" shall mean a municipal subdivision that is a city, town, or village;

(d) "property assessment list" shall mean a list (in such form as the Corporation may require) compiled by a municipality containing description (location, size and residential or commercial nature of each building, and whether the building is proposed to be demolished, deconstructed, rehabilitated or reconstructed) and an assessment of whether each building is vacant, abandoned, surplus or condemned within its jurisdiction;

(e) "reconstruction" shall mean the construction of a new building which is similar in architecture, size and purpose to a previously existing building at such location, provided, however, to the extent possible, all such reconstruction program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

(f) "rehabilitation" shall mean structural repairs, mechanical systems repair or replacement, repairs related to deferred maintenance, emergency repairs, energy efficiency upgrades, accessibility improvements, mitigation of lead based paint hazards, and other repairs which result in a significant improvement to the property, provided, however, to the extent possible, all such rehabilitation program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

#### Section 4245.3 Request for Proposals

The Corporation may, within available appropriations, issue requests for proposals to municipalities at least once per fiscal year to provide grants to municipalities, for demolition, deconstruction, reconstruction, and rehabilitation projects set forth in a property assessment list submitted by the municipality.

#### Section 4245.4 Eligibility

(a) To be eligible for the demolition and deconstruction program or rehabilitation and reconstruction program assistance, as described in sections 4245.5 and 4245.6 of this Part, municipalities must conduct an assessment of vacant, abandoned, surplus or condemned buildings in communities within their jurisdiction. Such real property may include both residential and commercial real properties. Such properties shall be selected for the purpose of revitalizing urban centers, encouraging commercial investment and adding value to the municipal housing stock. Such information shall be set forth in the property assessment list. Such properties shall be published in a local daily newspaper for no less than three consecutive days. Additionally, the municipality shall conduct a public hearing in the municipality where the buildings identified on the property assessment list are located. Such public hearing shall be held before the Corporation accepts an application.

(b) No full-time employee of the State or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the State shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

#### Section 4245.5 Demolition and Deconstruction Projects

Demolition and deconstruction projects for real property in need of demolition or deconstruction on the property assessment list may receive grants of up to twenty thousand dollars per residential real property. The Corporation shall determine the cost of demolition and deconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of demolition and deconstruction in the establishment of maximum grant awards.

#### Section 4245.6 Rehabilitation and Reconstruction Projects

Rehabilitation and reconstruction projects for real property in need of rehabilitation or reconstruction on the property assessment list may receive grants of up to one hundred thousand dollars per residential real property. The Corporation shall determine the cost of rehabilitation and reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of rehabilitation and reconstruction in the establishment of maximum grant awards. Provided, however, to the extent possible, all such rehabilitation and reconstruction projects real property shall be rehabilitated or reconstructed in a manner that is architecturally consistent with nearby and adjacent properties or consistent with a local revitalization or urban development plan. Provided, further, such grants may be used for site development needs including but not limited to water, sewer and parking as specified in the grant agreement entered into between the Corporation and the municipality.

#### Section 4245.7 Required Considerations and Priorities

In considering the awarding of initiative grant assistance, the Corporation:

(a) shall review all qualified applications to determine the awards to be made pursuant to sections 4245.5 and 4245.6 of this Part and shall, to the fullest extent possible, provide such assistance in a geographically proportionate manner throughout the State based on the qualified applications received pursuant to this section.

(b) shall give priority in granting such assistance to eligible properties that have approved applications or are receiving grants pursuant to other state or federal redevelopment, remediation or planning programs including, but not limited to, the brownfield opportunity areas program adopted pursuant to section 970-r of the General Municipal Law or empire zone development plans pursuant to article 18-B of the General Municipal Law.

(c) shall give priority to properties in economically distressed communities.

#### Section 4245.8 Required Matching Contribution

A municipality that is granted an award or awards under this section shall provide a matching contribution of no less than ten percent of the aggregated award or awards amount. Such matching contribution may be in the form of a financial and/or in kind contribution by the municipality, a government entity, or a private entity. In establishing the matching contribution, a municipality's financial contribution may include grants from federal, state and local entities. In kind contributions may include but shall not be limited to the efforts of municipalities to conduct an inventory and assessment of vacant, abandoned, surplus, condemned, and deteriorated properties and to manage and administer grants pursuant to sections 4245.5 and 4245.6 of this Part.

#### Section 4245.9 Application and Approval Process

(a) Promptly after receipt of the application, including the property assessment list, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Part. Applications shall be processed in full compliance with the applicable provisions of section 16-n of the Act as it may be in effect from time to time.

(b) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the demolition or deconstruction or rehabilitation or reconstruction of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accor-

dance with PACB requirements and policies. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

#### Section 4245.10 Confidentiality

To the extent permitted by law and regulations, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting initiative assistance from the Corporation, which is submitted by or on behalf of such person or entity to the Corporation in connection with an application for initiative assistance, shall be confidential and exempt from public disclosures.

#### Section 4245.11 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's Affirmative Action Department, which shall, in consultation with the applicant and/or proposed recipient of the Program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the Public Authorities Law, article 15-A of the Executive Law, and section 6254(11) of the Unconsolidated Laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 3, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Chapter 109, Laws of 2006 (Unconsolidated Laws, section 6266-n. Another Unconsolidated Laws section 6266-n was added by another act) authorized the Urban Development Corporation, d/b/a Empire State Development Corporation (the "Corporation") to implement the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities. Section 5(4) of the New York State Urban Development Corporation (UDC) Act (Unconsolidated Laws, section 6255(4)), which was originally enacted as Chapter 174 of the Laws of 1968, authorizes the Corporation to make rules and regulations with respect to its projects, operations, properties and facilities, in accordance with section 102 of the Executive Law.

##### 2. Legislative Objective:

The objective of the statute authorizing the Program is to revitalize urban areas and stabilize neighborhoods to attract industry and people to urban areas thereby improving municipal finances, giving municipal governments the wherewithal to grow their tax and resource base and attract individuals, families, industry and commercial enterprises, and lessen distressed municipalities' reliance on state aid, achieving stable and diverse economies and vibrant communities.

##### 3. Need and Benefits:

The Program's legislation assists the revitalization of urban areas and stabilization of neighborhoods throughout the State by providing the following types of assistance:

a) Demolition and Deconstruction Grants of up to twenty thousand dollars per residential real property in need of demolition or deconstruction on the property assessment list.

b) Rehabilitation and Reconstruction Grants of up to one hundred thousand dollars per residential real property in need of rehabilitation or reconstruction on the property assessment list.

c) Demolition and Deconstruction Grants and Rehabilitation and Reconstruction Grants for commercial properties. The Corporation shall determine the cost of demolition/deconstruction and rehabilitation/reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly. The Corporation shall also consider geographic differences in the establishment of maximum grant awards.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the UDC Act. The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for

the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

1. Evaluation Criteria - The Corporation will review and evaluate applications for assistance pursuant to eligibility requirements and criteria set forth in the UDC Act and the Rule.

2. Application procedure - Approval of applications shall be made only upon a determination by the Corporation:

(i) that the proposed project would promote the economic health of the State by facilitating the revitalization of urban areas and the stabilization of neighborhoods within a political subdivision or region of the State or would enhance or help to maintain the economic viability the State.

(ii) that the project would be unlikely to take place in the State without the requested assistance; and

(iii) that the project is reasonably likely to accomplish its stated objectives and that the likely benefits of the project exceed costs.

##### 4. Costs:

The funding source is appropriation funds (2006-07 Supplemental Bill (S8470/A12044) page 227, lines 8-14). \$150,000,000 is available for 2008. Discussions regarding funds were conducted by Ray Richardson on behalf of the Corporation and Andrew Kennedy on behalf of the Division of Budget.

##### 5. Local Government Mandates:

There is no imposition of any mandates upon local governments by the amended rule.

##### 6. Paperwork:

As instructed by the legislation, a Request for Proposal was developed for this program.

##### 7. Duplication:

There are no duplicative, overlapping or conflicting rules or legal requirements, either federal or state.

##### 8. Federal Standards:

There are no applicable federal government standards which apply.

##### 9. Alternatives:

The Corporation considered the alternative of not promulgating this rule. However, this rulemaking was necessary in order to complete aspects of the Program that were not addressed by the enacting legislation.

##### 10. Compliance Schedule:

No significant time will be needed for compliance.

#### Regulatory Flexibility Analysis

##### 1. Effect of the Rule:

The proposed Rule will provide the framework for administration of the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities.

The objective of the statute authorizing the Program is to promote the economic health of New York State by facilitating the creation or retention of jobs or increasing business activity within municipalities or regions of the State.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in Section 16-n of the Urban Development Corporation Act. The Program promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

The Program emphasizes the effective provision of economic development throughout New York State. Program funds are available only to municipalities. Small business will benefit from the aid to municipalities provided for this economic development. Therefore, the effect of the Rule on small business and local government will be beneficial.

##### 2. Compliance Requirement:

No affirmative acts will be needed to comply.

##### 3. Professional Services:

No professional services will be needed to comply.

##### 4. Compliance Costs:

No initial costs will be needed to comply with the proposed Rule.

##### 5. Economic Feasibility:

The Rule makes the Program assistance feasible for local governments, by expressly stating that municipalities are eligible for certain types of Program assistance while permitting local governments access to all other types of Program assistance for which they may be eligible. It is also economically feasible for local governments to coordinate their respective economic development and job retention and attraction efforts.

##### 6. Minimizing Adverse Impact:

The revised rule will have no adverse economic impact on small business or local governments.

**7. Small Business and Local Participation:**

Program funds are available only to municipalities. Comments were received from applicants under the Program including Albany, Syracuse, Yonkers, Buffalo, Utica, Watervliet, Rochester, Binghamton, Elmira, Wappingers Falls and Amherst. The response was overwhelmingly positive. There were some requests to reduce the requirements of the application process. However, given that the Rule's application requirements are prescribed by the enabling legislation, the corporation has determined that this is not possible.

There were also requests to expand the types of property covered and the types of entities eligible for assistance. However these are legislative matters beyond the scope of the corporation's powers.

***Rural Area Flexibility Analysis***

A Rural Area Flexibility Analysis Statement is not submitted because the amended rule will not impose any adverse economic impact, reporting requirements, record keeping or other compliance requirements on public or private entities in rural areas.

***Job Impact Statement***

A JIS is not submitted because 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. In fact, the proposed amended rule should have a positive impact on job creation because it will facilitate administration of and access to the Empire State Economic Development Fund, which should improve the opportunities for the creation of jobs throughout the State by encouraging business expansion and attraction.