

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.

Department of Correctional Services

EMERGENCY RULE MAKING

Standards of Inmate Behavior, Inmate Correspondence Program and Privileged Correspondence

I.D. No. COR-30-09-00018-E

Filing No. 1168

Filing Date: 2009-10-08

Effective Date: 2009-10-08

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

Action taken: Amendment of sections 270.2, 720.3, 720.4, 721.2 and 721.3 of Title 7 NYCRR.

Statutory authority: Correction Law, sections 112, 137, 70 and 18

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. This emergency rule is in response to a scheme whereby inmates have fraudulently utilized provisions of the Uniform Commercial Code (UCC) to file baseless liens with the Secretary of State against Department employees and others. Under this scheme, an inmate asserts a “copyright” over his or her name; files a UCC-1 financing statement that asserts a claim over the inmates “property”, which in this case is him/herself. The inmate then makes demands to be compensated for the unauthorized use of his or her property (i.e., every time an officer writes down the “copyrighted” name) or for the illegal holding of his or her property, which in this case is the

inmate him/herself. When the demands are ignored, the inmate claims a right to assert a UCC lien against the staff member to whom the demand was made. This has the potential to have a severe detrimental effect on the individual’s credit or to cause them significant financial hardship. Since the adoption of the original emergency rule, the Department has discovered prohibited materials in the possession of at least forty (40) inmates at nineteen (19) of the Department’s facilities. In each case the documents were consistent with the bogus filings associated with the “Redemptive Process” scheme that may lead to the filing of a false lien.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the process and procedure with respect to the processing of correspondence from the Secretary of State, Department of State, Corporation Division or Uniform Commercial Code of any state and the processing of outgoing correspondence to such entities; to provide notice that unauthorized Uniform Commercial Code financing statements and related materials and materials pertaining to the “Redemptive Process,” “Acceptance for Value” presentments or documents indicating copyright of a name are prohibited within incoming mail and of the applicable procedure when such materials are found; to prohibit an inmate from filing any document which purports to create a lien without authorization; and to prohibit the unauthorized possession of Uniform Commercial Code financing statements and associated documents and materials pertaining to a scheme involving an inmate’s “strawman,” the “Redemptive Process,” “Acceptance for Value” presentments or documents indicating copyright of a name by an inmate.

Subject: Standards of Inmate Behavior, Inmate Correspondence Program and Privileged Correspondence.

Purpose: To revise correspondence procedures and inmate rules with respect to the processing/possession of UCC related documents.

Text of emergency rule: Amend section 720.3(c).

(c) Except for oversize envelopes and parcels, [and] inmate-to-inmate correspondence, and *correspondence specified in § 721.3(a)(2) of this Chapter*, outgoing correspondence may be sealed by the inmate.

Amend section 720.3(e).

(e) Outgoing correspondence, *except as specified in § 721.3(a)(2) of this Chapter*, shall not be opened, inspected, or read without express written authorization from the facility superintendent.

Add new section 720.4(d)(7).

(7) *Uniform Commercial Code (UCC) Financing Statements. Any UCC Article 9 form, including but not limited to any financing statement (UCC1, UCC1Ad, UCC1AP, UCC3, UCC3Ad, UCC3AP, UCC1Cad), correction statement (UCC5) or information request (UCC11), whether printed, copied, typed or hand written, or any document concerning a scheme involving an inmate’s “strawman.” “House Joint Resolution 192 of 1933,” the “Redemptive Process,” “Acceptance for Value,” or document indicating copyright of an inmate’s name is prohibited absent prior written authorization from the superintendent. All such material and any other material contained within the correspondence shall be examined by the superintendent in consultation with Counsel’s Office and may be withheld for investigation. An inmate may request authorization from the superintendent to receive specific materials by providing the superintendent with specific, legitimate legal reasons why such materials are required.*

Amend sections 721.2(b)(4) and 721.2(b)(5) and adds new subdivision (6) to section 721.2(b) as follows:

(4) mail received from the State Education Department, excluding materials sent to inmates marked “legal mail” by the New York State Library’s Prisoner Services Project; [and]

(5) mail received from any county or local tax assessor or clerk, except for a clerk of a court[.]; and

(6) *mail received from the secretary of state, department of state, corporation division or uniform commercial code unit of any state.*

Amend section 721.3(a)(2).

(2) Outgoing privileged correspondence may be sealed by the inmate, and such correspondence shall not be opened, inspected, or read without express written authorization from the facility superintendent as specified in subdivision (c) of this section. *Notwithstanding the foregoing or any other provision of this Chapter, outgoing mail to the secretary of state, department of state, corporation division or uniform commercial code unit of any state shall be submitted by the inmate unsealed and is subject to inspection.*

Add new section 270.2(B)(8) iv

iv	107.21	<i>An inmate shall not file or record any document or instrument of any description which purports to create a lien or record a security interest of any kind against the person or property of any officer or employee of the Department, the State of New York or the United States absent prior written authorization from the superintendent or a court order authorizing such filing.</i>	II, III
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Add new section 270.2(B)(14) xx

xx	113.30	<i>An inmate shall not possess any Uniform Commercial Code (UCC) Article 9 form, including but not limited to any financing statement (UCC1, UCC1Ad, UCC1AP, UCC3, UCC3Ad, UCC3AP, UCC1CAd), correction statement (UCC5) or information request (UCC11), whether printed, copied, typed or hand written, or any document concerning a scheme involving an inmate's "strawman," "House Joint Resolution 192 of 1933," the "Redemptive Process," "Acceptance for Value" presentments or document indicating copyright or attempted copyright of an inmate's name absent prior written authorization from the superintendent.</i>	II, III
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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. COR-30-09-00018-EP, Issue of July 14, 2009. The emergency rule will expire December 6, 2009.

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Regulatory Impact Statement

Statutory Authority

Section 112 of Correction Law grants the Commissioner the management and control of the correctional facilities in the department. He shall make such rules and regulations, not in conflict with the statutes of the state. Section 137(2) of the Correction Law requires the Commissioner to provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein. Section 70(2) of the Correction Law provides in part that correctional facilities shall be used for the purpose of providing places of confinement of persons in the custody of the Department, that such use shall be suited to the objective of assisting sentenced persons to live as law abiding citizens, and that in establishing and maintaining Department facilities, the safety and security of the community must be considered. Section 18(2) of the Correction Law grants the Superintendent the authority to provide for the supervision and management of his or her correctional facility subject to the rules and statutory powers of the Commissioner, or rules approved by the Commissioner.

Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to promulgate such rules and regulations in the best interest of the public safety, in addition to the safe secure and orderly operation of the correctional facility.

Needs and Benefits

This action is in response to a scheme whereby inmates have fraudulently utilized Article 9 of the Uniform Commercial Code (UCC) to file baseless liens with the Secretary of State against Department employees, employees of state and local criminal justice agencies, judges and employees of the Office of the Attorney General. Under this scheme, an inmate asserts a "copyright" over his or her name; files a UCC-1 financing statement that asserts a claim over the inmate's "property", which in this case is him/herself. The inmate then makes demands to be compensated for the unauthorized use of his or her property (i.e., every time an officer writes down the "copyrighted" name) or for the illegal holding of his or her property, which in this case is the inmate him/herself. When the demands are ignored, the inmate claims a right to assert a UCC lien against the staff member to whom the demand was made.

The filing of such a baseless lien has the potential to have a severe detrimental effect on the individual's credit or to cause them significant financial hardship. This response is narrowly tailored to address this significant problem while providing a mechanism for an inmate with a legitimate legal need for such documents to request and obtain authorization to process such documents. Restriction from unauthorized possession of blank UCC Article 9 forms is intended to address the concern that an inmate may complete such forms and file false liens with the aid of third parties. This proposed body of rules is similar to rules in place in other jurisdictions such as Pennsylvania and Michigan.

The Department recognizes that although "imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment,...the Constitution sometimes permits greater restriction of such rights in a prison than it would elsewhere." *Beard v. Banks*, 548 U.S. 521, 528 (2006). The Second Circuit has noted that "under the First Amendment, prisoners have a right to 'the free flow of incoming and outgoing mail.'" *Johnson v. Goord*, 445 F. 3d 532, 534 (2d Cir.2006), citing *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir.2003). These and other decisions provide that a prisoner's right to receive and send mail may be regulated so long as the regulation is reasonably related to legitimate penological interests.

It is also noted that in *Lewis v. Casey*, the United States Supreme Court recognized that the right of access to the courts "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). The provisions of UCC Article 9 are generally inapplicable to such issues, thus this proposed rule does not impair an inmate from challenging his or her sentence, conviction and conditions of confinement.

The Department seeks to amend the process and procedure with respect to the processing of correspondence from the Secretary of State, Department of State, Corporation Division or Uniform Commercial Code of any state and the processing of outgoing correspondence to such entities; to provide notice that unauthorized Uniform Commercial Code financing statements and related materials and materials pertaining to the "Redemptive Process," "Acceptance for Value" presentments or documents indicating copyright of a name are prohibited within incoming mail and of the applicable procedure when such materials are found; to prohibit an inmate from filing any document which purports to create a lien without authorization; and to prohibit the unauthorized possession of Uniform Commercial Code financing statements and associated documents and materials pertaining to the "Redemptive Process," "Acceptance for Value" presentments or documents indicating copyright of a name by an inmate.

Costs

- a) To agency, the state and local governments: None.
- b) Costs to private regulated parties: None.
- c) This cost analysis is based upon the fact that this proposal merely amends the policy and procedure for handling inmate mail.

Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments. Correctional Facilities are State funded and operated.

Paperwork

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

Duplication

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

Alternatives

The Department crafted this rule as narrowly as possible. The Department previously enacted a broader rule declaring all unauthorized UCC financing statements and associated documents contraband. This rule specifically applies to UCC Article 9 materials and documents in connection with the "strawman" and "Redemptive Process" scheme. The Department of Correctional Services has communicated with the Department of State to inquire about any less restrictive measures and have been advised there are none.

Federal Standards

There are no applicable minimum standards of the Federal government.

Compliance Schedule

A version of this rule has been filed as an emergency. Because this more narrowly tailored rule is internal to the Department, compliance with the proposed rules will be achieved immediately.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal is clarifying the Department's procedures for the processing of privileged correspondence, it is providing instruction regarding the handling of regular correspondence that is determined to be contraband and is adding new rules to the Standards of Inmate Behavior.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal is clarifying the Department's procedures for the processing of privileged correspondence, it is providing instruction regarding the handling of regular correspondence that is determined to be contraband and is adding a new rules to the Standards of Inmate Behavior.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal is clarifying the Department's procedures for the processing of privileged correspondence, it is providing instruction regarding the handling of regular correspondence that is determined to be contraband and is adding new rules to the Standards of Inmate Behavior.

Division of Criminal Justice Services

NOTICE OF ADOPTION

Security Guard Instructor and Security Guard Training School Fees

I.D. No. CJS-33-09-00003-A
Filing No. 1177
Filing Date: 2009-10-13
Effective Date: 2009-10-28

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

Action taken: Amendment of sections 6028.4, 6028.6, 6028.8, 6029.1, 6029.2, 6029.3, 6029.5, 6029.6(b) and 6029.8 of Title 9 NYCRR.

Statutory authority: Executive Law, section 837(8-b) and (13); State Fiscal Year 2009-10 Budget

Subject: Security guard instructor and security guard training school fees.
Purpose: To establish application fees for approval of security guard training schools and certification of security guard instructors.

Text or summary was published in the August 19, 2009 issue of the Register, I.D. No. CJS-33-09-00003-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Education Department

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Education Department publishes a new notice of proposed rule making in the NYS Register.

Curricular Content for Registered Programs Leading to Licensure in Public Accountancy and Examination Requirements for Licensure

I.D. No.	Proposed	Expiration Date
EDU-41-08-00003-RP	October 8, 2008	October 8, 2009

State Board of Elections

EMERGENCY RULE MAKING

Voting Systems Standards Amendment to Remove Under Vote Notification by Ballot Counting Scanner

I.D. No. SBE-39-09-00024-E
Filing No. 1167
Filing Date: 2009-10-07
Effective Date: 2009-10-07

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

Action taken: Amendment of section 6209.2(a)(8) of Title 9 NYCRR.

Statutory authority: Election Law, sections 3-102, 7-201, 7-202, 7-203 and 7-204

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

Specific reasons underlying the finding of necessity: The Commissioners determined that it is necessary for the preservation of the general welfare that this amendment be re-adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act, effective immediately upon filing with the Department of State. This amendment is re-adopted as an emergency measure because time is of the essence and to adopt the regulation in the normal course of business would be contrary to the public interest as a necessary change in the agency's regulations would not be effective for the upcoming November 3rd General Election. The agency is under an Order of the United States District Court for the Northern District of New York in *United States of America v. State of New York, et al* (06-cv-263) to implement the Help America Vote Act across the state in a Pilot Program wherein numerous counties are using optical scan voting systems in the September Primary and November General Election in 2009. The previous regulation, 9 NYCRR § 6209.2(a)(8), would create serious violations of a voter's constitutional and statutory right to privacy in casting his/her vote in that it would be obvious that the voter chose not to vote in all races upon the ballot; would create delays in the voting process as the system must communicate the fact of the under vote to the voter and the voter must deal with the initial rejection of the voter's choice not to vote all races upon the ballot.

On July 15, 2009 the Commissioners adopted the original emergency regulation addressing this issue and same was filed with the Secretary of State on July 21, 2009 and will expire on October 19, 2009, some three (3) weeks before the General Election. A Notice of Proposed Rulemaking noticing the potential adoption of this regulatory change on a permanent basis has been filed with the Secretary of State (3-6090) and published in the State Register on September 30, 2009 (ID: SBE-39-09-0024-P).

In some areas of the state, Primary and Election Day are already days of long lines for voters without the unnecessary and intrusive delay the under vote notification feature would occasion, which notification is not required by any state or federal statute. Currently only Illinois requires a notice of under vote of its voting systems.

As these issues became apparent, staff from the State Board of Elections discussed this problem with the various County Boards of Elections at the June, 2009 Elections Commissioners Association Conference. County BOE Commissioners unanimously requested that the regulation be changed to eliminate this requirement.

There is no more important function in a democracy than the act of voting and as New York moves to a new system of voting, that system of voting should not be impaired by suspect regulations which violate a voter's constitutional right to privacy when voting. If this regulation is not amended the general welfare will be seriously impaired in that voting access and privacy will be impaired. The delays and lack of privacy which this emergency regulatory amendment addresses cannot be resolved on a permanent basis in time for the November 3rd General Election and the vendors of the new election system must know whether their final firmware and software builds should or should not include an under vote notification. Delays in implementing the new regulation will put compliance with the Court Ordered Pilot Project in jeopardy as the vendors and the counties will not have sufficient time to implement systems without the under vote notification feature and the only alternative is to conduct an election with a constitutionally suspect feature which impedes voter privacy and access to the polls.

Additionally, as the Primary Election was conducted under the emergency regulation adopted on July 15, 2009 machines have been programmed and inspectors trained under that regulation. To revert to the old regulation, upon the expiration of the emergency regulation on October 19, 2006, for the General Election would cause confusion and unnecessary costs in re-programming machines and retraining inspectors.

Subject: Voting Systems Standards amendment to remove under vote notification by ballot counting scanner.

Purpose: To ensure that voters have the right to a private vote and that voting will not be unduly delayed by unnecessary requirements.

Text of emergency rule: Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended by amending Part 6209.2(a)(8) Polling Place Voting System Requirements, to read as follows:

(8) In a DRE voting system, the system must prevent voters from overvoting and indicate to the voter specific contests or ballot issues for which no selection or an insufficient number of selections has been made. *A ballot marking device must prevent voters from overvoting and indicate to the voter specific contests or ballot issues for which no selection or an insufficient number of selections has been made.* [In a paper-based voting system, the system] *A ballot counting scanner must indicate to the voter specific contests or ballot issues for which an overvote [or undervote] is detected.*

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. SBE-39-09-00024-P, Issue of September 30, 2009. The emergency rule will expire December 5, 2009.

Text of rule and any required statements and analyses may be obtained from: Paul M. Collins, Esq, State Board of Elections, 40 Steuben Street, Albany, New York 12207, (518) 474-6367, email: pcollins@elections.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Election Law Section 3-102(1) provides for the State Board to promulgate rules and regulations relating to the administration of the election process; and Section 7-201(3) provides for the examination of voting systems to determine if they are safe for use in elections; and, if found not to be safe, a process is provided to rescind the approval to use such voting machine or system; Section 7-202(3) provides that the State Board of elections may establish, by regulation, additional standards for voting machines or systems. Section 7-203(2) authorizes the State Board of Elections to establish the minimum number of voting machines required at each polling place. This is necessary to ensure that the voting equipment used in New York State is safe, secure, reliable and will accurately record the votes cast on them in the elections in which they are used.

2. Legislative Objectives:

The Election Reform and Modernization Act of 2005 (Chapter 181 of the Laws of 2005), enacted a HAVA-required over vote notification requirement and authorized the State Board of Elections to implement that legislation. In implementing that legislation, the State Board of Elections also included an under vote notification not required by either federal or state statute. Upon subsequent reflection, the State Board of Elections has determined that the under vote notification regulation set forth in 9 NYCRR 6209.2(a)(8) is not statutorily authorized, will result in long lines at polling places and violates a voter's constitutional and statutory right to cast a vote in private.

3. Needs and Benefits:

The Commissioners further determined that it is necessary for the preservation of the general welfare that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act, effective immediately upon filing with the Department of State on July 21, 2009 for a period of ninety (90) days. This amendment is re-adopted as an emergency measure because time is of the essence. The agency is under an Order of the United States District Court for the Northern District of New York in *United States of America v. State of New York et al* (06-cv-263) to implement the Help America Vote Act across the state in a Pilot Program wherein numerous counties are using optical scan voting systems in the September Primary and November General Election in 2009. The prior regulation, 9 NYCRR § 6209.2(a)(8), would create serious violations of a voter's constitutional and statutory right to privacy in casting his/her vote in that it would be obvious that the voter chose not to vote in every race on the ballot; would create delays in the voting process as the system must communicate the fact of the under vote to the voter and the voter must deal with the initial rejection of the voter's choice not to vote all races upon the ballot. In some areas of the state, Primary and Election Day are already days of long lines for voters without the unnecessary and intrusive delay the under vote notification feature would occasion, which notification is not required by any state or federal statute. Currently only Illinois requires a notice of undervote of its voting systems.

As these issues became apparent, staff from the State Board of Elections discussed this problem with the various County Boards of Elections Commissioners at the June, 2009 Elections Commissioners Association Conference. County BOE Commissioners unanimously requested that the regulation be changed to eliminate this requirement.

There is no more important function in a democracy than the act of voting, and as New York moves to a new system of voting, that system of voting should not be impaired by suspect regulations which violate voters' constitutional right to privacy when voting.

To revert to the prior regulation upon the expiration of the July 15th emergency regulation on October 19, 2009, would mean that inspectors would have to be retrained and machines reprogrammed as the September Primary was conducted under the emergency regulation.

4. Costs:

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The re-adoption of this regulation on an emergency basis will minimize any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties finalized training of inspectors for the Fall 2009 Pilot Program under the emergency

regulation and this re-adoption will simply mean one less item that the inspectors will be called upon to explain to the voters as the notice of under vote feature will not be generated by ballot scanning devices.

5. Local Governmental Mandates:

The new emergency regulation creates uniform procedures that county boards of elections are mandated to follow pursuant to Election Law and these rules.

The re-adoption of the change will simplify what the counties are called upon to implement by removing the under vote notification requirement for ballot scanning devices in the change from lever to HAVA compliant machines for the 2009 Fall Pilot Program.

6. Paperwork:

The emergency regulation will not alter the paperwork burden upon the counties as established in the Election Law and other portions of 9 NYCRR Part 6209.

7. Duplication:

This regulatory change does not duplicate or overlap with any other federal or state regulations and in fact simplifies existing requirements.

8. Alternatives:

An alternative that was considered was make this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change. At the present time there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs were not changed in this emergency regulation.

9. Federal Standards:

There are no mandatory federal standards pertaining to under vote notification.

10. Compliance Schedule:

Compliance can be achieved in conjunction with the first election conducted by the county board of elections immediately after adoption. The State Board of Elections has been formulating and developing instructional tools and a training schedule for county board commissioners and their staff which were used for the Primary Election and will be further refined for the General Election.

Regulatory Flexibility Analysis

1. Effect of Rule:

There are 58 local boards of elections which must meet these requirements. This does not have any effect on small businesses.

2. Compliance Requirements:

County boards of elections and/or their election system vendors are required to remove or otherwise disable, in a manner prescribed by the State Board of Elections, the under vote notification feature of their ballot scanning equipment pursuant to this emergency regulation.

These regulations do not have any impact on small businesses.

3. Professional Services:

The county boards of elections and/or their designated staff or their election system vendors will be able to remove or otherwise disable the under vote notification on ballot scanning equipment to implement this emergency regulation.

4. Compliance Costs:

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The adoption of this regulation on an emergency basis in July minimized any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties had not as yet begun final training of inspectors for the Fall 2009 Pilot Program and this regulatory change simply meant one less item that the inspectors would be called upon to explain to the voters as a notice of under vote will not be generated by ballot scanning devices. To revert to the original regulation upon the expiration of the July 15th emergency regulation on October 19, 2009 would mean conducting the General Election under a different set of rules and would require re-programming of machines and retraining of inspectors.

5. Economic and Technological Feasibility:

It is anticipated that no new or advanced technology is required to remove or disable the under vote notification by ballot scanning devices to implement this emergency regulation.

As such, the regulation will not be cost prohibitive.

6. Minimizing Adverse Effect:

The Commissioners further determined that it is necessary for the preservation of the general welfare that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act, effective immediately upon filing with the Department of State. This amendment is adopted as an emergency measure because time is of the essence. The agency is under an Order of the United

States District Court for the Northern District of New York in United States of America v. State of New York et al (06-cv-263) to implement the Help America Vote Act across the state in a Pilot Program wherein numerous counties are using optical scan voting systems in the November General Election in 2009. The prior regulation, 9 NYCRR § 6209.2(a)(8), would create serious violations of a voter's constitutional and statutory right to privacy in casting his/her vote in that it would be obvious that the voter chose not to vote in all races upon the ballot; would create delays in the voting process as the system must the fact of the under vote to the voter and the voter must deal with the initial rejection of the voter's choice not to vote all races upon the ballot. In some areas of the state, Primary and Election Day are already days of long lines for voters without the unnecessary and intrusive delay the under vote notification feature would occasion, which notification is not required by any state or federal statute. Currently only Illinois requires a notice of under vote of its voting systems.

An alternative that was considered was to make this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change. At the present time, there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs was not changed in this emergency regulation or its re-adoption.

7. Small Business and Local Government Participation:

As these issues became apparent, staff of the State Board of Elections discussed this problem with the various County Boards of Elections at the June, 2009 Elections Commissioners Association Conference County BOE Commissioners unanimously requested that the regulation be changed to eliminate this requirement.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

There are 44 county boards of elections from counties which meet the definition of 'rural areas' as defined in the Executive Law § 481(7).

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

The statutory and regulatory requirement to remove the under vote notification by ballot scanning devices by county boards of elections from jurisdiction(s) in rural areas of this state will be governed by this emergency regulation consistent with uniform statewide standards.

It is anticipated that such county boards of elections and/or their designated staff or their election system vendors will be able to easily implement the requirements of this regulation.

3. Costs:

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The re-adoption of this regulation on an emergency basis will minimize any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties have not as yet begun final training of inspectors for the Fall 2009 Pilot Program and this regulatory change will simply mean one less item that the inspectors will be called upon to explain to the voters as notice of under vote will not be generated by ballot scanning devices. The September Primary was conducted under the emergency regulation which has been re-adopted for the General Election pending the adoption of the permanent regulatory change.

4. Minimizing adverse impact:

An alternative that was considered was making this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change. At the present time there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs was not changed in this emergency regulation. Rural counties will find it easy to comply with this emergency regulation as it removes rather than adds a mandate.

5. Rural area participation:

The State Board has participated in an Elections Commissioners Association session which was held in a rural county and rural county election commissioners were unanimous in their opinion that the requirement eliminated by this emergency regulation should be removed immediately so that the 2009 Pilot Program can go forward with as much ease as possible and as little burden upon rural counties as possible.

Job Impact Statement

It is evident from the nature and purpose of the rule that the re-adoption of this regulation amendment neither creates nor eliminates employment positions and/or opportunities, and therefore, has no adverse impact on employment opportunities in New York State.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

The Proposed Regulations are for the CWSRF Co-Administered by NYSDEC and the Environmental Facilities Corporation

I.D. No. ENV-43-09-00002-EP

Filing No. 1173

Filing Date: 2009-10-09

Effective Date: 2009-10-09

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

Proposed Action: Amendment of Part 649 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 15-0101, 15-0105, 15-0109, 15-0315, 15-0317, 15-1303; L. 1989, ch. 565

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

Specific reasons underlying the finding of necessity: The New York State Department of Environmental Conservation ("DEC") has determined that the attached amendment to the Part 649 of Title 6 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 has been adopted as an emergency measure as it is in the public interest to expeditiously use funds made available pursuant to the American Recovery and Reinvestment Act of 2009 ("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. If the rules are not adopted, projects that protect the public health will not be funded and therefore, not be built. The expected duration of such emergency is expected to last through the 90-day emergency time period and any subsequent 60-day extension of such emergency period while DEC initiates and 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 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 in place. 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. Criteria for Green Infrastructure projects will be included in the intended use plan. Given that the science of Green Infrastructure is changing, including the criteria in the intended use plan allows for development and use of the most up to date criteria for Green Infrastructure Projects. 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 ad-

ditional 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 7.8 percent as of February, 2009.

The need to address clean water infrastructure to protect water quality 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 adoption 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 CWSRF co-administered by NYSDEC and the Environmental Facilities Corporation.

Purpose: To set forth rules implementing the statutory provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA").

Public hearing(s) will be held at: 2:30 p.m., Dec. 3, 2009 at Department of Environmental Conservation, 625 Broadway, Albany, 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 emergency/proposed rule (Text is posted on the following State website: <http://www.dec.ny.gov/regs/4625.html>): I. SUBJECT:

The proposed revised regulations are for the New York State Clean Water Revolving Fund ("CWSRF"), Section 1285-j of the Public Authorities Law ("PAL"), co-administered by the New York State Environmental Facilities Corporation ("EFC") and the New York State Department of Environmental Conservation ("DEC"), pursuant to Chapter 565 of the Laws of 1989.

II. PURPOSE:

The proposed regulations set forth rules and procedures whereby EFC and DEC implement the requirements and objectives of the American Recovery and Reinvestment Act of 2009 ("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 is an addition to the CWSRF Project Priority System ("PPS") for the purpose of including green infrastructure, water or energy efficiency improvements or other environmentally innovative activities as required by ARRA.

III. GENERAL SUBSTANCE:

It is proposed to amend the regulations found within 6 NYCRR Part 649 (Companion regulations found within 21 NYCRR Part 2602 will also be changed).

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 proposed amendments will also add school district and soil and water conservation district to the definition of recipient. 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. It is proposed 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 set out in a new section, and 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.

Section 2602.3(a) of EFC's proposed new regulations regarding the PPS make a cross reference to the PPS contained in Section 649.12 of DEC's regulations. It is proposed that the PPS be expanded to include a new category (Category G) for green infrastructure, water or energy efficiency improvements or other environmentally innovative activities in order to meet the objectives of the ARRA.

The proposed regulations provide for an annual allocation for Category G, including a project funding cap, to be determined annually by the Commissioner and described in the IUP. Through these changes, CWSRF funds may be made available to a variety of recipients (public and private) carrying out green infrastructure, water or energy efficiency improvements or other environmentally innovative activities.

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" and use of the acronym "Clean Water" Revolving Fund instead of "Water Pollution Control" Revolving Fund.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 6, 2010.

Text of rule and any required statements and analyses may be obtained from: Robert Simson, New York State Department of Environmental Conservation, Division of Water, 4th Floor, 625 Broadway, Albany, New York, 12233-3500, (518) 402-8233, email: rjsimson@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

When the Legislature enacted Chapter 565 of the Laws of 1989, it created the New York State Clean Water Revolving Fund ("CWSRF") and, in part, amended the State's Environmental Conservation Law ("ECL"), creating ECL Section 17-1909, and Public Authorities Law ("PAL") Section 1285-j, both of which set forth the provisions of the CWSRF. Under ECL Section 17-1909 and Section 1285 of the PAL, the New York State Department of Environmental Conservation ("DEC") and the New York State Environmental Facilities Corporation ("EFC") are given the statutory authority to administer the CWSRF. Under Section 17-1909 of the ECL, DEC is given the statutory authority to promulgate regulations for the purpose of carrying out its responsibilities with respect to the administration of the CWSRF. Pursuant to Section 1285, the Legislature provided that "moneys in the water pollution control revolving fund shall be applied by the corporation to provide financial assistance to municipalities for construction of eligible projects and, upon consultation with the director of the division of the budget and the commissioner, for such other purposes permitted by the Federal Water Pollution Control Act, as amended...." In addition, the Federal Clean Water Act of 1986 ("CWA") provided for the establishment, by each state, of a revolving fund, for certain identified water pollution control projects. During the last year, the economy has weakened significantly and the American Recovery and Reinvestment Act of 2009 ("ARRA") was signed into law amending the CWA in an effort to stimulate the economy through building environmental infrastructure.

2. LEGISLATIVE OBJECTIVES

In creating the CWSRF under the ECL and in Public Authorities Law ("PAL"), the Legislature directed DEC and EFC to provide assistance in support of the planning, development and construction of municipal water pollution control projects and other types of projects permitted by the CWA. ARRA provides federal funds through the CWSRF to create and retain jobs, to stimulate the economy and to promote green infrastructure. Pub.L. 111-5, § 4, February 17, 2009, 123 Stat. 115, Section. 3. Purposes and Principles, (a) Statement of Purposes; and Title VII, Environmental Protection Agency, State and Tribal Assistance Grants. DEC and EFC are amending the CWSRF 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 CWSRF to obtain ARRA funds and provide the same to CWSRF applicants.

These revisions conform the current CWSRF regulations with the requirements set forth in the 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. 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. 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. Pub.L. 111-5, § 4, February 17, 2009, 123 Stat. 115, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (1).

The proposed regulations amend the regulations found in 6 NYCRR Part 649 and, as appropriate, the 21 NYCRR Part 2602 companion regulations of EFC 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) expand the CWSRF Project Priority System ("PPS") to include a new category (Category G) for green infrastructure projects allowed under the ARRA and CWA; (iv) permit financing of pre-design planning costs prior to completion to further stimulate project development; (v) clarify provisions regarding project bypassing to meet the objectives of ARRA as to project readiness; and (vi) other administrative-oriented changes, including the changing of various definitions in the regulations for purposes of increasing flexibility in CWSRF financial terms and products to address current market conditions and meet the objectives of ARRA to stimulate the economy and help initiate projects. Pub.L. 111-5, § 4, February 17, 2009, 123 Stat. 115, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants; and Sections 1605: Buy American and Section 1606: Wage Rate Requirements.

3. NEEDS AND BENEFITS

As set forth above, ECL 17-1909 and PAL Section 1284(5), give DEC and EFC the authority to make and alter regulations to fulfill its purposes under its enabling statutes. Compliance with ARRA objectives and requirements will provide substantial additional Federal funds to the CWSRF to construct eligible clean water infrastructure projects and to reduce operational costs.

The proposed regulations allow DEC to use CWSRF funding for green infrastructure, water, and energy efficiency improvements or other environmentally innovative activities and projects, and allow EFC after notification to DEC 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. Pub.L. 111-5, § 4, February 17, 2009, 123 Stat. 115, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (1); These changes will provide greater access to funding for CWSRF recipients and stimulate environmental projects.

The use of ARRA funds in New York State will create and retain jobs, and stimulate the construction of authorized critical environmental infrastructure throughout New York State.

With the changes outlined above being made to the current CWSRF regulations, a clean up of the regulatory definitions will need to be done 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 CWSRF 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 CWSRF program is voluntary. Local governments are free to finance wastewater and green infrastructure projects in any manner permitted by law. Some local governments seek financing

from private financial institutions; others seek funds directly from the federal government; still others use existing capital. If a local government chooses to participate in New York State's CWSRF program to obtain lower than market interest rates and grants through programs administered by the New York State Environmental Facilities Corporation, the local government subjects itself to the existing requirements of 6 NYCRR Part 649 (the Department's regulations governing the State Clean Water State Revolving Fund) and the new requirements contained in ARRA that all of the iron, steel, and manufactured goods that will be used in the project should be produced in the United States; and the local government will be required to report to the Department on a monthly basis the number of jobs created and retained as a result of receiving ARRA funding under this contract. There are waivers and exceptions if necessary. The Proposed Rule Making contains no changes – other than ARRA mandated requirements – to the existing regulations.

6. PAPERWORK

The proposed amendments do not require any additional paperwork. Participation in the CWSRF program is voluntary. Anyone choosing to apply for financial assistance from the CWSRF would have to submit the documentation required for a complete application to EFC for its consideration, and meet the reporting requirements of ARRA, Pub.L. 111-5, § 4, February 17, 2009, 123 Stat. 115, Title XV. Accountability and Transparency, Subtitle A – Transparency and Oversight Requirements.

7. DUPLICATION

The proposed amendments to 21 NYCRR Part 2602 will be consistent, as applicable, with the DEC CWSRF regulations found in 6 NYCRR Part 649.

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 CWSRF 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, as cited above.

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 ("ARRA") will provide over \$432 million in additional funding for New York State Clean Water State Revolving Fund ("CWSRF") projects, including sewage treatment works, sewage collection systems and solid waste disposal 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 CWSRF funds into the New York State economy will preserve and create a significant number of jobs, primarily via funding for water pollution control construction projects. This will have commensurate positive effect on small businesses and consultants involved in the construction of environmental infrastructure projects, in particular engineering firms, financial consulting firms and attorneys. Small businesses are actively involved in the clean water construction industry in New York State. The rule will also expand the types of projects eligible to receive funding under the CWSRF 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 CWSRF. 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 clean 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 CWSRF by small businesses and local governments is entirely voluntary. Any reporting or record keeping imposed by this rule would solely be the result of their decision to participate in the CWSRF program. Such participation would require compliance with existing CWSRF reporting and record keeping requirements and any reporting and record keeping requirements imposed by the ARRA.

3. PROFESSIONAL SERVICES

Small businesses and local governments who voluntarily participate in

the CWSRF 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 record keeping should not vary depending on the size of such small business or local government. However, these reporting and record keeping 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 CWSRF 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 CWSRF program is entirely voluntary and any direct or indirect compliance requirements will result from small businesses and local governments applying for and seeking CWSRF 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 state services and counterproductive local tax increases. In addition, the New York State Department of Environmental Conservation (Department) considered whether there were any feasible approaches 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, the Department 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 emergency rulemaking, the Department will publish this Notice of Emergency Rulemaking and supporting documentation in the State Register and in the Environmental Notice Bulletin. The Department also intends to submit a notice of proposed rulemaking in the near future and will 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 sewage treatment facilities, sewage collection facilities, solid waste disposal facilities and other eligible Clean Water State Revolving Fund ("CWSRF") projects.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

Participation in the CWSRF 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 CWSRF program. Such participation would require compliance with existing CWSRF reporting and recordkeeping requirements and any reporting and record keeping requirements imposed by the American Recovery and Reinvestment Act of 2009 ("ARRA"). However, the provisions of the proposed rule, in and of themselves, will not require any additional reporting or record keeping 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 CWSRF 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 state services and counterproductive local tax increases. In addition,

tion, the New York State Department of Environmental Conservation (Department) 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, the Department 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 emergency rulemaking, the Department will publish this Notice of Emergency Adoption and supporting documentation in the State Register and in the Environmental Notice Bulletin. The Department also intends to submit a notice of proposed rulemaking in the near future and will 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 (“ARRA”) is job preservation and creation. The infusion of over \$432 million dollars into the New York State Clean Water State Revolving Fund (“CWSRF”) will preserve and create a significant number of jobs, in particular those involving construction of sewage collection systems, sewage treatment works and solid waste disposal facilities. The rule will also provide jobs and employment opportunities for consultants involved with CWSRF 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.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Parts 204, 237, and 238 Implement Cap-and-Trade Programs That Help Reduce NOx and SO2 Emissions From Major Stationary Sources

I.D. No. ENV-43-09-00004-P

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

Proposed Action: Amendment of Parts 200, 237 and 238; and repeal of Part 204 of Title 6 NYCRR.

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

Subject: Parts 204, 237 and 238 implement cap-and-trade programs that help reduce NOx and SO2 emissions from major stationary sources.

Purpose: This rulemaking will repeal Part 204 and render Parts 237 and 238 inoperative after the 2009-2010 control periods.

Public hearing(s) will be held at: 2:00 p.m., December 1, 2009 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., December 2, 2009 at NYSDEC, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., December 3, 2009 at NYSDEC 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:

[204-1.2(b)(3)	40 CFR 72.2 (May 26, 1999)	*
204-1.2(b)(15)	40 CFR Part 75 (May 26, 1999)	*
204-1.2(b)(33)	40 CFR Part 75, Appendix D (May 26, 1999)	*
	40 CFR Part 75 (May 26, 1999)	
204-1.2(b)(34)	40 CFR Part 75, Appendix F, Section 3 (May 26, 1999)	*
	40 CFR Part 75, Appendix A, Section 2 (May 26, 1999)	
204-1.2(b)(53)	40 CFR 51.121 (October 27, 1998)	*
	40 CFR Part 97 (September 24, 1998)	
204-1.2(b)(66)	40 CFR Part 60, Appendix A (July 1, 1998)	*
204-1.4(b)(1)(iii)(a)	40 CFR 75.19(c)(1)(ii), Table 2 (May 26, 1999)	*
204-5.3(g)	40 CFR 51.121 (October 27, 1998)	*
204-8.1	40 CFR Part 75, Subpart H (May 26, 1999)	*
	40 CFR 72.2 (May 26, 1999)	
	40 Part 75 (May 26, 1999)	
204-8.1(a)(1)	40 CFR 75.71 and 75.72 (May 26, 1999)	*
204-8.1(c)	40 CFR 75.50(g) (May 26, 1999)	*
204-8.1(d)(1)	40 CFR 75.72(b)(2)(ii) (May 26, 1999)	*
204-8.1(d)(2)	40 CFR 75.72(b)(2)(ii) (May 26, 1999)	*
	40 CFR Part 75 (May 26, 1999)	
	40 CFR 75.74 (May 26, 1999)	
204-8.1(d)(3)	40 CFR 75.72(b)(2)(ii) (May 26, 1999)	*
	40 CFR Part 75 (May 26, 1999)	
	40 CFR 75.74 (May 26, 1999)	
204-8.1(d)(4)	40 CFR 75.72(b)(2)(ii) (May 26, 1999)	*
204-8.1(d)(4)(i)	40 CFR Part 75 (May 26, 1999)	*
204-8.2(a)	40 CFR Part 75 (May 26, 1999)	*
204-8.2(a)(1)	40 CFR 75-17(a) or (b) (May 26, 1999)	*
	40 CFR 75.66 (May 26, 1999)	
	40 CFR 75.17 (May 26, 1999)	
204-8.2(a)(2)	40 CFR 75.72 (May 26, 1999)	*
	40 CFR 75.71(a)(2) (May 26, 1999)	
204-8.2(b)	40 CFR 75.19 (May 26, 1999)	*
	40 CFR Part 75, Subpart E (May 26, 1999)	
	40 CFR 75.72 (May 26, 1999)	
	40 CFR 75.71(a)(2) (May 26, 1999)	
204-8.2(b)(1)	40 CFR Part 75, Subpart E (May 26, 1999)	*
	40 CFR 75.20 (May 26, 1999)	
204-8.2(b)(2)	40 CFR 75.21 (May 26, 1999)	*
	40 CFR Part 75, Appendix B (May 26, 1999)	
	40 CFR 75.20(b) (May 26, 1999)	
204-8.2(b)(3)(ii)	40 CFR Part 75, Subpart H (May 26, 1999)	*
204-8.2(b)(3)(iii)	40 CFR 75.19 (May 26, 1999)	*
	40 CFR 75.20(a)(3) (May 26, 1999)	
	40 CFR Part 75 (May 26, 1999)	

204-8.2(b)(3)(iv)	40 CFR Part 75 (May 26, 1999)	*	<p><i>ing on April 30, 2010 will be the final control period for the ADR NO_x Budget Trading Program.</i></p> <p>Paragraph 237-1.2(b)(13) through subdivision 237-5.2(a) remain unchanged.</p> <p>Subdivision (b) of section 5.2 is amended to read as follows:</p> <p>(b) By September 1, 2004 and September 1st of each year thereafter <i>until September 1, 2009</i>, the department will allocate NO_x allowances, in accordance with section 237-5.3 of this Subpart, for the control period that commences in the year that is three years after the applicable deadline for allocation under this subdivision. If the department fails to allocate NO_x allowances in accordance with this subdivision, the department will, for the applicable control period, repeat the NO_x allowance allocations that were performed for the preceding control period. <i>The department will not allocate NO_x allowances after September 1, 2009.</i></p> <p>The remainder of Section 237-5.2 remains unchanged.</p> <p>Sections 237-5.3 through 237-7.3 remain unchanged.</p> <p>Section 237-8.1 is amended to read as follows:</p> <p>237-8.1 General requirements.</p> <p>The owners and operators, and to the extent applicable, the NO_x authorized account representative of a NO_x budget unit, shall, <i>with respect to each control period</i>, comply with the monitoring and reporting requirements as provided in this Subpart and in Subpart H of 40 CFR part 75. For purposes of complying with such requirements, the definitions in section 237-1.2 of this Part and in 40 CFR 72.2 shall apply, and the terms ‘affected unit,’ and ‘designated representative’ in 40 CFR part 75 shall be replaced by the terms ‘NO_x budget unit,’ and ‘NO_x authorized account representative,’ respectively, as defined in section 237-1.2 of this Part.</p> <p>Sections 237-8.2 through 237-9.9 remain unchanged.</p> <p>Section 238-1.1 through paragraph 238-1.2(b)(11) remain unchanged.</p> <p>Paragraph (12) of subdivision 1.2(b) is amended to read as follows:</p> <p>(12) ‘Control period’. The period beginning January 1st of a year and ending on December 31st of the same year, inclusive. <i>The period ending on December 31, 2010 will be the final control period for the ADR SO₂ Budget Trading Program.</i></p> <p>Paragraph 238-1.2(b)(13) through subdivision 238-5.2(a) remain unchanged.</p> <p>Subdivision (b) of section 5.2 is amended to read as follows:</p> <p>(b) By January 1, 2005 and January 1st of each year thereafter <i>until January 1, 2010</i>, the department will allocate SO₂ allowances, in accordance with section 238-5.3 of this Subpart, for the control period in the year that is three years after the year of the applicable deadline for allocation under this subdivision. If the department fails to allocate SO₂ allowances in accordance with this subdivision, the department will, for the applicable control period, repeat the SO₂ allowance allocations that were performed for the preceding control period. <i>The department will not allocate SO₂ allowances after January 1, 2010.</i></p> <p>Sections 238-5.3 through 238-7.3 remain unchanged.</p> <p>Subpart 238-8 is amended to read as follows:</p> <p>Subpart 238-8 Monitoring and Reporting</p> <p>The owners and operators, and to the extent applicable, the SO₂ authorized account representative of an SO₂ budget unit, shall, <i>with respect to each control period</i>, comply with the monitoring and reporting requirements as provided for in all applicable sections of 40 CFR Part 75. For purposes of complying with such requirements, the definitions in section 238-1.2 of this Part and in 40 CFR 72.2 shall apply, and the terms ‘affected unit,’ and ‘designated representative’ in 40 CFR Part 75 shall be replaced by the terms ‘SO₂ budget unit,’ and ‘SO₂ authorized account representative,’ respectively, as defined in section 238-1.2 of this Part.</p> <p><i>Text of proposed rule and any required statements and analyses may be obtained from:</i> Michael Milianni, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: EndADRP@gw.dec.state.ny.us</p> <p><i>Data, views or arguments may be submitted to:</i> Same as above.</p> <p><i>Public comment will be received until:</i> December 10, 2009.</p> <p><i>Additional matter required by statute:</i> 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.</p> <p><i>Regulatory Impact Statement</i></p> <p>INTRODUCTION</p> <p>The Department intends to (1) repeal 6 NYCRR Part 204, NO_x Budget Trading Program, (2) render inoperative 6 NYCRR Part 237, Acid Deposition Reduction NO_x Budget Trading Program upon completion of the 2009-2010 control period, and (3) render inoperative 6 NYCRR Part 238, Acid Deposition Reduction SO₂ Budget Trading Program, upon completion of the 2010 control period. These rules have essentially been superseded by 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6</p>
204-8.2(b)(3)(iv)(a)	40 CFR Part 75 (May 26, 1999)	*	
204-8.2(b)(3)(v)(a)	40 CFR 75.20(a)(5)(i) (May 26, 1999)	*	
204-8.2(b)(3)(v)(a)(1)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(b)(3)(v)(a)(2)	40 CFR Part 75, Appendix A, Section 2.1 (May 26, 1999)	*	
204-8.2(c)	40 CFR 75.19 (May 26, 1999)	*	
	40 CFR 75.10 (May 26, 1999)	*	
204-8.2(c)(1)(i)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(c)(1)(ii)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(c)(2)(i)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(c)(2)(ii)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(c)(2)(iv)	40 CFR 75.19 (May 26, 1999)	*	
204-8.2(d)	40 CFR Part 75, Subpart E (May 26, 1999)	*	
	40 CFR 75.20(f) (May 26, 1999)	*	
204-8.3(a)	40 CFR Part 75, Appendix B (May 26, 1999)	*	
	40 CFR Part 75, Subpart D, Appendix D or Appendix E (May 26, 1999)	*	
204-8.3(b)	40 CFR Part 75 (May 26, 1999)	*	
204-8.4	40 CFR 75.61 (May 26, 1999)	*	
204-8.5(a)(2)	40 CFR Part 75, Subpart F, G or H (May 26, 1999)	*	
	40 CFR Part 72 (May 26, 1999)	*	
204-8.5(b)(1)	40 CFR 75.62 (May 26, 1999)	*	
	40 CFR Part 75, Subpart H (May 26, 1999)	*	
204-8.5(b)(2)	40 CFR 75.62 (May 26, 1999)	*	
	40 CFR Part 75, Subpart H (May 26, 1999)	*	
204-8.5(c)	40 CFR Part 75, Subpart H (May 26, 1999)	*	
204-8.5(d)(2)(i)	40 CFR Part 75 (May 26, 1999)	*	
204-8.5(d)(2)(ii)	40 CFR 75.74(d)(3) (May 26, 1999)	*	
	40 CFR 75.74(b) (May 26, 1999)	*	
204-8.5(d)(3)	40 CFR Part 75, Subpart H (May 26, 1999)	*	
	40 CFR 75.64 (May 26, 1999)	*	
204-8.5(d)(3)(i)	40 CFR Part 75, Subparts G & H (May 26, 1999)	*	
204-8.5(d)(3)(ii)	40 CFR Part 75, Subpart H (May 26, 1999)	*	
204-8.5(d)(4)(i)	40 CFR Part 75, (May 26, 1999)	*	
204-8.5(d)(4)(ii)	40 CFR 75.34(a)(1) (May 26, 1999)	*	
204-8.5(d)(4)(iii)	40 CFR Part 75, Subpart D (May 26, 1999)	*	
204-8.6(a)	40 CFR 75.66 (May 26, 1999)	*	
204-8.6(a)(2)	40 CFR 75.72 (May 26, 1999)	*	
204-8.6(b)	40 CFR 75.66 (May 26, 1999)	*	
204-8.6(b)(1)	40 CFR 75.66 (May 26, 1999)	*	
	40 CFR 75.72 (May 26, 1999)	*	
	40 CFR 75.71(a)(2) (May 26, 1999)	*	
204-8.7	40 CFR Part 75 (May 26, 1999)	*]	

Part 204 is repealed.
 Section 237-1.1 through paragraph 237-1.2(b)(11) remain unchanged.
 Paragraph (12) of subdivision 1.2(b) is amended to read as follows:
 (12) ‘Control period’. The period beginning October 1st of a year and ending on April 30th of the following year, inclusive. *The period end-*

NYCRR Part 245, CAIR SO₂ Trading Program (the NYS CAIR rules). These proposed regulatory revisions will prevent affected sources from needing to comply with duplicative programs.

STATUTORY AUTHORITY

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. Section 1-0101 further expresses, among other things, that it is the policy of New York State to coordinate the State's environmental plans, functions, powers and programs with those of the federal government and other regions and manage air resources to the end 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 New York State to foster, promote, create and maintain conditions by which man and nature can thrive in harmony by, among other things, providing that care is taken for the air resources that are shared with other states in the manner of a good neighbor.

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. Section 19-0303 also provides that the Department, in adopting any regulation which contains a requirement that is more stringent than the CAA or its implementing regulations, must include in the Regulatory Impact Statement, among other things, an evaluation of the cost-effectiveness of the proposed regulation in comparison to the cost-effectiveness of reasonably available alternatives and a review of the reasonable available alternative measures along with an explanation of the reasons for rejecting such alternatives.

ECL section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA. Section 19-0311 specifically requires that complete permit applications must include, among other things, compliance plans and schedules of compliance. This section further expresses that any permits issued must include, among other things, terms setting emissions limitations or standards, terms for detailed monitoring, record keeping and reporting, and terms allowing Department inspection, entry, and monitoring to assure compliance with the terms and conditions of the permit.

EPA will not be administering the regional NO_x Budget Trading Program (of which New York State's NO_x Budget Trading Program under Part 204 was a part) for any ozone season after 2008. 'See' 40 CFR section 51.121(r)(1). Consequently, pursuant to federal regulation, the NO_x Budget Trading Program under Part 204 is no longer operational. However, while the NO_x Budget Trading Program will not be in place after the 2008 control period, some of the reconciliation activities for the 2008 control period will take place in calendar year 2009.

The NYS CAIR rules have superseded Parts 204, 237, and 238. By repealing Part 204 and revising Parts 237 and 238 so that they become inoperative upon the completion of the 2009-2010 control periods, the Department will be removing redundant programs while continuing to control emissions of NO_x and SO₂ which contribute to local and regional nonattainment of the ozone and PM_{2.5} National Ambient Air Quality Standards (NAAQS).

LEGISLATIVE OBJECTIVES

The State of New York is required by the federal Clean Air Act to develop a State Implementation Plan (SIP) that includes enforceable emission limitations and other control measures necessary to assure that the NAAQS are attained, and contains adequate provisions prohibiting emissions activity within the State that contributes significantly to nonattainment in, or interferes with maintenance by, any other State. By making the proposed revisions to Parts 204, 237, and 238, the Department is amending State regulations so that the regulations are consistent with the State's current SIP obligations.

NEEDS AND BENEFITS

The Department intends an immediate repeal of Part 204. All compliance related activities under Part 204 will have been fully concluded by

the time that the repeal will take effect. The Department intends to revise certain provisions of Parts 237 and 238 in order to end allowance allocations and compliance obligations under the rules. Full repeals of Parts 237 and 238 will be undertaken once final accounting for compliance under the rules is completed.

Parts 204, 237, and 238 will remain in effect for the purposes of compliance certifications for the final control periods and any enforcement actions. It will not be necessary for subject sources to initiate the removal of permit conditions associated with the repealed regulations. The removal of the permit conditions associated with these rules will be completed by Department staff when each permit is either renewed or opened for modification.

COSTS

This rule making will eliminate compliance costs for sources subject to Parts 204, 237 or 238.

PAPERWORK

By repealing Part 204 and rendering Parts 237 and 238 inoperative, subject sources will no longer be required to comply with the reporting or recordkeeping obligations under these regulations.

LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements will be imposed on local governments as a result of this rulemaking. There will be no new programs, services, duties or responsibilities imposed upon any county, city, town, village, school district, or fire district affected by this rulemaking.

DUPLICATION BETWEEN THIS REGULATION AND OTHER REGULATIONS AND LAWS

The proposed revisions to Parts 204, 237, and 238 do not duplicate, overlap, or conflict with any other State or federal requirements. The NYS CAIR rules are in place and supersede Parts 204, 237, and 238.

ALTERNATIVES

The only alternative to this rulemaking is no rulemaking. This option would allow Parts 204, 237, and 238 to remain in place which would result in duplicative New York State cap-and-trade programs. The NO_x Budget Trading Program under Part 204 is part of the regional NO_x Budget Trading Program that is no longer administered by EPA. Therefore, Part 204 is no longer operational.

FEDERAL STANDARDS

The proposed revisions do not result in the imposition of requirements that exceed any minimum standards of the federal government for the same or similar subject areas.

COMPLIANCE SCHEDULE

The proposed revisions do not impose any new compliance obligations on regulated entities.

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

The proposed rule changes would (1) repeal 6 NYCRR Part 204, NO_x Budget Trading Program, (2) render inoperative 6 NYCRR Part 237, Acid Deposition Reduction NO_x Budget Trading Program upon completion of the 2009-2010 control period, and (3) render inoperative 6 NYCRR Part 238, Acid Deposition Reduction SO₂ Budget Trading Program, upon completion of the 2010 control period. The Department proposes to revise certain provisions of Parts 237 and 238 in order to end the allocation of allowances and compliance obligations under the rules. Full repeals of Parts 237 and 238 will be undertaken once final accounting for compliance under the rules is completed. The Department has determined that the repeal of Part 204 and revisions to Parts 237 and 238 to render them inoperative will eliminate reporting, recordkeeping, and other compliance obligations for subject sources. These rules have essentially been superseded by the New York State Clean Air Interstate Rules (Parts 243, 244, and 245). The revisions being proposed will not have any adverse impacts on small businesses, local governments, public or private entities in rural areas, or jobs and employment opportunities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Zero Emission Vehicle (ZEV) Standards

I.D. No. ENV-43-09-00005-P

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

Proposed Action: Amendment of 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, 9-0305, 71-2103 and 71-2105; and Federal Clean Air Act, section 177 (42 U.S.C. 7507)

Subject: Zero Emission Vehicle (ZEV) standards.

Purpose: To incorporate revisions California has made to its zero emission vehicle program.

Public hearing(s) will be held at: 2:00 p.m., December 1, 2009 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., December 2, 2009 at NYSDEC, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., December 3, 2009 at NYSDEC 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): The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Part 218 and Section 200.9. Section 200.9 is a list of items that have been incorporated by reference in air related rulemakings. The purpose of the amendment is to revise the existing Low Emission Vehicle (LEV) program to incorporate modifications California has made to its Zero Emission Vehicle (ZEV) program, and to otherwise update various provisions of the LEV program. The Department is proposing to amend sections 200.9 Referenced Material, 218-2.1(b) Prohibitions, 218-4.1 ZEV Percentages, and add a new 218-2.4 Research Authorizations.

Section 218-2.1 is being amended to update applicable requirements of California Code of Regulations, title 13. The Department is incorporating by reference sections 1962.1 and 1968.2. Section 1962.1 establishes new ZEV standards for 2009 and subsequent model year passenger cars, light-duty trucks, and medium-duty vehicles. Section 1968.2 establishes malfunction and diagnostic system requirements for 2004 and subsequent model year passenger cars, light-duty trucks, and medium-duty passenger vehicles. The incorporation by reference was missing on previous rulemakings.

A new section 218-2.4 is being added to incorporate California procedures for issuing research authorizations for on-road vehicles. The Department is incorporating by reference California Health and Safety Code Section 43014. Section 43014 allows permits to be issued for testing experimental motor vehicle pollution control devices.

Section 218-4.1 is being amended to incorporate new standards for 2009 and subsequent model year passenger cars, light-duty trucks, and medium-duty vehicles. The remaining text of this section is unchanged.

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: 218ZEV@gw.dec.state.ny.us

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

Public comment will be received until: December 10, 2009.

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 amend 6 NYCRR Part 218 and Part 200. This will be accomplished by revising the existing Part 218 to reflect changes to California's low emission vehicle (LEV) program that incorporated zero emission vehicle (ZEV) standards for light and medium-duty vehicles, to maintain identical standards with California for all vehicle weight classes as required under section 177 of the Clean Air Act, and to incorporate California's experimental permit procedures for on-road motor vehicles.

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. Emissions from motor vehicles adversely impact human health and the environment. Zero and near zero emission motor vehicle technology is important to achieving and maintaining the long term air quality of New York. While motor vehicle

technology has continued to improve, the number of vehicles and the number of vehicle miles traveled (VMT) has continued to increase. While vehicles emit pollutants at a lower level when new, the increases in VMT, as well as deterioration of vehicle emission control systems over vehicle life, have resulted in the mobile sector being a major contributor to air quality degradation. Since ZEVs have no emissions, and therefore cannot deteriorate, they represent a long term benefit with regard to criteria pollutant and GHG emissions.

Part 218 is being revised to incorporate California's adopted amendments to the ZEV program. The Department is also proposing to adopt California's experimental permit procedures for on-road motor vehicles. The ZEV amendments proposed by the California Air Resources Board (CARB) consist of the following:

CARB is granting manufacturers the option of meeting the minimum production requirement of pure ZEV during the 2012-2014 timeframe by producing 7,500 fuel cell vehicles and meeting the remaining portion of their requirement with up to 58,000 Enhanced Advanced Technology Partial Zero Emission Vehicles (Enhanced ATPZEV). The previous requirement was 25,000 ZEV and no Enhanced ATPZEV. The required volume was adjusted to aid development and commercialization of ZEV given the availability and cost of current technology. For the 2015-2017 timeframe, manufacturers would be required to produce 25,000 pure ZEV if they wish to backfill with Enhanced ATPZEV. Alternatively, manufacturers would be required to produce 50,000 ZEV if they decide not to meet a portion of the requirement with Enhanced ATPZEV.

CARB has created three new ZEV types to increase compliance flexibility. These new types are Type I.5, Type IV, and Type V which will be added to the existing Neighborhood Electric Vehicles (NEV) and Types 0, I, II, and III. CARB is providing manufacturers with the option of backfilling their ZEV requirement through the production of Enhanced ATPZEVs. These vehicles will earn fewer credits than pure ZEV, but it is expected that this option will result in manufacturers producing clean vehicles in greater numbers than would occur under the current requirements.

The previous ZEV regulation allowed manufacturers to bank credits earned from early implementation or over-compliance. Manufacturers have used these actions to amass significant credit balances. These credit balances have the potential to result in ZEV production blackouts since manufacturers could conceivably meet their ZEV requirements without producing any vehicles. To prevent this from occurring, CARB's recently adopted rule contains carry forward and carry back provisions for banked ZEV credits. Under the carry forward provision banked ZEV credits would retain full value for three model years in order to provide compliance flexibility. Advanced Technology Partial Zero Emission Vehicles (ATPZEV) and Partial Zero Emission Vehicles (PZEV) credits would not be affected by this provision. CARB also changed the carry back provision from one year to two. This change will not affect ATPZEV and PZEV credits. The combination of the new carry forward and carry back provisions is expected to reduce blackout periods to a maximum of four years.

CARB removed the cap on Type I and II battery electric vehicles (BEV) to meet the ZEV requirement and established compliance ratios based on credits earned rather than a substitution ratio. The intent is to establish technology neutrality between BEV and fuel cell vehicles since they both provide significant air quality benefits. Several manufacturers have indicated interest in developing BEVs and it is possible that this equality will spur advances in battery technology.

CARB adjusted plug-in hybrid electric vehicle (PHEV) credits to account for a vehicle's equivalent all electric range (EAER), the presence of advanced componentry, and low fuel cycle emissions. CARB is retaining the existing 10 mile minimum all electric range (AER), but allow credit for blended PHEV that achieve at least 10 miles EAER on the UDSS before their charge is depleted. A blended PHEV differs from an AER PHEV since the engine may start at any time and usually before the charge has been depleted. This change will result in a blended PHEV receiving less credit than an AER PHEV.

CARB has extended the advanced componentry allowance for Type C HEV and created new higher power Type F and Type G categories. The new Type F and G categories establish requirements for higher battery capacity to power a HEV through the UDSS for at least 10 miles of AER. These categories are also intended to encourage the development of advanced batteries that can be used in other ZEVs in order to reduce production costs and speed deployment.

CARB is also eliminating the low fuel cycle emission allowance for PHEV that do not make exclusive use of low fuel cycle emission fuels. Under this provision, only CNG and hydrogen internal combustion vehicles would receive this credit. Also, CARB has adopted a pre-multiplier credit cap of 3.0 for all ATPZEV. This cap was implemented to ensure that ATPZEV do not earn more credit than a full function Type II ZEV.

CARB is doubling the credits earned by neighborhood electric vehicles

(NEV) from 0.15 credits per vehicle to 0.30. NEVs are low speed battery electric vehicles that have a top speed of 25 miles per hour and are restricted to roads with posted speed limits of 35 miles per hour or less. They provide an emissions reduction benefit since they do not emit harmful criteria or GHG pollutants; however, they are not as useful as a full function ZEV due to restrictions placed on their use and limited range.

CARB's amendments would extend the travel provision for Type I, I.5, and II ZEVs until 2014 and extends the provision to 2017 for Type III, IV, and V ZEVs. NEVs and Type 0 ZEVs are specifically excluded from the proposed travel provision. ZEV credits would be prorated based on a Section 177 state's large volume manufacturer's (LVM) total sales relative to that same LVM's total sales in California. This is being implemented to account for difference in sales volume between California and the Section 177 states. The intent of this ratio is to prevent Section 177 states from being flooded by credits earned in California, which could potentially result in manufacturers meeting the ZEV requirements in those states without ever delivering any ZEVs, Enhanced ATPZEVs, or ATPZEVs for sale.

Intermediate volume manufacturers (IVM) may currently meet 100 percent of their ZEV requirements through the production of PZEVs. IVMs that produce more than 60,000 vehicles per year for sale in California for three consecutive years will be reclassified as LVM subject to the full ZEV requirements. As such, they will be required to comply with the proposed ZEV requirements starting with the sixth model year after transitioning to LVM status. This transition period is intended to allow for the development of ATPZEV and full ZEV technologies.

CARB also adopted new restrictions on ZEV credits for advanced technology demonstration programs, transportation systems and fast refueling capability. CARB would require ZEVs and Enhanced ATPZEVs placed as part of a demonstration program remain in California for at least the first year of a two year placement requirement. The number of demonstration vehicles would be capped at 25 vehicles per state per model per year, up from 6. Further, CARB is requiring vehicles placed as part of a transportation system must remain in the program for at least two years in order to obtain ZEV credits. These programs include ride sharing or links to mass transit. CARB is also reducing credits earned from transportation systems and phasing out credits for ATPZEV and PZEV in 2011. Lastly, CARB would require Type III ZEVs to be capable of achieving 95 miles of UDDS range in 10 minutes or less of refueling.

The Department is proposing to adopt ZEV standards and credit mechanisms that are identical to those adopted by CARB. The revisions to Part 218 would apply to all 2009 and subsequent model year passenger cars, light-duty trucks, and medium-duty passenger vehicles.

The Department is proposing to adopt research authorization application and testing procedures that are identical to those used by CARB. This proposal would apply to all 1993 and subsequent model year California certified on-road motor vehicles that require an anti-tampering exemption for experimental testing of pollution control devices in New York State. Specific information about the modifications, testing procedures, vehicle identification information, and the disposition of the vehicle after testing would be required. The research authorizations would be issued by the Department for a finite time period and would require Department review for any extension. The Department believes that adopting research authorization procedures identical to those used by CARB for its permits would avoid any issues related to certifying a "third vehicle", provide potential air quality benefits to New York by advancing emission control technology, and benefit New York State businesses involved in these projects by simplifying the exemption process.

For the 2009-2011 timeframe (Phase II), the amendments are not expected to significantly change the number of pure ZEVs, i.e., fuel cell and battery electric vehicles, relative to the existing program. However, since many automakers still retain sufficient banked credits to assist with their compliance plans in the near-term, CARB staff expects that they will use these credits aggressively during this timeframe as ZEV technologies remain very expensive. The expected numbers of new ZEVs produced will be lower than the 2,500 previously associated with this time period while the recent revisions point to continuing development of PHEVs.

For the 2012-2014 timeframe (Phase III), the amendments decrease the number of pure ZEVs introduced relative to the previous program. Given the evolving status of technology and manufacturing costs, the amendments could result in as few as 7,500 pure ZEVs, whereas the previous requirements called for 25,000 ZEVs during this timeframe. The overall number of ATPZEVs should increase as manufacturers are allowed to meet part of the requirements with a new class of vehicle, Enhanced ATPZEV. Manufacturers may backfill a portion of their ZEV requirements with up to 58,000 Enhanced ATPZEVs during this timeframe. However, use of banked credits is expected to decrease relative to Phase II, meaning that production of ZEVs should more closely match the stated requirements than in the previous years of the program.

Due to the lower production requirements of pure ZEVs, the changes adopted by CARB significantly reduce automakers' cost of compliance.

CARB used the incremental cost per vehicle from the 2003 regulatory amendment process as the starting point for the cost estimates. Where appropriate, CARB modified the projected costs based on gathered estimates of technology costs and assumptions regarding changes in volume and timing. For example, the 2003 rulemaking estimated the incremental cost of a Type III fuel cell vehicle during Phase III at \$120,000 per vehicle. However, this estimate assumed production of tens of thousands of vehicles, and therefore, lowers unit costs. For the Phase III pure ZEV production levels, CARB assumed an average incremental cost of \$250,000 for Type III ZEVs. The impact of the lower required production level, however, outweighs the per vehicle cost impact, resulting in manufacturers' savings in the recent amendments compared to the previous program. During Phase III the required minimum number of pure ZEVs would be reduced from 25,000 in the previous program to 7,500 vehicles. This pure ZEV requirement could be met with either fuel cell vehicles or battery electric vehicles. These vehicles must have a range of at least 200 miles and fast refuel capability.

During 2015-2017 (Phase IV), the requirements in terms of vehicle numbers significantly increase while the incremental cost per vehicle decreases due to expected technological improvements and the impact of economies of scale, or the "learning curve". For example, the requirement for pure ZEVs is 25,000 during Phase IV.

When compared to the previous regulation, the average cost of compliance using various combinations of vehicle types is lower under the new amendments, due to the reduction in vehicle numbers of the most expensive technologies. The estimated annual savings average \$1.3 billion in 2012 to 2017 for the Type I (city electric) vehicle and \$847 million for the Type IV (fuel cell) vehicle. CARB's amendments significantly reduce the number of fuel cells and battery EVs demonstrated. Due to their high average cost, these vehicles are not expected to be sold or leased as a commercial product in the time frame under consideration. However, the impact of the regulatory changes on the dealerships that buy the small number of vehicles placed depends on the extent to which manufacturers are able to pass along any cost increases.

The proposed research authorization procedures are not expected to have any adverse impact on New York State businesses. The Department believes this proposal will benefit businesses involved in experimental programs by making it easier to apply for a research authorization that could potentially be delayed by CARB's reluctance to issue one. Further, by using procedures identical to those used by California it may expedite the process of obtaining emission certification from CARB if any control devices tested in New York go into production.

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 ZEV requirements 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. The proposed research authorizations are not expected to result in any additional costs for local and state agencies. 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 privately owned vehicles. In other words, they must purchase California certified vehicles. The proposed research authorizations are not expected to result in any additional local government mandates. No additional paperwork or staffing requirements are expected.

The ZEV regulation should not result in any 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 ZEV regulation is not expected to be burdensome in terms of paperwork to owners/operators of vehicles.

The research authorization procedures should not result in any significant paperwork requirements for New York vehicle suppliers, dealers or government. This proposal would enable the Department to use procedures identical to California's to issue research authorizations for vehicles testing experimental pollution control devices in New York State. The implementation of the proposed research authorization procedures 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 recently adopted ZEV amendment. 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 standards available as an alternative. California's standards are more stringent and protective of public health and the environment than federal standards.

The only alternative to adopting the research authorization procedures in New York is to continue to rely on California to issue such authorizations. This is problematic for New York State due to the fact that California is increasingly reluctant to issue authorizations for California certified vehicles that are not being built, operated, or tested in California. Without these exemptions, test programs in New York State utilizing experimental pollution control devices could be drastically curtailed which could potentially result in adverse impacts on the State's air quality.

This ZEV regulatory amendment will take effect for the 2009 model year for passenger cars, light-duty trucks, and medium-duty passenger vehicles. The research authorization procedures will take effect for all 1993 and subsequent model year California certified on-road motor vehicles.

Regulatory Flexibility Analysis

1. Effect of rule:

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 Zero Emission Vehicle (ZEV) 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.

The Department is also proposing to adopt California's experimental permit procedures for on-road motor vehicles. This proposal would enable the Department to issue research authorizations for experimental pollution control devices being tested on vehicles in New York State.

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 privately owned vehicles in New York State; i.e., they must purchase California certified vehicles.

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.

The research authorization procedures should not result in any significant paperwork requirements for New York vehicle suppliers, dealers or government. These procedures would only apply to businesses performing modifications on California certified vehicles for research purposes in New York State. This proposal would enable the Department to use procedures identical to California's to issue research authorizations for vehicle testing. The implementation of the proposed research authorization procedures is not expected to be burdensome in terms of paperwork to owners/operators of vehicles.

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 ZEV 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. Some dealerships may experience cost increases associated with the sale and service of ZEVs, Advanced Technology Partial Zero Emission Vehicles (ATPZEVs), and Partial Zero Emission Vehicles (PZEVs) since these may be technologies the dealership has not dealt with previously. However, various applications of these technologies have been in service for several years and the Department is unaware of any significant adverse impacts on dealerships. The implementation of the proposed ZEV regulation is not expected to be burdensome in terms of additional reporting requirements for dealers.

The Department is proposing to adopt research authorization application and testing procedures that are identical to those used by CARB to obtain experimental permits. This proposal would apply to all 1993 and subsequent model year California certified on-road motor vehicles that require an anti-tampering exemption for experimental testing of pollution control devices in New York State. The research authorizations would be issued by the Department for a finite time period and would require Department review for any extension. The Department believes that adopting research authorization procedures identical to those used by CARB would avoid any issues related to certifying a "third vehicle", provide potential air quality benefits to New York by advancing emission control technology, and benefit New York State businesses involved in these projects by simplifying the exemption process and providing employment opportunities.

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 privately owned vehicles. In other words, state and local governments will be required to purchase California certified vehicles.

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:

There will be no change in the competitive relationship with out-of-state businesses. The ZEV requirements attempt to minimize adverse impacts on automobile manufacturers by simplifying the existing program, increasing compliance flexibility and creating incentives for new technology. The required volume of pure ZEVs was reduced due to the availability and cost of current technology, and manufacturers have the option of meeting a portion of their production requirement with Enhanced Advanced Technology Partial Zero Emission Vehicles (Enhanced ATPZEVs). New ZEV types were created (Types I.5, IV, and V), the cap on Battery Electric Vehicles (BEVs) was removed to establish technology neutrality between BEVs and fuel cell vehicles, and Neighborhood Electric Vehicles (NEVs) are eligible to earn increased credits. The ZEV requirements also include provisions for banking and trading of credits, transition requirements for Intermediate Volume Manufacturers, and the credit travel provision has been extended in duration and to include all Type I, I.5, II, III, IV, and V ZEVs.

The proposed research authorization procedures are not expected to have any adverse impact on New York State businesses. The Department believes this proposal will benefit businesses involved in experimental programs by making it easier to apply for a research authorization that could potentially be delayed by CARB's reluctance to issue one. Further, by using procedures identical to those used by California it may expedite the process of obtaining emission certification from CARB if any control devices tested in New York go into production. The Department believes these research efforts and any potential production of these components would benefit New York State businesses by enabling them to retain, or possibly add, jobs.

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 Zero Emission Vehicle (ZEV) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program. The Department is also proposing to adopt California's experimental permit procedures for on-road motor vehicles. This proposal would enable the Department to issue research authoriza-

tions for experimental pollution control devices being tested on vehicles in New York State.

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.

The Department is proposing to adopt research authorization application and testing procedures that are identical to those used by CARB. The Department believes that adopting research authorization procedures identical to those used by CARB for its permits would avoid any issues related to certifying a "third vehicle", provide potential air quality benefits to New York by advancing emission control technology, and benefit New York State businesses involved in these projects by simplifying the exemption process.

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

3. Costs:

California has estimated the incremental per vehicle cost for ZEV Types I, I.5, II, III, IV, as well as Enhanced ATPZEVs for the 2012-2014 and 2015-2017 timeframes. ZEV Types I and I.5 are city EVs; Type II ZEVs are full function EVs; and ZEV Types III and IV are fuel cell vehicles. The estimated incremental per vehicle cost of Type I ZEVs is \$35,000 to \$65,000 in 2012-2014 and \$15,000 to \$35,000 in 2015-2017. The estimated incremental per vehicle cost of Type I ZEVs is \$35,000 to \$65,000 in 2012-2014 and \$15,000 to \$35,000 in 2015-2017. The estimated incremental per vehicle cost of Type I.5 ZEVs is \$40,000 to \$80,000 in 2012-2014 and \$20,000 to \$40,000 in 2015-2017. The estimated incremental per vehicle cost of Type II ZEVs is \$80,000 to \$120,000 in 2012-2014 and \$40,000 to \$60,000 in 2015-2017. The estimated incremental per vehicle cost of Type III ZEVs is \$250,000 in 2012-2014 and \$125,000 in 2015-2017. The estimated incremental per vehicle cost of Type IV ZEVs is \$300,000 in 2012-2014 and \$150,000 in 2015-2017. The estimated incremental per vehicle cost of Enhanced ATPZEVs is \$25,000 in 2012-2014 and \$12,500 in 2015-2017. Incremental costs per vehicle are expected to decrease due to economies of scale and anticipated technological improvements.

4. Minimizing adverse impact:

The changes will not adversely impact rural areas. As a result of the adoption of the ZEV 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 Zero Emission Vehicle (ZEV) requirements that have been adopted by the California Air Resources Board (CARB) as part of the Low Emission Vehicle (LEV) program. The Department is also proposing to adopt California's experimental permit procedures for on-road motor vehicles. This proposal would enable the Department to issue research authorizations for experimental pollution control devices being tested on vehicles in New York State.

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 may impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks. Automobile manufacturers are likely 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.

The proposed research authorization procedures are not expected to have any adverse impact on New York State businesses. The Department believes this proposal will benefit businesses involved in experimental programs by making it easier to apply for a research authorization that could potentially be delayed by CARB's reluctance to issue one. Further, by using procedures identical to those used by California it may expedite the process of obtaining emission certification from CARB if any control devices tested in New York go into production. The Department believes these research efforts and any potential production of these components would benefit New York State businesses by enabling them to retain, or possibly add, jobs.

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

The ZEV 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. Some dealerships may experience cost increases associated with the sale and service of ZEVs, Advanced Technology Partial Zero Emission Vehicles (ATPZEVs), and Partial Zero Emission Vehicles (PZEVs) since these may be technologies the dealership has not dealt with previously. However, various applications of these technologies have been in service for several years and the Department is unaware of any significant adverse impacts on dealerships. The implementation of the proposed ZEV 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 ZEV requirements attempt to minimize adverse impacts on automobile manufacturers by simplifying the existing program, increasing compliance flexibility and creating incentives for new technology. The required volume of pure ZEVs was reduced due to the availability and cost of current technology, and manufacturers have the option of meeting a portion of their production requirement with Enhanced Advanced Technology Partial Zero Emission Vehicles (Enhanced ATPZEVs). New ZEV types were created (Types I.5, IV, and V), the cap on Battery Electric Vehicles (BEVs) was removed to establish technology neutrality between BEVs and fuel cell vehicles, and Neighborhood Electric Vehicles (NEVs) are eligible to earn increased credits. The ZEV requirements also include provisions for banking and trading of credits, transition requirements for Intermediate Volume Manufacturers, and the credit travel provision has been extended in duration and to include all Type I, I.5, II, III, IV, and V ZEVs.

The Department is proposing to adopt research authorization application and testing procedures that are identical to those used by CARB to obtain experimental permits. This proposal would apply to all 1993 and subsequent model year California certified on-road motor vehicles that require an anti-tampering exemption for experimental testing of pollution control devices in New York State. The research authorizations would be issued by the Department for a finite time period and would require Department review for any extension. The Department believes that adopting research authorization procedures identical to those used by CARB would avoid any issues related to certifying a "third vehicle", provide potential air quality benefits to New York by advancing emission control technology, and benefit New York State businesses involved in these projects by simplifying the exemption process and providing employment opportunities.

5. Self-employment opportunities:

None that the Department is aware of at this time.

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

Requirements for the Applicability, Analysis, and Installation of Best Available Retrofit Technology (BART) Controls

I.D. No. ENV-43-09-00006-P

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

Proposed Action: Amendment of Part 200; and addition of Part 249 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: Requirements for the applicability, analysis, and installation of Best Available Retrofit Technology (BART) controls.

Purpose: Require analysis of controls for eligible stationary sources which contribute to regional haze issues in Federal Class I areas.

Public hearing(s) will be held at: 2:00 p.m., December 1, 2009 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., December 2, 2009 at NYSDEC, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., December 3, 2009 at NYSDEC 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.

Table 1 of existing Section 200.9 is amended to include the following reference:

Regulation	Referenced Material	Availability
249.2(g)	40 CFR Part 60.15(f)(1) through (3) (July 1, 2007)	*

6 NYCRR Part 249, Best Available Retrofit Technology (BART)

249.1 Purpose and Applicability

249.2 Definitions

249.3 Requirements for Sources Subject to Case-by-Case BART Determinations

249.4 Emissions Tests and Monitoring

Section 249.1 Purpose and Applicability

(a) This Part restricts the emissions of visibility-impairing pollutants by requiring the installation of Best Available Retrofit Technology (BART) on a BART-eligible stationary source to reduce regional haze and restore natural visibility conditions to Federal Class I Areas.

(b) Except as provided under Subdivision (c) of this Section, this Part applies to any stationary source that has been determined to be BART-eligible and whose emissions require control pursuant to section 169A of the Act. BART-eligible refers to any stationary source that:

(1) is in one of 26 specific source categories identified in Section 231-2.2(c)(1) through (26) of this Title;

(2) was not in operation prior to August 7, 1962 and was in existence on August 7, 1977, or underwent reconstruction between August 7, 1962 and August 7, 1977; and,

(3) has a potential to emit (PTE) 250 tons per year (tpy) or more of any visibility-impairing pollutant.

(c) Exempted from the provisions of this Part is any BART-eligible source that:

(1) is subject to a permit condition that restricts the source's PTE to less than 250 tpy for each visibility-impairing pollutant;

(2) is subject to a permit condition that requires the source to permanently shut down by July 1, 2013; or,

(3) has shown through modeling or other means acceptable to the department that it does not or will not emit any combination of visibility-impairing pollutants that results in a visibility impairment equal to or greater than 0.1 deciviews in any Federal Class I Area.

Section 249.2 Definitions

For the purpose of this regulation, the following definitions apply:

(a) 'Best Available Retrofit Technology' or 'BART.' An emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each visibility-impairing pollutant which is emitted by an existing stationary facility. BART for any individual source is determined by undertaking the case-by-case analysis required under Section 249.3 of this Part.

(b) 'Deciview.' A measurement of visibility impairment. A deciview is a haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired. The deciview haze index is calculated based on the following equation (for the purposes of calculating deciview, the atmospheric light extinction coefficient must be calculated from aerosol measurements):

$$HI = 10 \ln (b/10)$$

Where b = the atmospheric light extinction coefficient, expressed in inverse megameters (Mm^{-1}).

(c) 'Federal Class I Area.' A national park which exceeds 6,000 acres, national wilderness area which exceeds 5,000 acres, national memorial park which exceeds 5,000 acres, or any international park, which was in existence as of August 7, 1977.

(d) 'In existence.' As used in Section 249.1(b)(2) of this Part, the owner or operator has obtained all necessary preconstruction approvals or permits required by federal, state, or local air pollution emissions and air quality laws or regulations and either has (1) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (2) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed in a reasonable time.

(e) 'Light extinction.' The process of light being absorbed or scattered as it passes through a medium, such as the atmosphere.

(f) 'Natural Visibility Conditions.' Includes naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration.

(g) 'Reconstruction.' Where the fixed capital cost of the new component exceeds 50 percent of the fixed capital cost of a comparable entirely new source. Any final decision as to whether reconstruction has occurred must be made in accordance with the provisions of 40 CFR 60.15 (f) (1) through (3).

(h) 'Regional haze.' Visibility impairment that is caused by the emission of visibility-impairing air pollutants from numerous sources located over a wide geographic area.

(i) 'Visibility-impairing pollutant.' Sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter less than or equal to 10 microns in diameter (PM_{10}).

(j) 'Visibility impairment.' Any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions.

Section 249.3 Requirements for Sources Subject to Case-by-Case BART Determinations

(a) The owner or operator of a source that is determined to be BART-eligible and whose emissions of visibility-impairing pollutants result in a visibility impairment equal to or greater than 0.1 deciviews in any Federal Class I Area must conduct an analysis to determine the appropriate emission limitation necessary to meet BART requirements. The analysis must consider, with respect to each visibility-impairing pollutant emitted by the source, the following factors:

- (1) the costs of compliance;
- (2) the energy and non-air quality environmental impacts of compliance;
- (3) any existing pollution control technology in use at the source;
- (4) the remaining useful life of the source; and,
- (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(b) The analysis must evaluate retrofit control options for each visibility-impairing pollutant unless facility-wide emissions for the relevant visibility-impairing pollutant are at or below the de minimis level. The facility-wide de minimis emissions levels are 40 tpy of SO_2 or NO_x and 15 tpy of PM_{10} .

(c) Any required BART analysis must be submitted to the department by October 1, 2010.

(d) Control equipment or other emission reduction methods approved by the department as BART must be installed and operating no later than July 1, 2013.

(e) Before commencing any required construction or process changes,

the owner or operator must submit an application for a permit or permit modification as required under Part 201 of this Title.

Section 249.4 Emissions Tests and Monitoring

(a) The owner or operator of the stationary source to which BART requirements apply must perform an emissions test according to a protocol approved by the department. This protocol must be submitted within six months of the commencement of operation of the BART controls. The protocol must include a schedule (using the date of department approval of the protocol as the starting event) for the performance of the required emissions test and submission of the emissions test report. The emissions test must demonstrate that the necessary emission reductions of visibility-impairing pollutants and other requirements under this Part are being met. Testing methods for particulate matter must quantify the emissions of PM_{10} and particulate matter less than or equal to 2.5 microns in diameter ($PM_{2.5}$). Both filterable and condensable particulate matter must be included.

(b) The owner or operator of the stationary source subject to BART requirements must provide, along with the analysis required under Section 249.3 of this Part, a proposal for an appropriate emissions monitoring technology that will be implemented at the source.

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: 249BART@gw.dec.state.ny.us

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

Public comment will be received until: December 10, 2009.

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

In Section 169A of the Clean Air Act (CAA), Congress declared as a national goal the prevention of any future, and remedying of any existing, visibility impairment in Federal Class I areas resulting from man-made pollutant emissions. For states with Class I areas, and for states that contain eligible stationary sources which may cause or contribute to regional haze issues in Class I areas contained in downwind states, the United States Environmental Protection Agency (EPA) requires the implementation of measures to reduce emissions of these visibility-impairing pollutants. While New York State contains no Class I areas, it has been identified as containing sources eligible for Best Available Retrofit Technology (BART) which contribute to the regional haze issue in Class I areas in other states. Accordingly, 6 NYCRR Part 249, "Best Available Retrofit Technology (BART)", must be promulgated to ensure that proper advances will be made in fulfilling the goals of the CAA. The visibility-impairing pollutants have been identified as particulate matter less than or equal to 10 microns in diameter (PM_{10}), sulfur dioxide (SO_2), and nitrogen oxides (NO_x). Under an option granted by EPA in the final BART rule (70 FR 39104), the New York State Department of Environmental Conservation (department) is not considering ammonia or volatile organic compounds as visibility-impairing pollutants, due to the uncertainty with which they contribute to visibility impairment.

On July 1, 1999, EPA published its final Regional Haze Rule (64 FR 35714), aimed at protecting and repairing visibility in the 156 Federal Class I areas. This legislation required states and tribes to submit regional haze implementation plans to EPA detailing their plans to reduce emissions of visibility-impairing pollutants and to eventually meet the national goal of achieving natural visibility conditions by 2064. One of the primary means of showing reasonable progress toward this goal is the installation of BART controls on stationary sources which meet the criteria for eligibility and which cause or contribute to visibility impairment in downwind Class I areas. Stationary sources which are eligible for the consideration of BART controls are those which:

- (1) belong to one of 26 specific source categories as listed in 6 NYCRR Part 231-2.2(c)(1) through (26);
- (2) commenced operation or underwent reconstruction between August 7, 1962 and August 7, 1977; and
- (3) have the potential to emit 250 tons per year (tpy) or more of any visibility-impairing pollutant.

EPA published the final BART rule on July 6, 2005. The rule specified the levels of contribution to visibility impairment by which stationary sources would be subject to BART. It also detailed the five-factor analysis to be used by states to determine the appropriate level of controls that would need to be installed. The promulgation of Part 249 will incorporate these elements to help reduce the emissions of pollutants which affect visibility in Class I areas. In addition to the promulgation of Part 249, this

rulemaking requires a revision to Part 200, "General Provisions." This revision relates to an addition to Table 1 of Section 200.9, "Referenced Material."

The promulgation of Part 249 is authorized by Environmental Conservation Law Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103, and 71-2105.

LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above statutes are directed toward protection of the environment and public health. CAA Section 169A outlined the need to lessen the impact of man-made air pollution in Class I areas. Part 249 will reduce emissions of visibility-impairing pollutants from certain stationary sources that pre-dated the CAA and thus may have been exempt from other control regulations. The need for Part 249 is witnessed in the benefits of improved visibility conditions to be achieved in the nation's Class I areas, as well as the associated health benefits which will be realized through the reduced emissions of these visibility-impairing pollutants.

Although New York State contains no Class I areas, it has been identified as containing BART-eligible sources which cause or contribute to regional haze issues in such areas in downwind states. In concert with the Regional Haze Rule and final BART rule, the department must promulgate Part 249 to ensure adequate control of these sources. This regulation will specify the eligibility requirements by which stationary sources would be subject to BART, and detail the five-factor analysis to be used by the department to determine the appropriate level of controls that would need to be installed.

Aside from the aspects of Part 249 which are intended to improve visibility and protect the environment, the regulation will also help preserve and improve public health. NO_x is an ozone precursor, while SO_2 and direct particulate matter (PM) emissions are the major contributors to elevated airborne particulate concentrations. Elevated levels of ozone and PM in the ambient air have been associated with respiratory and cardiovascular impairment. By regulating these pollutants, the public will be better protected.

NEEDS AND BENEFITS

Any stationary source which meets the criteria of eligibility and is considered to be causing or contributing to visibility impairment in a Class I area is required to perform a five-factor BART determination analysis to decide on the appropriate level of controls that would need to be installed. Although no Class I areas exist within New York State, modeling has shown that emissions from some of the state's stationary sources may contribute to visibility impairment in nine downwind Class I areas. With the final BART rule, EPA considered a source whose emissions result in a 1.0 deciview degradation of visibility in a Class I area would be thought of as "causing" visibility impairment, while emissions resulting in a 0.5 deciview degradation would be "contributing" to impairment. However, EPA granted authority to each state to decide upon a lower deciview level at which a source is considered to be contributing to impairment.

In their draft "Five Factor Analysis of BART - Eligible Sources" study released on June 1, 2007, the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Regional Planning Organization (RPO) analyzed eligible sources' contribution to visibility impairment in order to determine which eligible sources should be subject to a BART determination analysis. This study showed significant contribution well below the 0.5 deciview level proposed by EPA. The study also demonstrated that sources below a 0.1 deciview contribution level have very small impacts on Class I areas. Based on MANE-VU's analysis, the department is proposing a 0.1 deciview impact level from individual sources as an adequate benchmark to declare a source as contributing to visibility impairment and thus subject to a determination analysis, and is soliciting comment on an impact level in the range of 0.1 to 0.5 deciviews.

In conducting a BART determination analysis, the facility must consider the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the expected degree of visibility improvement from controls. This analysis must be completed and submitted to the department by October 1, 2010. Control equipment or other emission reduction methods approved by the department as BART must be installed and operating no later than July 1, 2013.

Many additional environmental and health benefits are inherent in the reductions of NO_x , PM, and SO_2 . Although downwind rural and urban areas within New York State were not specifically targeted through the Regional Haze Rule, these areas can expect to benefit from improved air quality. NO_x is a precursor to ground-level ozone formation, which is of major concern for New York State, which contains several non-attainment areas for the 8-hour ozone National Ambient Air Quality Standard (NAAQS). Ozone can affect crop yield and forest growth, and cause numerous respiratory problems for the elderly, children, people with pre-existing respiratory conditions (such as asthma), and those who spend much of their time outdoors.

Elevated PM levels are of concern for the New York City metropolitan area, which has been designated as non-attainment for the annual PM_{2.5} NAAQS, and for which current monitoring data indicate non-attainment with the 24-hour PM_{2.5} NAAQS. PM can be emitted directly from stationary sources, or comprised of nitrate and sulfate particles formed through reactions involving NO_x and SO₂ in the atmosphere. These particles are small enough to be inhaled into the lungs, and can even enter the bloodstream. Ongoing scientific studies show that particulate inhalation can cause severe respiratory and cardiovascular conditions.

Nitric and sulfuric acid are formed through reactions involving NO_x and SO₂ which have entered the atmosphere. These acidic chemicals return to the surface through dry or wet deposition. Acid deposition has many far-reaching ecological effects, such as damaging plants and aquatic life, and inflicting aesthetic damage on statues and buildings.

COSTS

Costs to Regulated Parties and Consumers:

Eligible sources which cause or contribute to visibility impairment in Class I areas must perform a five-factor BART determination analysis, in which a number of control options will be explored. The department is proposing to apply a general cost range to determine if the cost of the installation of control equipment is appropriate. These costs would range from what currently constitutes the threshold value for Reasonably Available Control Technology (RACT) on the lower end, to the current threshold value of Best Available Control Technology (BACT) on the higher end. The department therefore seeks comments on an approximate cost range for BART controls between \$5,500 and \$10,000 per ton of pollutant reduced.

Sources subject to Part 249 may be able to avoid a BART determination analysis if they accept a permit emissions limit to cap the source below 250 tpy for each visibility-impairing pollutant. Alternatively, a facility may accept the option to perform a modeling analysis, which would be submitted to the department and would need to demonstrate that the particular source does not cause or contribute to visibility impairment in any Class I area. If approved by the department, the source in question would be exempt from any BART requirements. The department is seeking comments on its intent to allow exemption modeling.

Consumers are not anticipated to see any significant increase in costs from the implementation of BART controls on sources in New York State. The facilities affected by this regulation serve extensive markets. Due to the large scale of company finances compared to the cost of additional controls on a few sources, the financial impact of the installation of control equipment is expected to be small enough that no consumer cost increases are expected. Additionally, competition will limit the ability of these companies to pass these costs on to consumers.

Costs to State and Local Governments:

There are no direct costs to state and local governments associated with this proposed regulation, as it applies only to industrial stationary sources. No recordkeeping, reporting, or other requirements will be imposed on local governments.

Costs to the Regulating Agency:

The department will face some initial administrative costs. These costs should be minimized, as many of the requirements pertain to tasks already required in processing and enforcing the subject facilities' Title V permits. There are labor costs associated with an estimated three day period for a staff member to review and approve each BART determination analysis. There are also labor costs associated with incorporating the BART determination into the facility's permit and the work involved with reviewing and processing the permit. This is estimated to take an additional two days of staff time for each facility. If the facility is required to implement controls, the department will need to conduct inspections related to the installation of that equipment, and will need to review testing and monitoring protocols, established to determine what monitoring is appropriate for the controlled source. Finally, the department will need to inspect the operation of the source, and review compliance and monitoring reports and data to determine if the source is in compliance with the BART requirements. The impact and scope of these ongoing activities is dependent upon whether additional controls are deemed necessary as a result of the BART analysis.

LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements will be imposed on local governments under this rulemaking.

PAPERWORK

Additional paperwork will be incurred by the affected facilities with the promulgation of Part 249. Sources which meet the criteria of eligibility and which cause or contribute to visibility impairment are required to perform a five-factor BART determination analysis, to be submitted to the department for approval. This analysis will consider the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in vis-

ibility which may reasonably be anticipated to result from the application of controls. These factors must be considered for emissions of PM₁₀, SO₂, and NO_x, regardless of which individual visibility-impairing pollutant has exceeded the 250 tpy threshold. Excluded from the analysis is any visibility-impairing pollutant for which emissions are below the established de minimis level-a level at which emissions of a pollutant are of minimal concern, and further reductions of any such pollutant would lead only to trivial reductions in visibility impairment. For the purposes of Part 249, as suggested by the final BART rule, the facility-wide de minimis emissions levels are 40 tpy of SO₂ or NO_x and 15 tpy of PM₁₀.

Facilities for which BART controls are deemed necessary may need to submit an application to modify their Title V permit. These changes can be incorporated into the renewal application process for the facility's Title V permit (which occurs every five years), presuming the renewal will take place within the necessary timeframe. Affected facilities may be required to perform emissions tests and, if required by the department, install adequate continuous emission monitoring systems to determine compliance with the new emission limits and performance requirements. Test protocols and reports will need to be submitted to the department for approval. However, all of the affected facilities are currently regulated under the Title V program, and are already required to perform a compliance emissions test at least once during the term of their permits.

DUPLICATION

In considering the existing pollution control technology in use at an eligible source as part of the five-factor analysis, it may be found that control measures have already been applied under the requirements of the department's RACT regulations. Depending upon the level of control in such cases, measures approved as RACT could potentially be superseded by the more stringent application of BART.

ALTERNATIVES

One alternative to the promulgation of Part 249 is to take no action. This alternative does not comply with the CAA and the subsequent issuance of the Regional Haze Rule and final BART rule. EPA would be obligated to promulgate a Federal Implementation Plan to enforce these BART provisions.

A second alternative is to regulate BART-eligible EGU sources under the Clean Air Interstate Rule (CAIR) program (6 NYCRR Parts 243, 244, and 245). The department does not believe this to be a viable alternative, as CAIR was recently remanded to EPA by the U.S. Circuit Court of Appeals for the D.C. Circuit due to various flaws. EPA's response to the CAIR remand, for which there is no deadline, will likely look quite different from the current program, and the finding that CAIR achieves greater emission reductions than does BART would be put into question with this new version of the program. Due to the high degree of uncertainty related to the future of CAIR, the department is proposing to regulate eligible EGU sources under Part 249.

FEDERAL STANDARDS

The proposed Part 249 regulation is designed to comply with the standards placed by the Federal government and does not exceed those standards. Part 249 is necessary to meet the requirements of the Regional Haze Rule and final BART rule, and is mandated by CAA Section 169A.

COMPLIANCE SCHEDULE

Sources found to be subject to the proposed regulation will be required to submit their five-factor analysis of potential BART controls to the department by October 1, 2010. Control equipment or other emission reduction methods approved as BART must be installed and operating no later than July 1, 2013. If an applicable source chooses not to comply with the provisions of Part 249, it must permanently shut down operations by July 1, 2013.

Regulatory Flexibility Analysis

The Department of Environmental Conservation (department) proposes to adopt 6 NYCRR Part 249, "Best Available Retrofit Technology (BART)." This regulation is proposed pursuant to Section 169A of the Clean Air Act and the Federal Regional Haze Rule (64 FR 35714), which call for a solution to the progressively worsening regional haze problem caused by visibility-impairing pollutants. This new regulation will establish protocols for the implementation of pollution control technology on older stationary sources which emit visibility-impairing pollutants to the detriment of Federal Class I areas. The visibility-impairing pollutants have been identified as sulfur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter less than or equal to 10 microns in diameter (PM₁₀). Due to the uncertainty with which they contribute to visibility impairment, under an option granted by EPA in the final BART rule (70 FR 39104), the department is not considering ammonia or volatile organic compounds as visibility-impairing pollutants. In addition to the promulgation of Part 249, this rulemaking requires a revision to Part 200, "General Provisions." This revision relates to an addition to Table 1 of Section 200.9, "Referenced Material."

Installation of BART controls and the subsequent emissions reductions will help show reasonable progress for the Regional Haze State Implemen-

tation Plan. It will also benefit New York State through reductions of ground-level ozone, airborne particulate matter, and acid deposition, and will improve visibility in areas such as the Adirondack Park.

The implementation of Part 249 will not directly affect any small businesses or local governments. Therefore, a full Regulatory Flexibility Analysis for Small Businesses and Local Governments will not be written. There are specific criteria which make a source eligible for BART controls: a source must belong to one of 26 specific source categories, have commenced operation or undergone reconstruction between August 7, 1962 and August 7, 1977, and have a potential to emit 250 tons per year or more of any of the visibility-impairing pollutants. The department has identified seven non-electric generating unit (non-EGU) stationary sources which may fit the eligibility criteria and which may contribute to visibility impairment, and is in the process of identifying the eligible EGU sources. None of these facilities can be considered small businesses or local governments.

The department incurs all responsibility for implementing and administering this regulation. Local governments will not face any recordkeeping, reporting, or other requirements associated with Part 249, as the requirements will be applicable only to the regulated source.

Rural Area Flexibility Analysis

The Department of Environmental Conservation (department) proposes to adopt 6 NYCRR Part 249, "Best Available Retrofit Technology (BART)." This regulation is proposed pursuant to Section 169A of the Clean Air Act and the Federal Regional Haze Rule (64 FR 35714), which call for a solution to the progressively worsening regional haze problem caused by visibility-impairing pollutants. This new regulation will establish protocols for the implementation of pollution control technology on older stationary sources which emit visibility-impairing pollutants to the detriment of Federal Class I areas. The visibility-impairing pollutants have been identified as sulfur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter less than or equal to 10 microns in diameter (PM₁₀). Due to the uncertainty with which they contribute to visibility impairment, under an option granted by EPA in the final BART rule (70 FR 39104), the department is not considering ammonia or volatile organic compounds as visibility-impairing pollutants. In addition to the promulgation of Part 249, this rulemaking requires a revision to Part 200, "General Provisions." This revision relates to an addition to Table 1 of Section 200.9, "Referenced Material."

Installation of such controls and the corresponding emissions reductions will help show reasonable progress for New York's Regional Haze State Implementation Plan. Part 249 will additionally benefit New York State through reductions of ground-level ozone, airborne particulate matter, and acid deposition, and will improve visibility in areas such as the Adirondack Park.

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS

The control standards proposed in this regulation apply to any stationary source within the state which meets the eligibility criteria and which causes or contributes to visibility impairment in downwind Class I areas. Stationary sources which are eligible for the consideration of BART controls are those which:

- (1) belong to one of 26 specific source categories as listed in 6 NYCRR Part 231-2.2(c)(1) through (26);
- (2) commenced operation or underwent reconstruction between August 7, 1962 and August 7, 1977; and
- (3) have the potential to emit 250 tons per year (tpy) or more of any visibility-impairing pollutant.

The requirements of Part 249 do not generally favor urban or rural areas. Of the seven non-electric generating unit (non-EGU) facilities identified by the department which may meet the eligibility criteria and which may contribute to visibility impairment in Class I areas by the standards proposed by the department, four are located in rural areas: ALCOA Massena Operations (West Plant) in St. Lawrence County; International Paper-Ticonderoga Mill in Essex County; Lehigh Northeast Cement Company in Warren County; and St. Lawrence Cement Corp.-Catskill Quarry in Greene County. These four sources may be required to install pollution control equipment, depending upon the results of a BART determination analysis to be conducted by the source pursuant to Part 249. The department is in the process of identifying the eligible EGU sources, and currently believes that the majority of these sources reside in urban areas.

COMPLIANCE REQUIREMENTS

Each eligible source which causes or contributes to visibility impairment in a Class I area will be required to perform a five-factor BART determination analysis, taking into account potential controls for each of the visibility-impairing pollutants (SO₂, NO_x and PM₁₀). Excluded from the analysis is any visibility-impairing pollutant for which emissions are below the established de minimis level. This represents a level at which emissions of a pollutant are of minimal concern, and further reductions of any such pollutant would lead only to trivial reductions in visibility impairment. For the purposes of Part 249, the facility-wide de minimis

emissions levels are 40 tpy of SO₂ or NO_x and 15 tpy of PM₁₀. This analysis, to be submitted to the department by October 1, 2010, must examine the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the application of controls. Department staff will review the BART determination analysis and, based on the information provided, reach a conclusion regarding the necessary controls to be installed. Control equipment or other emission reduction methods approved by the department as BART must be installed and operating no later than July 1, 2013. Professional services may be required for the writing of the determination analysis or the potential installation of pollution control equipment.

Facilities for which BART controls are deemed necessary will need to submit an application to modify their Title V permit. These changes can be incorporated into the renewal application process for the facility's Title V permit (which occurs every five years) if the renewal will take place in the necessary timeframe. The affected facilities will also be required to perform emissions tests, and, if required by the department, install adequate continuous emission monitoring systems to determine compliance with emissions and performance requirements. Test protocols and reports may need to be submitted to the department for approval. Because all of the affected facilities are currently regulated under the Title V program, they are already required to perform a compliance emissions test at least once during the term of their permits.

COSTS

Eligible sources which cause or contribute to visibility impairment will face costs associated with conducting the BART determination analysis. The department is proposing to apply a general cost range to determine if the cost of the installation of control equipment is appropriate. These costs would range by what currently constitutes the threshold value for Reasonably Available Control Technology (RACT) on the lower end, to the current threshold value of Best Available Control Technology (BACT) on the higher end. The department therefore seeks comments on an approximate cost range for BART controls between \$5,500 and \$10,000 per ton of pollutant reduced. Additional costs would be incurred for emissions testing or the installation and operation of continuous emission monitoring systems on control equipment.

Consumers are not anticipated to see any significant increase in costs as a result of implementation of BART controls. The facilities affected by this regulation serve large-scale markets, and competition will force companies to absorb the costs of implementation of controls.

MINIMIZING ADVERSE IMPACT

The department does not expect any adverse impacts on rural areas. Applicable stationary sources will undergo an analysis to determine which controls, monitoring systems, recordkeeping and reporting may be required. These factors are not influenced by the location of the facility in a rural, suburban, or urban area.

There will be positive environmental impacts from the regulation in rural areas. Rural areas containing applicable stationary sources, as well as rural areas downwind of such sources, should witness improved visibility with an associated decrease in ground-level ozone, airborne particulate matter, and acid deposition.

Part 249 is a statewide regulation. Its requirements are the same for all facilities, and rural areas are impacted no differently than other areas in the state.

RURAL AREA PARTICIPATION

During the drafting of Part 249, the department held meetings with The Business Council of New York State, Inc. Its membership includes facilities affected by the requirements of Part 249. These meetings were held to give representatives from these companies, which include the rural-area stakeholders, an opportunity to meet with department staff and discuss various issues during the rulemaking process. An initial in-person meeting was held on April 27, 2007, followed by a teleconference on September 21, 2007. The department also included a BART discussion in a presentation made on October 18, 2007, at the annual Business Council meeting in Saratoga.

Job Impact Statement

NATURE OF IMPACT

The Department of Environmental Conservation (department) proposes to adopt 6 NYCRR Part 249, "Best Available Retrofit Technology (BART)." This regulation is proposed pursuant to Clean Air Act (CAA) Section 169A and the Federal Regional Haze Rule (64 FR 35714), which call for a solution to the progressively worsening regional haze problem caused by visibility-impairing pollutants. This new regulation will establish protocols for the installation of pollution control technology on older stationary sources which emit these visibility-impairing pollutants to the detriment of Federal Class I areas. The visibility-impairing pollutants have been identified as particulate matter less than or equal to 10 microns in diameter (PM₁₀), sulfur dioxide (SO₂), and nitrogen oxides (NO_x).

Because of the uncertainty with which they contribute to visibility impairment, under an option granted by EPA in the final BART rule (70 FR 39104), the department is not considering ammonia or volatile organic compounds as visibility-impairing pollutants. In addition to the promulgation of Part 249, this rulemaking requires a revision to Part 200, "General Provisions." This revision relates to an addition to Table 1 of Section 200.9, "Referenced Material."

Part 249 identifies the requirements for the installation of BART controls on stationary sources which meet the criteria for eligibility and which cause or contribute to visibility impairment in downwind Class I areas. Stationary sources that are eligible for the consideration of BART controls are those which:

- (1) belong to one of 26 specific source categories as listed in 6 NYCRR Part 231-2.2(c)(1) through (26);
- (2) commenced operation or underwent reconstruction between August 7, 1962 and August 7, 1977; and
- (3) have the potential to emit 250 tons per year or more of any visibility-impairing pollutant.

Installation of BART controls and the subsequent emissions reductions of visibility-impairing pollutants will help show reasonable progress for New York's Regional Haze State Implementation Plan. Eligible stationary sources which cause or contribute to visibility impairment in downwind Class I areas must perform a five-factor BART determination analysis, through which the best control option from both a technical and an economic standpoint will be selected. The department has identified seven non-electric generating unit (non-EGU) stationary sources within New York State which may require a BART analysis, and is currently undergoing a process to identify the eligible EGU stationary sources. Some of these sources may have fulfilled the control requirements through other control programs such as Reasonably Available Control Technology (RACT), so it is anticipated that the actual number of sources required to install controls may be less. The proposed regulation is not expected to have an adverse impact on jobs or employment opportunities in New York State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The promulgation of Part 249 is not anticipated to have any long-term effects on the number of current jobs or future employment opportunities. In order to comply with the BART requirements, the applicable facilities may be required to purchase and install control equipment. 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. Because it is unknown at this time which facilities will find it necessary to install such control equipment, the department is unable to estimate the actual number of short-term jobs created.

The reductions in visibility-impairing pollutants resulting from the implementation of Part 249 could result in a positive impact on the tourism industry, particularly for the Adirondack and Catskill Parks. Aside from the mitigation of haze in these areas and across New York State, improvements in acid deposition will be seen, keeping trees and waterways in good condition, thus allowing state parks to remain healthy and attractive places to visit.

REGIONS OF ADVERSE IMPACT

The proposed Part 249 is a statewide regulation. This regulation is not expected to have an adverse impact on jobs or employment opportunities in New York State. It does not impact any region or area of the state disproportionately in terms of jobs or employment opportunities.

MINIMIZING ADVERSE IMPACT

Implementation of Part 249 is mandated by CAA Section 169A and the federal Regional Haze Rule. This regulation is designed to comply with the standards enacted by the federal government and does not exceed those standards.

The Federal Regional Haze Rule and final BART rule allow for some discretion in the interpretation of the five-factor determination analysis, to be performed by eligible non-EGU sources which cause or contribute to visibility impairment in Class I areas. Except for pollutants whose facility-wide emissions are below the established de minimis level, this determination analysis is to be performed for each visibility-impairing pollutant in order to decide on the necessary control equipment. Pursuant to Part 249, the department will determine, on a case-by-case basis, an appropriate level of BART control based upon the costs of compliance, the energy and non-air quality environmental impacts of compliance, the existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of visibility improvement which can be reasonably expected from the application of control technology. The department is proposing to apply a general cost range to determine if the cost of the installation of control equipment is appropriate. These costs would range by what currently constitutes the threshold value for RACT on the lower end, to the current threshold value of Best Available Control Technology

(BACT) on the higher end. Therefore, subject facilities can expect a cost range for BART controls between \$5,500 and \$10,000 per ton of pollutant reduced.

By reviewing the BART determination analyses on a case-by-case basis, the department can enforce controls independently, rather than under more general conditions which may impose excessive expenditures to certain facilities. By allowing for this flexibility in the selection of emissions control technology, affected sources will spend only as much money as necessary for adequate reductions. This efficient use of resources will minimize the effect on employment opportunities.

SELF-EMPLOYMENT OPPORTUNITIES

There are no adverse impacts towards self-employment opportunities associated with the proposed BART regulation. The types of facilities affected by this regulation are larger operations than what would be found in a self-employment situation. Even though it is expected that most design, engineering, and construction will be performed by larger consultation and construction firms, there may be opportunities for self-employed consultants to advise the facilities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

CAIR Rules are the NYS Components of Regional Cap-and-Trade Programs That Apply Primarily to Large Fossil Fuel-Fired EGUs

I.D. No. ENV-43-09-00007-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, 243, 244 and 245 of Title 6 NYCRR.

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

Subject: The CAIR rules are the NYS components of regional cap-and-trade programs that apply primarily to large fossil fuel-fired EGUs.

Purpose: Mitigate interstate transport of NO_x and SO₂ to help reduce ozone and fine particulate formation in eastern U.S. CAIR states.

Public hearing(s) will be held at: 2:00 p.m., December 1, 2009 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., December 2, 2009 at NYSDEC, Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., December 3, 2009 at NYSDEC 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): The New York State Department of Environmental Conservation (the Department) proposes revisions to the terms of 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6 NYCRR Part 245, CAIR SO₂ Trading Program (collectively, the NYS CAIR rules) to incorporate changes made to the model federal regulations on which the three NYS CAIR rules are based, and make minor clarifications and corrections to the NYS CAIR rules.

The NYS CAIR rules are the New York State components of regional cap-and-trade programs that apply primarily to large fossil fuel-fired electricity generating units (EGUs) in a region encompassing the District of Columbia and 27 States in the eastern United States. With the exception of the inclusion of certain additional sources under Part 243, the NYS CAIR rules apply to EGUs having a nameplate capacity equal to or greater than 25 megawatts electrical (MWe) producing electricity for sale. Part 243 also covers all sources that were covered under Part 204, NO_x Budget Trading Program, including cement manufacturers, certain large industrial sources, and EGUs with a nameplate capacity equal to or greater than 15 MWe.

The NYS CAIR express terms contain provisions that detail requirements as to general provisions, designated representatives, permits, allowance allocations, compliance accounting, monitoring and reporting, and opt-in units. There were no substantial changes made to these provisions as part of this rulemaking beyond what is identified in this summary.

Changes were made to the definitions of "cogeneration unit," "bio-

mass,” and “total energy input,” to be consistent with EPA’s CAIR model rules. By changing the definitions of “cogeneration unit,” “biomass,” and “total energy input,” the proposed rule revisions will comply with the mandate of 40 CFR section 51.123(o)(1) and (aa)(1), and 40 CFR section 51.124(o)(1).

The Department has revised the definition of “fossil fuel-fired” in Part 243 to include the cross reference to the applicability in 243-1.4(a)(3).

The Department has revised the definition of “non-electric generating unit” in section 243-1.2 to identify, by ORIS Code, the certain units owned by Eastman Kodak Company and International Paper.

The Department proposes to revise the number of control periods for which a new unit may receive NO_x allowances under sections 243-5.3(f)(3) and 244-5.3(c)(3) from six consecutive control periods to no more than four consecutive control periods.

The Department has deleted the text included in the definitions of “CAIR designated representative” and “Alternate CAIR designated representative” that referred to the Mercury Reduction Program for Coal-Fired Electric Utility Steam Generating Units established at 6 NYCRR Part 246.

Part 200 has been revised to include a listing of updated versions of federal regulations that are incorporated by reference into Parts 243, 244, and 245.

Text of proposed rule and any required statements and analyses may be obtained from: Michael Miliani, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: CAIR@gw.dec.state.ny.us

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

Public comment will be received until: December 10, 2009.

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 (the Department) proposes to revise the terms of 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6 NYCRR Part 245, CAIR SO₂ Trading Program (collectively, the NYS CAIR rules) to incorporate changes to the model federal regulations on which the three NYS CAIR rules are based, and make minor clarifications and corrections to the NYS CAIR rules.

The NYS CAIR rules are the New York State components of regional cap-and-trade programs that apply primarily to large fossil fuel-fired electricity generating units (EGUs) in a region encompassing the District of Columbia and 27 States in the eastern United States. With the exception of the inclusion of certain additional sources under Part 243, the NYS CAIR rules apply to EGUs having a nameplate capacity greater than 25 megawatts electrical (MWE) producing electricity for sale. Part 243 also covers all sources that were covered under Part 204, NO_x Budget Trading Program, including cement manufacturers, certain large industrial sources, and EGUs with a nameplate capacity equal to or greater than 15 MWE.

The NYS CAIR rules originally took effect on October 19, 2007. The rules were promulgated in response to the determination of the United States Environmental Protection Agency (EPA) that New York State must submit, in compliance with federal Clean Air Act (CAA) section 110(a)(2)(D)(i)(I), State Implementation Plan (SIP) revisions that contain adequate provisions prohibiting sources and other activities from emitting NO_x and SO₂ in amounts that will contribute significantly to nonattainment in, or interfere with maintenance by, one or more other States with respect to the fine particles (PM_{2.5}) and 8-hour ozone National Ambient Air Quality Standards (NAAQS). ‘See’ 40 CFR section 51.123(a)(1) and (a)(2), and 40 CFR section 51.124(a). EPA offered three model rules for States to adopt in order to participate in regional NO_x and SO₂ cap-and-trade programs that achieve the emissions reductions determined necessary by EPA to comply with the provisions of CAA section 110(a)(2)(D). ‘See’ 40 CFR sections 96.101-188, CAIR NO_x Annual Trading Program, 40 CFR sections 96.201-288, CAIR SO₂ Trading Program, and 40 CFR sections 96.301-388, CAIR NO_x Ozone Season Trading Program. These federal regulations setting forth the SIP requirements and optional cap-and-trade programs were originally promulgated as part of the ‘Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule’, 70 FR 25162-405 (May 12, 2005) (‘CAIR’) (the federal CAIR rules).

Any State that promulgated regulations that followed the federal model rules, except for certain specifically allowed deviations, was assured of automatic approval of the regulations by EPA as SIP revisions. 40 CFR section 51.123(o) and (aa), and 40 CFR section 51.124(o). On September 17, 2007 (following approval for adoption by the State Environmental

Board), the Department submitted the NYS CAIR rules to EPA as proposed SIP revisions. EPA approved the SIP revisions on January 24, 2008. ‘See Approval and Promulgation of Implementation Plans; New York: Clean Air Interstate Rule’, 73 Fed. Reg. 4109-4113.

On the same day that the NYS CAIR rules became effective, EPA promulgated revisions to the federal CAIR rules. ‘See Revisions to Definition of Cogeneration Unit in Clean Air Interstate Rule (CAIR), CAIR Federal Implementation Plans, Clean Air Mercury Rule (CAMR); and Technical Corrections to CAIR, CAIR FIPs, CAMR, and Acid Rain Program Rules’ 72 Fed. Reg. 59190-207 (October 19, 2007). These revisions consist of changes to the provisions that established the exemption for cogeneration units that exist in each program (primarily changes to the definitions of “cogeneration unit”, “biomass”, and “total energy input”).

In order to continue to participate in the regional cap-and-trade programs under CAIR, the Department was supposed to promulgate revisions to the NYS CAIR rules that comport with the federal revisions by January 1, 2009. ‘See’ 40 CFR section 51.123(o)(1) and (aa)(1), and 40 CFR section 51.124(o)(1). As indicated below, litigation over the federal CAIR rules disrupted the efforts of the Department to meet this deadline.

Each of the NYS CAIR rules provide, as do all corresponding rules in other States subject to CAIR, that certain units meeting the definition of “cogeneration unit” may be excluded from the definition of “electric generating unit” and thereby be exempt from the requirements of the rules. In order to be a cogeneration unit, a unit must have equipment used to produce electricity and useful thermal energy through sequential use of energy and must meet a specified efficiency standard, that is, the useful power plus one-half of useful thermal energy output of the unit must equal no less than a certain percentage of the total energy input, or in some cases, useful power must be no less than a certain percentage of total energy input. As presently written, the efficiency standard in the cogeneration unit definition applies to all energy input to the unit regardless of fuel type.

EPA summarized the reasons for changing the definition of “cogeneration unit” as follows:

EPA believes that biomass cogeneration units as a group have a particular set of characteristics that together may make it difficult for many units to meet the efficiency standard in the cogeneration unit definition unless the units co-fire significant amounts of fossil fuel, such as coal. These characteristics are: fuels with relatively high moisture content, units designated for relatively low pressure and temperature conditions for industrial processes, and relatively small boilers and steam turbines that are inherently less efficient due to their size. EPA recognizes that there are some existing biomass cogeneration units (e.g., those that co-fire coal, natural gas, or oil for a large portion of their heat input) that might be able to meet the efficiency standard, as discussed in the following section.

The cogeneration unit definition finalized in the CAIR model cap-and-trade rules, the CAIR FIPs, CAMR, the CAMR Hg model cap-and-trade rule and in the proposed CAMR Federal Plan includes all energy input in the efficiency calculation. EPA believes that the inclusion of energy input from all fuels - rather than from all fuels except biomass - has the unanticipated and unintended consequence of making it very difficult for existing biomass cogeneration units to qualify as cogeneration units unless they co-fire significant amounts of fossil fuel, such as coal. Preventing these existing units from qualifying as cogeneration units is not consistent with the purposes of the efficiency standard. These units were originally designed to, and still do, produce significant amounts of useful thermal energy (relative to their total energy output) and to achieve efficiency gains over non-cogeneration units. Under these circumstances, application of the original efficiency standard to existing biomass cogeneration units does not seem to promote the purposes of the standard. In addition, application of this standard as originally written had the paradoxical result that existing biomass cogeneration units burning greater amounts of fossil fuels (therefore likely having greater emissions) were much more likely to meet the efficiency requirement and thus qualify as cogeneration units exempt from emission limits under the CAIR model cap-and-trade programs and CAMR model cap-and-trade rule, while existing biomass cogeneration units burning less coal (therefore likely having lower emissions) were less likely to meet the requirement and qualify for the exemption.

72 Fed. Reg. at 59194-95

Under 40 CFR section 51.123(aa)(2)(i), states subject to CAIR were allowed to bring non-EGUs covered by the NO_x SIP Call into the CAIR NO_x Season Trading Program. EPA described the intent behind this provision as follows:

The EPA is allowing States affected by the NO_x SIP Call that wish to use EPA’s model trading rule to include non-EGUs currently covered by the NO_x SIP Call in the CAIR ozone season NO_x trading program. This will ensure that non-EGUs in the NO_x SIP Call will continue to be able to trade with EGUs as they currently do under the NO_x SIP Call. This will

not require States to get additional reductions from non-EGUs. Budgets for these units would remain the same as they are currently under the NO_x SIP Call. States will, however, be required to modify their existing NO_x SIP Call regulations to reflect the replacement of the NO_x SIP Call with the CAIR ozone season NO_x trading program. The EPA will continue to operate the NO_x SIP Call trading program until implementation of the CAIR begins in 2009. The EPA will no longer operate the NO_x SIP Call trading program after the 2008 ozone season and the CAIR ozone season NO_x trading program will replace the NO_x SIP Call trading program. If States affected by the NO_x SIP Call do not wish to use EPA's CAIR ozone season NO_x trading program to achieve reductions from non-EGU boilers and turbines required by the NO_x SIP Call, they would be required to submit a SIP Revision deleting the requirements related to non-EGU participation in the NO_x SIP Call Budget Trading Program and replacing them with new requirements that achieve the same level of reduction.

70 Fed. Reg. at 25290.

The CAIR NO_x Ozone Season Trading Program is the successor program to Part 204, NO_x Budget Trading Program. The NO_x Budget Trading Program was New York State's NO_x cap-and-trade program promulgated in compliance with the NO_x SIP Call. In accord with 40 CFR section 51.123(aa)(2)(i), the Department is making Part 243 explicitly applicable to certain units owned or operated by Eastman Kodak Company (Kodak) and International Paper (IP) that were classified as non-EGUs under Part 204.

Numerous legal challenges to the federal CAIR rules were decided in 'North Carolina v. EPA', 531 F.3d 896 (D.C. Cir. 2008). In this opinion issued on July 11, 2008, the court vacated the federal CAIR rules and the associated Federal Implementation Plan. The Court relied on several grounds to vacate CAIR: the Court concluded that EPA failed to measure each upwind State's significant contribution to downwind nonattainment as required by CAA section 110(a)(2)(D); the Court found that EPA interpreted and applied CAA section 110(a)(2)(D) in a manner that effectively read the "interfere with maintenance" provision out of the statute; the Court held that EPA ignored its statutory mandate to promulgate CAIR consistent with Title I of the CAA because EPA's use of a second phase of CAIR in 2015 to achieve reductions that would eliminate significant contribution from upwind States left downwind States (most facing 2010 attainment dates) with the obligation to attain the ozone and PM_{2.5} NAAQS without the elimination of the upwind State's significant contribution to downwind nonattainment (which would force downwind areas to make greater reductions than CAA section 110(a)(2)(D) requires); EPA based its determination of each upwind State's SO₂ emissions budget on the number of allowances that the State's EGUs received under CAA Title IV - the Federal Acid Rain Program - which the Court held was arbitrary, capricious, or not otherwise in accordance with law; the Court held that EPA's method of setting the NO_x budgets for upwind states was arbitrary and capricious and had the effect of making states with mainly oil- and gas-fired EGUs subsidize reductions in States with mainly coal-fired (and thus more polluting) EGUs; and the Court held that CAA section 110(a)(2)(D) gave EPA no authority to terminate or limit Title IV allowances. The Court also held that any State that chose not to adopt EPA's cap-and-trade programs, but which had filed SIP revisions that satisfied CAA section 110(a)(2)(D) by prohibiting emissions within the State from contributing significantly to downwind nonattainment, could not be forced by EPA to adopt SIP provisions that directed the retirement of excess Title IV allowances.

By a decision issued on December 23, 2008, the Court in 'North Carolina' responded to EPA's petition for rehearing by remanding the case to EPA without vacatur. EPA was directed to conduct further proceedings consistent with the Court's July 11, 2008. The court did not provide a deadline or schedule for EPA action on the remand. Thus, the federal CAIR rules and, by extension, the NYS CAIR rules, remain in effect until EPA promulgates new rules that repeal or replace the federal CAIR rules.

Because of the original July 11, 2008 decision vacating the federal CAIR rules, the Department ceased rulemaking activity aimed at complying with the January 1, 2009 SIP revision deadline set forth in 40 CFR section 51.123(o)(1) and (aa)(1), and 40 CFR section 51.124(o)(1). The present rulemaking is aimed at fulfilling the mandated SIP obligations.

The New York State Legislature has given 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 revisions to the NYS CAIR rules and submit the revisions to EPA for approval into the SIP. The statutory authority to promulgate Parts 243, 244, and 245 derives primarily from the Department's obligation to prevent and control air pollution, as set out in Environmental Conservation Law (ECL) at Sections 1-0101, 19-1013, 19-0105, 19-0301, 19-0303, 19-0311 and 3-0301. The legislative objectives underlying the above statutory authority are essentially directed toward promoting the safety, health and welfare of the public, and protecting the State's natural environment.

By promulgating and implementing the proposed revisions to the NYS CAIR rules, the Department will be amending rules that control emissions of NO_x and SO₂ that contribute to local and regional nonattainment of the ozone and PM_{2.5} NAAQS. The amendments to certain definitions in the NYS CAIR rules will comply with federal mandates to conform the NYS CAIR rules to the changes made by EPA to the federal model regulations of which the NYS CAIR rules are based and will provide more clarity to the NYS CAIR rules.

By changing the definitions of "cogeneration unit", "biomass", and "total energy input", the proposed rule revisions will comply with the mandate of 40 CFR section 51.123(o)(1) and (aa)(1), and 40 CFR section 51.124(o)(1). The Department has committed to EPA to revise the definition of "fossil fuel-fired" in Part 243. As previously written, the definition did not include the cross reference to the applicability in 243-1.4(a)(3). The Department has revised the "fossil fuel-fired" definition to include this reference.

There are units owned or operated by Kodak and IP that produce, but do not sell, electricity. These units were classified as non-EGUs under Part 204. If these units, while subject to Part 243, begin to sell electricity to any utility power distribution system, these units would be considered EGUs but would likely qualify for the cogeneration unit exemption under section 243-1.4(b). Should the Kodak and IP units become exempt from Part 243, the Department would be obligated to achieve other emissions reductions at least equivalent to those lost due to the inapplicability of Part 243 to these units. Rather than accept the loss of these important emissions reductions under Part 243, the Department has chosen to explicitly retain the Kodak and IP units as non-EGUs under Part 243. This is being accomplished by revising the definition of "non-electric generating unit" in section 243-1.2 to identify, by ORIS Code, the relevant units at Kodak and IP.

This proposed revision serves to clarify, rather than change, the status of the Kodak and IP units as non-EGUs under Part 243. These units are currently regulated under Part 243 and have been allocated allowances under section 243-5.3(e). None of the Kodak or IP units were accounted for by EPA when it established New York State's ozone season NO_x trading budgets as recorded at 40 CFR section 96.340 and reflected in 6 NYCRR section 243-5.3(a)(1). Therefore, the Department accounted for the 2,860 tons of NO_x emissions contained in the section 204-5.3(a)(3) non-EGU sector budget by creating the non-EGU sector budget at section 243-5.3(a)(4) in the same amount.

The Department proposes to revise the number of control periods for which a new unit may receive NO_x allowances under sections 243-5.3(f)(3) and 244-5.3(c)(3) from six consecutive control periods to no more than four consecutive control periods so that the Department's allowance allocation methodology will comport with established EPA administrative practices.

The Department has deleted the text included in the definitions of "CAIR designated representative" and "Alternate CAIR designated representative" that referred to the Mercury Reduction Program for Coal-Fired Electric Utility Steam Generating Units established at 6 NYCRR Part 246. The original text was included in the definition so that it would comport with the federal CAIR model rules which provided that all designated representatives under the CAIR, Acid Rain, and Clean Air Mercury (CAMR) programs must be the same person. Since the CAMR program was found unlawful and vacated by the court in 'State of New Jersey v. EPA', 517 F.3d 574 (D.C. Cir. 2008), the Department sees no reason to retain this unnecessary requirement.

The proposed revisions to the NYS CAIR rules incorporate changes made by EPA to the model federal regulations on which the three NYS CAIR rules are based. The minor clarifications and corrections to the NYS CAIR rules do not impose additional costs on the regulated parties, the Department, or other State or local government entities.

This rulemaking is not expected to either increase or decrease the number or complexity of recordkeeping or reporting requirements that apply to sources subject to the NYS CAIR rules.

The proposed minor clarifications and corrections to the NYS CAIR rules are not expected to result in any additional recordkeeping, reporting, or other requirement for any local government entity. They do not duplicate, overlap, or conflict with any other State or federal requirements.

The Department has no permissible alternative to the revisions that incorporate the changes required by 40 CFR section 51.123(o)(1) and (aa)(1), and 40 CFR section 51.124(o)(1). In its September 17, 2007 SIP submission to EPA, the Department committed to correct the error in the definition of "fossil fuel-fired" in section 243-1.2. See 'Approval and Promulgation of Implementation Plans; New York: Clean Air Interstate Rule; Proposed Rule', 72 Fed. Reg. 55723-29 (October 1, 2007). This commitment is now a SIP obligation that the Department must fulfill. See 40 CFR section 52.1670(c)(113).

The proposed revisions do not result in the imposition of requirements that exceed any minimum standards of the federal government for the

same or similar subject areas and do not impose any new compliance obligations on regulated entities.

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

The proposed revisions to Parts 243, 244, and 245 include minor clarifications and corrections that do not substantially change the structure or operation of these rules. The revisions incorporate changes to the model federal regulations on which the three NYS CAIR rules are based. The Department has determined that the revisions to Parts 243, 244, and 245 will not impose any additional reporting, recordkeeping, other costs or compliance requirements on affected sources. The revisions will not have any adverse impacts on small businesses, local governments, or on public or private entities in rural areas, or on jobs and employment opportunities.

Environmental Facilities Corporation

EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

The Proposed Regulations are for the CWSRF Co-Administered by EFC and the NYS Department of Environmental Conservation (DEC)

I.D. No. EFC-43-09-00003-EP

Filing No. 1174

Filing Date: 2009-10-09

Effective Date: 2009-10-09

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

Proposed Action: Amendment of Part 2602 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1284(5) and 1285-j-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 Clean Water State Revolving Fund ("DWSRF") Regulations, Part 2602 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 has been adopted as an emergency measure 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 90-day emergency time period and any subsequent 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 adopted 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 8.6 percent as of July, 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 adoption 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 CWSRF co-administered by EFC and the NYS Department of Environmental Conservation (DEC).

Purpose: To set forth rules implementing the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) - P.L. 111-5.

Public hearing(s) will be held at: 2:30 p.m., December 3, 2009 at 625 Broadway, Room 129A, Albany, 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 emergency/proposed rule (Full text is posted at the following State website: www.nysefc.org): I. SUBJECT:

The proposed revised regulations are for the New York State Clean Water Revolving Fund ("CWSRF"), Section 1285-j of the Public Authorities Law ("PAL"), co-administered by the New York State Environmental Facilities Corporation ("EFC") and the New York State Department of Environmental Conservation ("DEC"), pursuant to Chapter 565 of the Laws of 1989.

II. PURPOSE:

The proposed regulations set forth rules and procedures whereby EFC and DEC implement the requirements and objectives of the American Recovery and Reinvestment Act of 2009 ("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. EFC is adding the term of additional subsidization in the form of forgiveness of principal, a negative interest loan or a grant to allow the SRF to provide principal forgiveness or grants, as required by ARRA.

Among the changes, DEC is adding to the CWSRF Project Priority System ("PPS") for the purpose of including green infrastructure, water or energy efficiency improvements or other environmentally innovative activities as required by ARRA; EFC is expanding the definition of project to incorporate green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The definitions and administrative-oriented changes increase flexibility in CWSRF financial terms and products to address current market conditions as well as meet the objectives of ARRA to stimulate the economy and help initiate projects.

III. GENERAL SUBSTANCE:

EFC is proposing to amend the CWSRF regulations found within 21 NYCRR Part 2602 in the following manner (Companion regulations found within 6 NYCRR Part 649 will also be changed):

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 proposed amendments will also add school district and soil and water conservation district to the definition of recipient. 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 set out in a new section, and 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.

Section 2602.3(a) of EFC's proposed new regulations regarding the PPS make a cross reference to the PPS contained in Section 649.12 of DEC's regulations. DEC is proposing that the PPS be expanded to include a new category (Category G) for green infrastructure, water or energy efficiency improvements or other environmentally innovative activities in order to meet the objectives of the ARRA, and this is reflected in EFC's proposed regulations.

The proposed regulations provide for an annual allocation for Category G, including a project funding cap, to be determined annually by the Commissioner and described in the IUP. Through these changes, CWSRF funds may be made available to a variety of recipients (public and private) carrying out green infrastructure, water or energy efficiency improvements or other environmentally innovative activities.

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" and use of the acronym "Clean Water" Revolving Fund instead of "Water Pollution Control" Revolving Fund.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 6, 2010.

Text of rule and any required statements and analyses may be obtained from: Judith A. Avent, Esq., Deputy General Counsel, New York State Environmental Facilities Corporation, 625 Broadway, 7th Floor, Albany, New York 12207-2997, (518) 402-6968, email: avent@nysefc.org

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

When the Legislature enacted Chapter 565 of the Laws of 1989, it created the New York State Clean Water Revolving Fund ("CWSRF") and, in part, amended the State's Public Authorities Law ("PAL"), creating Section 1285-j, which sets forth the provisions of the CWSRF. Under Section 1285-j of the PAL, the New York State Environmental Facilities Corporation ("EFC") is given the statutory authority to administer the CWSRF. Pursuant to Section 1285-j(4), the Legislature provided that "moneys in the water pollution control revolving fund shall be applied by the corporation to provide financial assistance to municipalities for construction of eligible projects and, upon consultation with the director of the division of the budget and the commissioner, for such other purposes permitted by the Federal Water Pollution Control 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 Clean Water Act of 1986

("CWA") provided for the establishment, by each state, of a revolving fund, for certain identified water pollution control 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 CWA in an effort to stimulate the economy through building environmental infrastructure.

2. LEGISLATIVE OBJECTIVES

In creating the CWSRF under the PAL, the Legislature directed EFC and the Department of Environmental Conservation ("DEC") to provide assistance in support of the planning, development and construction of municipal water pollution control projects and other types of projects permitted by the CWA. ARRA provides federal funds through the CWSRF to create and retain jobs, to stimulate the economy and to promote green infrastructure. EFC and DEC are amending the CWSRF 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 CWSRF applicants.

These revisions conform the current CWSRF 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's proposed regulations amend the CWSRF regulations found in 21 NYCRR Part 2602 and, as appropriate, DEC is amending the 6 NYCRR Part 649 companion regulations 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) expand the CWSRF Project Priority System ("PPS") to include a new category (Category G) for green infrastructure projects allowed under the ARRA and CWA; (iv) permit financing of pre-design planning costs prior to completion to further stimulate project development; (v) clarify provisions regarding project bypassing to meet the objectives of ARRA as to project readiness; and (vi) other administrative-oriented changes, including the changing of various definitions in the regulations for purposes of increasing flexibility in CWSRF 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-j(4) gives EFC the power to provide assistance for such other purposes permitted by the CWA, as amended. Compliance with ARRA objectives and requirements will provide substantial additional Federal funds to the CWSRF to construct eligible clean water infrastructure projects and to reduce operational costs.

The proposed regulations allow for CWSRF 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 CWSRF 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 CWSRF regulations, EFC is also revising certain regulatory definitions 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 CWSRF 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 CWSRF program is voluntary. Anyone choosing to apply for financial assistance from the CWSRF 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 CWSRF program is voluntary. Anyone choosing to apply for financial assistance from the CWSRF 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

EFC's proposed amendments to 21 NYCRR Part 2602 will be consistent, as applicable, with the DEC CWSRF regulations found in 6 NYCRR Part 649.

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 CWSRF 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 \$432 million in additional funding for New York State Clean Water State Revolving Fund ("CWSRF") projects, including sewage treatment works, sewage collection systems and solid waste disposal 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 CWSRF funds into the New York State economy will preserve and create a significant number of jobs, primarily via funding for water pollution control construction projects. This will have a commensurate positive effect on small businesses and consultants involved in the construction of environmental infrastructure projects, in particular engineering firms, financial consulting firms and attorneys. Small businesses are actively involved in the clean water construction industry in New York State. The rule will also expand the types of projects eligible to receive funding under the CWSRF 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 CWSRF. 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 clean 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 CWSRF by small businesses and local governments is entirely voluntary. Any reporting or record keeping imposed by this rule would solely be the result of their decision to participate in the CWSRF program. Such participation would require compliance with existing CWSRF reporting and record keeping requirements and any reporting and record keeping requirements imposed by the ARRA.

3. PROFESSIONAL SERVICES

Small businesses and local governments who voluntarily participate in the CWSRF 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 record keeping should not vary depending on the size of such small business or local government. However, these reporting and record keeping 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 CWSRF 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 CWSRF program is entirely voluntary and any direct or indirect compliance requirements will result from small businesses and local governments applying for and seeking CWSRF 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 approaches 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 this rule.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

With respect to this proposed rulemaking, EFC will publish this Notice of Emergency Adoption and Proposed Rulemaking and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also will 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 sewage treatment facilities, sewage collection facilities, solid waste disposal facilities and other eligible Clean Water State Revolving Fund ("CWSRF") projects.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

Participation in the CWSRF 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 CWSRF program. Such participation would require compliance with existing CWSRF 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 CWSRF 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 state 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 this rule.

5. RURAL AREA PARTICIPATION

With respect to this proposed rulemaking, EFC will publish this Notice of Emergency Adoption and Proposed Rulemaking and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also will 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 \$432 million dollars into the New York State Clean Water State Revolving Fund ("CWSRF") will preserve and create a significant number of jobs, in particular those involving construction of sewage collection systems, sewage treatment works and solid waste disposal facilities. The rule will also provide jobs and employment opportunities for consultants involved with CWSRF 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.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517

Subject: Minimum standards for determining reserve liabilities and non-forfeiture values for preneed life insurance.

Purpose: To establish minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

Text or summary was published in the August 19, 2009 issue of the Register, I.D. No. INS-33-09-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY
RULE MAKING

Restrictions on the Consecutive Hours of Work for Nurses As Enacted in Section 167 of the Labor Law

I.D. No. LAB-43-09-00008-E

Filing No. 1178

Filing Date: 2009-10-13

Effective Date: 2009-10-13

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

Action taken: Addition of Part 177 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21

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

Specific reasons underlying the finding of necessity: Section 167 of the Labor Law is effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

Subject: Restrictions on the consecutive hours of work for nurses as enacted in Section 167 of the Labor Law.

Purpose: To clarify the emergency circumstances under which an employer may require mandatory overtime for nurses.

Substance of emergency rule: RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

By L. 2008, Ch. 493, § 1, the New York State Legislature created Section 167 of the Labor Law with the title "Restrictions on consecutive hours of work for nurses."

The proposed rule creates a new part of regulations designated as 12 NYCRR Part 177 entitled "Restrictions on Consecutive Hours of Work for Nurses."

Subpart 177.1, entitled "Application," sets forth that Part 177 applies to the hours of work for all nurses by health care employers.

Subpart 177.2, entitled "Definitions," sets forth the definitions, for the purposes of Part 177, of the following terms: "emergency," "health care disaster," "health care employer," "nurse," "on call," "overtime," "patient care emergency," and "regularly scheduled work hours."

Subpart 177.3, entitled "Mandatory Overtime Prohibition," provides that a health care employer is prohibited from requiring a nurse to work overtime. Subpart B sets forth the exceptions to that prohibition, which are entitled: "Health Care Disaster," "Government Declaration of Emergency," "Patient Care Emergency," and "Ongoing Medical or Surgical Procedure." Subpart B provides that the Part 177 does not prohibit a nurse from voluntarily working overtime.

Subpart 177.4, entitled "Nurse Coverage Plans," provides that health care employers are required to prepare and implement a "Nurse Coverage Plan" within ninety days of the effective date of this part and also sets forth the requirements for such a plan.

Subpart 177.5, entitled "Report of Violations," provides the Department of Labor shall establish a procedure to file a complaint of a violation of Part 177.

Department of Health

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Health publishes a new notice of proposed rule making in the NYS Register.

Hospital Based Residential Health Care Facilities

I.D. No.	Proposed	Expiration Date
HLT-41-08-00004-P	October 8, 2008	October 8, 2009

Insurance Department

NOTICE OF ADOPTION

Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values for Preneed Life Insurance

I.D. No. INS-33-09-00001-A

Filing No. 1179

Filing Date: 2009-10-14

Effective Date: 2009-10-28

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

Action taken: Addition of Part 102 (Regulation No. 192) to Title 11 NYCRR.

Subpart 177.6, entitled "Conflicts of Law and Regulation; Collective Bargaining Rights Not Diminished," provides that the provisions of Part 177 shall not be construed to diminish or waive the rights of nurses.

Subpart 177.7, entitled "Waiver of Rights Prohibited," provides that a health care employer may not utilize employee waivers as an alternative to compliance with Labor Law Section 167 or Part 177.

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 January 10, 2010.

Text of rule and any required statements and analyses may be obtained from: Thomas McGovern, New York State Department of Labor, Counsel's Office, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law is July 1, 2009.

2. Legislative objectives:

Legislation passed during the last legislative session (Chapter 493 of the Laws of 2008) recognizes the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

The rule improves the health care environment for patients and the working environment for nurses by clarifying the emergency circumstances under which an employer may require mandatory overtime. The Legislature's intent in enacting Section 167 was to encourage employers to attract and retain nurses in the profession during this period of shortage.

3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse's performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

Finally, the rule will improve overall patient care by allowing patients to be cared for by nurses who can exercise sound decision-making because they have had the proper rest needed to perform their duties. In sum, the reduction of the use of mandatory overtime should help employers attract and retain adequate numbers of nurses to ensure patient safety.

4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely

that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Paperwork:

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime.

6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan for these expected staffing issues, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care. Accordingly, the Commissioner must retain the right to cite an employer whose declaration of an emergency situation is not supported by the facts or is intended to evade the restrictions imposed by the law or limit the protections afforded nurses under the law.

The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the regulations. Specifically, DOCS requested that the regulations include language that a health care disaster included the occurrence of a riot, disturbance, or other serious event within an institution that increases the level of nursing care needed. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer's intranet. The Department considered this comment and revised the regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. Moreover, since employees or their representatives are entitled to receive the Plan on request or otherwise have access to the plan, they can take immediate steps to ensure that the Plan has been prepared and notify the Commissioner if it has not.

Finally, the Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

In other instances, the Department has not made changes in response to comments received, so that comments from other regulated parties, nurses, and their representatives could be obtained during the rulemaking process and considered along with some comments before final action is taken.

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

The rule would be effective on the same date as the statute: July 1, 2009. However, the Nurse Coverage Plans required by Section 177.4 of the regulations are to be prepared within ninety days of the effective date of the regulations. This gives employers ample time to develop and implement these Nurse Coverage Plans.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

3. Professional services:

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - will be offset by savings of \$5 million, which otherwise would have been paid for

such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

7. Small business and local government participation:

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

3. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan in place that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

5. Rural area participation:

The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, this rule would not have a substantial adverse impact on jobs; in fact it will create more jobs.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Repeal of an Obsolete Rule (14 NYCRR Part 55)

I.D. No. MRD-32-09-00008-A

Filing No. 1176

Filing Date: 2009-10-13

Effective Date: 2009-10-28

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

Action taken: Repeal of Part 55 of Title 14 NYCRR.

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

Subject: Repeal of an obsolete rule (14 NYCRR Part 55).

Purpose: To repeal antiquated regulations which do not reflect current practice or uses for specified facilities.

Text or summary was published in the August 12, 2009 issue of the Register, I.D. No. MRD-32-09-00008-P.

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

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

Additional matter required by statute: Pursuant to the requirement of SEQRA and 14 NYCRR Part 602, OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Revision of the Reimbursement Methodologies for Various Facilities and Services Provided Under the Auspices of OMRDD

I.D. No. MRD-32-09-00020-A

Filing No. 1175

Filing Date: 2009-10-13

Effective Date: 2009-11-01

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

Action taken: Amendment of sections 635-10.5, 671.7, 679.6, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

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

Subject: Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OMRDD.

Purpose: To implement Health Care Adjustments (HCA) IV and V.

Text or summary was published in the August 12, 2009 issue of the Register, I.D. No. MRD-32-09-00020-P.

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

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Ave., 3rd Fl., Albany, NY 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Request to Repeal Submetering Approval

I.D. No. PSC-43-09-00009-P

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

Proposed Action: The Public Service Commission is considering whether to grant or deny, in whole or in part, the October 9, 2009 Petition of the Riverview II Tenants Association to repeal, stay or rehear submetering approval.

Statutory authority: Public Service Law, art. 2

Subject: Request to repeal submetering approval.

Purpose: To review the Commission's decision in Case 08-E-0439.

Substance of proposed rule: The Public Service Commission (Commission) is considering whether to grant or deny, in whole or in part, a petition filed by the Riverview II Tenants Association, which requested that the Commission stay, rehear or repeal the August 27, 2008 Order of the Commission approving submetering at 47 Riverdale Avenue, Yonkers, New York. The original petition to submeter electricity at 47 Riverdale Avenue was submitted by Riverview II Preservation LP in Case 08-E-0439.

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

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

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

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

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

(08-E-0439SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Implementation of Hourly Pricing for Customers of Central Hudson Gas & Electric's Electricity Service

I.D. No. PSC-43-09-00010-P

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

Proposed Action: The Commission is considering whether to approve, deny or modify, in whole or in part, a "Supplemental Plan for Implementation of Expansion of Hourly Pricing Provision" filed by Central Hudson Gas & Electric Corporation.

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

Subject: The implementation of hourly pricing for customers of Central Hudson Gas & Electric's electricity service.

Purpose: Allows Central Hudson Gas & Electric to implement a plan to initiate hourly pricing for the company's electricity customers.

Substance of proposed rule: The Commission is considering whether to approve, deny or modify, in whole or in part, a plan for implementation of expansion of Hourly Pricing Provision to customers with demand exceeding 500 kW, filed by Central Hudson Gas & Electric Corporation. The Commission may approve, reject or modify, in whole or in part, the plan filed by Central Hudson Gas & Electric Corporation.

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

New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

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

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

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

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

(08-E-0887SP3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Frontier and Time Warner ResCom for Local Exchange Service and Exchange Access

I.D. No. PSC-43-09-00011-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Frontier Telephone of Rochester (Frontier) for approval of an Interconnection Agreement with Time Warner ResCom of New York, LLC, executed on August 17, 2009.

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

Subject: Interconnection of the networks between Frontier and Time Warner ResCom for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Frontier and Time Warner ResCom.

Substance of proposed rule: Frontier Telephone of Rochester, Inc. (Frontier) and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby Frontier and Time Warner ResCom of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

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

(09-01622SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Citizens and Time Warner ResCom for Local Exchange Service and Exchange Access

I.D. No. PSC-43-09-00012-P

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

Proposed Action: The PSC is considering whether to approve or reject a

proposal filed by Citizens Telecommunications Company of New York, Inc. (Citizens) for approval of an Interconnection Agreement with Time Warner ResCom of New York, LLC, executed on August 17, 2009.

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

Subject: Interconnection of the networks between Citizens and Time Warner ResCom for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Citizens and Time Warner ResCom.

Substance of proposed rule: Citizens Telecommunications Company of New York, Inc. (Citizens) and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby Citizens and Time Warner ResCom of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

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

(09-01623SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Frontier and Time Warner ResCom for Local Exchange Service and Exchange Access

I.D. No. PSC-43-09-00013-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Frontier Communications of AuSable Valley, Inc., et al. (Frontier) for approval of an Interconnection Agreement with Time Warner ResCom of New York, LLC, executed on August 17, 2009.

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

Subject: Interconnection of the networks between Frontier and Time Warner ResCom for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Frontier and Time Warner ResCom.

Substance of proposed rule: Frontier Communications of AuSable Valley, Inc., Frontier Communications of New York, Inc. and Frontier Communications of Seneca-Gorham, Inc. (Frontier) and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby Frontier and Time Warner ResCom of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

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

(09-01624SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Frontier and XO Communications for Local Exchange Service and Exchange Access

I.D. No. PSC-43-09-00014-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Frontier Telephone of Rochester, Inc. (Frontier) for approval of an Interconnection Agreement with XO Communications Services, Inc., executed on August 17, 2009.

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

Subject: Interconnection of the networks between Frontier and XO Communications for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Frontier and XO Communications.

Substance of proposed rule: Frontier Telephone of Rochester, Inc. and XO Communications Services, Inc. have reached a negotiated agreement whereby Frontier Telephone of Rochester, Inc. and XO Communications Services, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

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

(09-01625SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pole Attachment Rate

I.D. No. PSC-43-09-00015-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 proposed filing by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 9—Electricity.

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

Subject: Pole Attachment Rate.

Purpose: To update its pole attachment rate to reflect 2008 costs.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by

Consolidated Edison Company of New York, Inc. to update its pole attachment rate to reflect 2008 costs. The proposed revisions have an effective date of January 1, 2010.

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

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

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

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

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

(09-E-0747SP1)

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

Interconnection of the Networks between Verizon and Entelegent Communications for Local Exchange Service and Exchange Access

I.D. No. PSC-43-09-00016-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with Entelegent Communications Solutions, executed on August 17, 2009.

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

Subject: Interconnection of the networks between Verizon and Entelegent Communications for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Verizon and Entelegent Communications.

Substance of proposed rule: Verizon New York Inc. and Entelegent Communications Solutions have reached a negotiated agreement whereby Verizon New York Inc. and Entelegent Communications Solutions will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until September 7, 2011, or as extended.

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

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

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

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

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

(09-01770SP1)

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

Pole Attachment Rate

I.D. No. PSC-43-09-00017-P

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

Proposed Action: The Commission is considering a proposed filing by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 9—Electricity.

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

Subject: Pole Attachment Rate.

Purpose: To update its pole attachment rate to reflect 2008 costs.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Orange and Rockland Utilities, Inc. to update its pole attachment rate to reflect 2008 costs. The proposed revisions have an effective date of January 1, 2010.

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

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

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

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

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

(09-E-0748SP1)

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

Easement by Central Hudson Gas & Electric Corporation to Dutchess County

I.D. No. PSC-43-09-00018-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Central Hudson Gas & Electric Corporation to grant to Dutchess County an easement of certain land located in Lagrange, New York.

Statutory authority: Public Service Law, sections 4(1), 66(1) and 70

Subject: Easement by Central Hudson Gas & Electric Corporation to Dutchess County.

Purpose: To consider the petition by Central Hudson Gas & Electric Corporation to grant to Dutchess County an easement of certain land.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Central Hudson Gas & Electric Corporation to grant to Dutchess County an easement of certain land located in Lagrange, New York, with an original cost of less than \$100,000, to enable Dutchess County to construct, maintain, and operate an access road for the Dutchess Rail Trail.

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

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

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

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

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

(09-M-0739SP1)

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

Water Rates and Charges

I.D. No. PSC-43-09-00019-P

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

Proposed Action: The Public Service Commission is considering a filing by Knolls Water Co., Inc. requesting approval to increase its restoration of service charges.

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

Subject: Water rates and charges.

Purpose: To approve an increase in the restoration of service charges.

Text of proposed rule: On September 17, 2009, Knolls Water Co., Inc. (Knolls or the company) submitted a filing requesting permission to increase its restoration of service charges from \$75 to \$170 during normal business hours (8:00 a.m. to 4:00 p.m., Monday through Friday), from \$100 to \$212.50 outside of normal business hours Monday through Friday, and from \$150 to \$260 on weekends and public holidays. Knolls provides flat rate water service to 79 residential customers in an area known as Forest Knolls on Greenwood Lake in the Town of Warwick, Orange County. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

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

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

(09-W-0714SP1)

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

Water Rates and Charges

I.D. No. PSC-43-09-00020-P

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

Proposed Action: The Public Service Commission is considering a filing by Arbor Hills Waterworks, Inc. requesting approval to increase its restoration of service charges.

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

Subject: Water rates and charges.

Purpose: To approve an increase in the restoration of service charges.

Text of proposed rule: On September 17, 2009, Arbor Hills Waterworks, Inc. (Arbor or the company) submitted a filing requesting permission to increase its restoration of service charges from \$75 to \$170 during normal business hours (8:00 a.m. to 4:00 p.m., Monday through Friday), from \$100 to \$212.50 outside of normal business hours Monday through Friday, and from \$150 to \$260 on weekends and public holidays. Arbor provides metered water service to 67 residential customers in the Arbor Hills Development in Westchester County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secre-

tary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

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

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

(09-W-0712SP1)

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

Water Rates and Charges

I.D. No. PSC-43-09-00021-P

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

Proposed Action: The Public Service Commission is considering a filing by Boniville Water Company, Inc. requesting approval to increase its restoration of service charges.

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

Subject: Water rates and charges.

Purpose: To approve an increase in the restoration of service charges.

Text of proposed rule: On September 17, 2009, Boniville Water Company, Inc. (Boniville or the company) submitted a filing requesting permission to increase its restoration of service charges from \$75 to \$170 during normal business hours (8:00 a.m. to 4:00 p.m., Monday through Friday), from \$100 to \$212.50 outside of normal business hours Monday through Friday, and from \$150 to \$260 on weekends and public holidays. Boniville provides metered water service to 99 residential customers in the Boniville Development in the Town of Mahopac Falls, Putnam County. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

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

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

(09-W-0713SP1)

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

Water Rates and Charges

I.D. No. PSC-43-09-00022-P

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

Proposed Action: The Public Service Commission is considering a filing by Hudson Valley Water Companies, Inc. requesting approval to establish an escrow account with maximum balance of \$22,000 by surcharging each customer \$6.10 per quarter effective January 1, 2010.

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

Subject: Water rates and charges.

Purpose: To approve an escrow account with maximum balance of \$22,000 by surcharging each customer \$6.10 per quarter.

Text of proposed rule: On October 7, 2009, Hudson Valley Water Companies, Inc. (Hudson Valley or the company) submitted a filing

requesting authority to establish a replenishable escrow account with a maximum balance of \$22,000 not including accrued interest, to cover the cost of extraordinary repairs and/or plant improvements/replacements. The company is proposing the funds be collected through a surcharge of \$6.10 per customer per quarter commencing with the January 1, 2010 customer billing. The company needs to install a treatment system and the funds in the escrow account will be used to pay for the cost of this improvement and repay interest and principal on short-term loans needed to assist with the construction. The funds would be kept in a separate interest bearing bank account in New York State. Hudson Valley provides metered water service to 435 residential customers in five non-contiguous water systems located in the Towns of Hurley, Saugerties, Marletown, and Olive, Ulster County. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

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

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

(09-W-0744SP1)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Out of Competition Drug Testing of Race Horses

I.D. No. RWB-43-09-00001-P

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

Proposed Action: Amendment of sections 4043.1, 4120.1; and addition of sections 4043.12 and 4120.17 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 301(2)(a) and 902(1)

Subject: Out of competition drug testing of race horses.

Purpose: To supplement existing equine drug testing requirements to include race horses that are not formally scheduled to race.

Text of proposed rule: Rule 4043.1 Definitions.

A new paragraph (g) is added to read:

(g) *Out-of-competition positive test.* A finding by the laboratory that any of the prohibited substances described in Rule 4043.12 was present in the sample.

Paragraphs (g) and (h) are relettered respectively to be paragraphs (h) and (i).

A new Rule 4043.12 is added to read:

Rule 4043.12 Out-of-Competition Testing.

(a) Any horse on the grounds of a racetrack under the jurisdiction of the Board or stabled off track grounds is subject to testing without advance notice for blood doping, gene doping, protein and peptide-based drugs, including toxins and venoms, and other drugs and substances while under the care or control of a trainer or owner licensed by the Board.

(b) Horses to be tested shall be selected at the discretion of the State judges or any Board representative. Horses to be tested shall be selected from among those anticipated to compete at New York tracks within 180 days of the date of testing or demand for testing.

(c) The State judges or any Board representative may require any horse of a licensed trainer or owner to be brought to a track under the jurisdiction of the Board for out-of-competition testing when that horse is stabled out-of-state at a site located within a radius not greater than 100 miles from a New York State racetrack. The trainer is responsible to have the horse or horses available at the designated time and location.

(d) A Board veterinarian or any licensed veterinarian authorized by the State judges or any Board representative may at any time take a urine or blood sample from a horse for out-of-competition testing.

(e) Prohibited substances are:

(1) blood doping agents including, but not limited to, erythropoietin (EPO), darbepoetin, Oxyglobin, Hemopure, Aranesp, or any substance that abnormally enhances the oxygenation of body tissues;

(2) gene doping agents or the nontherapeutic use of genes, genetic elements, and/or cells that have the capacity to enhance athletic performance or produce analgesia;

(3) protein and peptide-based drugs, including toxins and venoms.

(f) The presence of any substance at anytime described in subsections (1), (2) or (3) of subdivision (e) is a violation of this rule for which the horse may be declared ineligible to participate until the horse has tested negative for the identified substance, and for which the trainer shall be responsible pursuant to Board Rule 4043.4.

(g) The trainer, owner, and/or their designees and any licensed racing corporation shall cooperate with the Board and its representatives/designees by:

(1) assisting in the immediate location and identification of the horse selected for out-of-competition testing;

(2) providing a stall or safe location to collect the samples;

(3) assisting in properly procuring the samples; and

(4) obeying any instruction necessary to accomplish the provisions of this rule.

The failure or refusal to cooperate in the above by any licensee or other person shall subject the licensee or person to penalties, including license suspension or revocation, the imposition of a fine and exclusion from tracks or facilities subject to the jurisdiction of the Board.

(h) Any horse which is not made available for testing as directed, including the failure to grant access on a timely basis, shall in the absence of acceptable mitigating circumstances, be ineligible to participate in racing for one hundred twenty days.

(i) In the absence of extraordinary mitigating circumstances, a minimum penalty of a ten (10) year suspension will be assessed for any violation set forth in subdivision (f).

(j) An application to the Board for an occupational license shall be deemed to constitute consent for access to any off-track premises on which horses owned and/or trained by the individual applicant are stabled. The applicant shall take any steps necessary to authorize access by Board representatives to such off-track premises.

Rule 4120.1 Definitions.

A new paragraph (g) is added to read:

(g) *Out-of-competition positive test.* A finding by the laboratory that any of the prohibited substances described in Rule 4120.17 was present in the sample.

Paragraphs (g) and (h) are relettered respectively to be paragraphs (h) and (i).

A new Rule 4120.17 is added to read:

Rule 4120.17 Out-of-Competition Testing.

(a) Any horse on the grounds of a racetrack under the jurisdiction of the Board or stabled off track grounds is subject to testing without advance notice for blood doping, gene doping, protein and peptide-based drugs, including toxins and venoms, and other drugs and substances while under the care or control of a trainer or owner licensed by the Board.

(b) Horses to be tested shall be selected at the discretion of the State judges or any Board representative. Horses to be tested shall be selected from among those anticipated to compete at New York tracks within 180 days of the date of testing or demand for testing.

(c) The State judges or any Board representative may require any horse of a licensed trainer or owner to be brought to a track under the jurisdiction of the Board for out-of-competition testing when that horse is stabled out-of-state at a site located within a radius not greater than 100 miles from a New York State racetrack. The trainer is responsible to have the horse or horses available at the designated time and location.

(d) A Board veterinarian or any licensed veterinarian authorized by the State judges or any Board representative may at any time take a urine or blood sample from a horse for out-of-competition testing.

(e) Prohibited substances are:

(1) blood doping agents including, but not limited to, erythropoietin (EPO), darbepoetin, Oxyglobin, Hemopure, Aranesp, or any substance that abnormally enhances the oxygenation of body tissues;

(2) gene doping agents or the nontherapeutic use of genes, genetic elements, and/or cells that have the capacity to enhance athletic performance or produce analgesia;

(3) protein and peptide-based drugs, including toxins and venoms.

(f) The presence of any substance at anytime described in subsections (1), (2) or (3) of subdivision (e) is a violation of this rule for which the horse may be declared ineligible to participate until the horse has tested negative for the identified substance, and for which the trainer shall be responsible pursuant to Board Rule 4120.4.

(g) *The trainer, owner, and/or their designees and any licensed racing corporation shall cooperate with the Board and its representatives/designees by:*

- (1) *assisting in the immediate location and identification of the horse selected for out-of-competition testing;*
- (2) *providing a stall or safe location to collect the samples;*
- (3) *assisting in properly procuring the samples; and*
- (4) *obeying any instruction necessary to accomplish the provisions of this rule.*

The failure or refusal to cooperate in the above by any licensee or other person shall subject the licensee or person to penalties, including license suspension or revocation, the imposition of a fine and exclusion from tracks or facilities subject to the jurisdiction of the Board.

(h) *Any horse which is not made available for testing as directed, including the failure to grant access on a timely basis, shall in the absence of acceptable mitigating circumstances, be ineligible to participate in racing for one hundred twenty days.*

(i) *In the absence of extraordinary mitigating circumstances, a minimum penalty of a ten (10) year suspension will be assessed for any violation set forth in subdivision (f).*

(j) *An application to the Board for an occupational license shall be deemed to constitute consent for access to any off-track premises on which horses owned and/or trained by the individual applicant are stabled. The applicant shall take any steps necessary to authorize access by Board representatives to such off-track premises.*

Text of proposed rule and any required statements and analyses may be obtained from: John Googas, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305, (518) 395-5400, email: info@racing.state.ny.us.

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

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

Regulatory Impact Statement

Statutory authority: The Racing, Pari-Mutuel Wagering and Breeding Law (Sections 101.1, 902.1, and 301.2[a]) authorizes the New York State Racing and Wagering Board ("Board") to prescribe and promulgate regulations to specify the use of and testing for drugs and medications in race horses. Section 101.1 creates the Board, and provides that the Board has general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state, and over the corporations, associations, and persons engaged therein. Section 301.2(a) authorizes the Board to prescribe rules and regulations for effectually preventing the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate. Section 902.1 authorizes the Board to promulgate any rules and regulations necessary to implement equine drug testing, and sets forth that equine drug testing at race meetings shall be conducted by a land grant university within New York State, with a regents approved veterinary college facility. Further, section 902.1 provides that the Board shall promulgate rules and regulations to implement administrative penalties of loss of purse money, fines, or denial, suspension or revocation of a license for drugged horses.

2. Legislative objectives: To enable the Board to assure the public's confidence and preserve the integrity of racing at pari-mutuel betting tracks by regulating the use of drugs and medications in race horses so that their natural racing ability is not compromised or enhanced by such use.

3. Needs and benefits: This rulemaking is necessary to detect and deter the administration of prohibited performance-enhancing drugs and substances in race horses that are not stabled on the grounds of a racetrack. Currently, the Board's equine drug testing rules only apply to pre-race and post-race testing, and samples are only taken at the track. This rule would allow drug testing samples to be taken from a race horse at any time if stabled in New York, and requires that licensees bring the horse for testing when requested to do so if stabled out of state within a radius of one hundred miles from a New York track. Many trainers and owners have opted to keep their horses in stables off of a race track. In doing so, they may be able to evade Board investigation of whether a trainer or owner is administering prohibited substances. Despite advances in drug testing procedures and equipment, certain drugs and substances are still difficult (if not impossible) to detect, including certain blood doping agents and gene doping agents. In the case of blood doping agents, the time frame for detecting these substances is limited, but the performance-enhancing benefits of the agent remain with the horse long after the detection period has passed. To evade testing, an unscrupulous owner or trainer only need stable a horse off of the race track grounds, administer the doping agent, and bring the horse to the track on the day of the race, well after the time for detection has passed but well within the timeframe for enhancing the horse's performance.

This rule is similar to an out of competition testing rule that New Jersey

adopted in 2006, which allows testing at anytime at race tracks and farms. In 2008, New Jersey regulators conducted testing on six harness horses that raced at Meadowlands and trained at an off-site track, and returned six positives for the presence of blood doping. The owner and veterinarian were subsequently suspended for 15 and a half years, fined \$56,000 and had their licenses revoked. Indiana has also adopted a similar out of competition testing rule.

The Ontario Racing Commission adopted an out of competition rule in 2006 and as of July 2008, found five positives for blood doping out of 500 samples taken.

This rule is based in part on the model rule for Out of Competition testing proposed by the Association of Racing Commissioners International, which is supported by the National Thoroughbred Racing Association and the Racing Medication and Testing Consortium.

This rule also expands the listed of prohibited substances for equine medication to include gene doping. Currently, gene therapy has a legitimate use in the therapeutic treatment of ill or injured horses. On the other hand, given the risk of abuse in pari-mutuel wagering activity and the threat to the integrity of thoroughbred and standardbred breeding, it obviously has no place in horse racing. This rule would allow the Board to test for gene doping.

4. Costs

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: The only costs that may be imposed on the owners or trainers will be the cost of transporting a horse from out of state when requested by Board officials. The cost of transporting the horse to track will differ on a case by case basis. The costs can be determined by figuring the cost of fuel, the consumption rate of the transport vehicle and the distance traveled. Assuming that a horse needs to be transported 100 miles (the maximum radius described in the rule) by a trailer hauled by a pick-up truck that gets 10 miles to the gallon, and the per-gallon cost of diesel (which is priced higher than unleaded gasoline) is \$2.41, then the cost of transporting the horse a maximum distance to the race track is \$24.00 one way. Naturally, there may also be toll costs that vary based upon specific locations, such as the toll at the Tappan Zee Bridge, where a four-axle vehicle/trailer over seven-foot, six-inches in height will cost \$13.25 for the eastbound trip (there is no toll in the westbound direction). There are also individual New York State Thruway tolls that vary on a case by case basis. At most, the cost of transporting the horse for testing should not exceed \$80 factoring in the highest tolls and using the current cost of fuel as a basis. Cost will also include the wages for the person who may be asked to drive the horse to the track. The Board is unable to calculate those costs because they are dictated on a case by case basis, including variations in travel time, rate of pay per individual based upon their employment terms, and whether or not the cost of transporting the horse to testing is actually an added cost (since owners may need to transport the out of competition horse to the vicinity of the track anyway, or the cost of paying a trainer to attend to the horse would be same as if the horse were stabled on track.)

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: There are no costs to local governments because the New York State Racing and Wagering Board is solely responsible for the regulation of horseracing. There will be new costs to the Racing and Wagering Board in relation to the Board's drug testing program. These costs are those associated with personnel requirements to collect and ship samples and travel costs related to collection of samples. The actual costs will depend upon the intensity of the program as implemented but are estimated to range from hundreds to thousands of dollars. The Board's actual drug testing is conducted at Cornell University. This rule will add costs to the existing drug testing program. These costs will depend upon the intensity of the program implemented and are estimated to be thousands of dollars.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: This information was compiled by Racing and Wagering Board staff based on cost associated with existing and projected testing and information commonly available to the public, including fuel costs and toll rates.

5. Local government mandates: None. See above.

6. Paperwork: None. The existing paperwork system used for the equine drug and medication system will be used.

7. Duplication: None.

8. Alternatives:

a) The Board did not consider any significant alternatives to the ARCI Model Rule approach. The model rule would afford uniformity among the various racing jurisdictions, and the Board could not identify any compelling reason to deviate from the general standards included in the model rule. Failure to amend the existing rule would defeat uniformity and result in the loss of significant stakes racing in New York State.

As a result of the Board's preliminary public comment solicitation period, the Board made the following amendments to the rule:

• Inserted changes as necessary to accommodate thoroughbred steward vs. harness judges, need to reference thoroughbred franchised corporation, and references specific to each type of racing.

• After review, inserted a new definition to Rules 4043.1 and 4120.1 for an “out-of-competition positive test”. This is necessary to preclude arguments that the respective trainer responsibility rules apply only to post-race positive tests.

• Inserted “Board representative” in place of “designee of the Board” in several locations to address apparent belief that the Board would designate a non-Board employee, e.g. track operator employee.

• Paragraph c-inserted text to limit distance required to travel to race-track to a radius of 100 miles from horse’s location; intended to apply only for horses stabled out-of-state. Board employees will travel to locations to collect samples within New York State.

• Inserted a new (h) to make horse ineligible for 120 days in the event of failure to produce or grant access.

• Revised (i) to refer to violation set forth in (f) rather than violation of (f) since (f) establishes the violation.

• Relettered old (h) and (i).

The Board considered whether or not to impose a maximum distance required to be traveled in the event a horse is stabled out of the State. The Board considered the cost and impracticality of shipping a horse for testing great distances (e.g. across the country). The distance of 100 miles set forth is based in part on the fact that many horsemen ship approximately that distance in order to compete at New York tracks. The Board further considered the distances that might be required to be traveled in New York State by horsemen for purposes of testing and determined that Board staff should travel to these horses if stabled in New York.

The Board considered whether or not to establish a time limit to modify the applicability of the testing requirement for horses selected to be tested. The Board chose a 180 day period in relation to anticipated race time (Rules 4034.12b and 4120.17b) this is based on a reasonable relationship between the purpose of testing and the anticipated race time.

The Board proposed a 120 day ineligibility period in order to provide a meaningful sanction related to the purpose and scope of the testing, as well as notice to the licensees of the consequence of non-compliance.

The Board did consider the nature of the penalty based upon public comment that the penalty was too harsh. The Board decided to retain the penalties as written because they are consistent with the penalties adopted in New Jersey and Indiana.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented as soon as it is published in the State Register. Due to the fact that the amendments merely amend the time and place where samples may be taken, there are no significant compliance requirements imposed on regulated parties. Similarly, given the fact that the Board already has an extensive drug testing and investigations program, the Board is ready to move forward with implementation of this rule once it is published in the State Register as a Notice of Adoption.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments:

These amendments will affect small businesses that stable/train horses for the purpose of competing in New York State horse racing. There are an unknown number of farms and stables located throughout the State that may house horses for training and rehabilitation purposes. The impact of these amendments is slight because the owner/trainer or his/her employee is the caretaker and the rule is clear that the owner/trainer is merely required to make the horse(s) available for testing. There is no impact on local governments.

2. Compliance Requirements:

The owner/trainer is merely required to make the horse(s) available for testing. There are no reporting or recordkeeping requirements. No additional licenses are required.

3. Professional Services:

None are required to comply.

4. Compliance Costs:

There should be no additional costs to comply because the owner/trainer and/or employee is generally present or in the vicinity of the stable located in New York State.

5. Economic and Technological Feasibility:

The rule does not impose any technological requirements on the industry.

6. Minimizing Adverse Impact:

The impact of these amendment is slight for the owner/trainer stabled in New York. Board staff will travel to horses in New York State and provide or arrange for the necessary personnel and equipment for collection of the samples.

7. Small Business and Local Government Participation:

Comments were solicited from industry groups, including representative horsemen’s associations. These associations (generally one per track)

are membership organizations that include small businesses. No local government comments were solicited because the rules have no impact on local governments.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers:

These rules will apply to any rural areas where farms and stables located throughout the State house horses for training and rehabilitation purposes. These include most of the counties other than the downstate area of New York State.

2. Compliance Requirements:

The owner/trainer is merely required to make the horse(s) available for testing. There are no reporting or recordkeeping requirements. No additional licenses are required and there is no need for professional services to achieve compliance.

3. Costs:

The owner/trainer is merely required to make the horse(s) available for testing. There should be no additional costs to comply because the owner/trainer and/or employee is generally present or in the vicinity of the stable located in New York State.

4. Minimizing Adverse Impact:

The impact of these amendment is slight for the owner/trainer stabled in New York. Board staff will travel to horses in New York State and provide or arrange for the necessary personnel and equipment for collection of the samples. Thus the owner/trainer does not bear any costs for labor or equipment and associated expenses that would be incurred if the New York owner/trainer was required to bring the horse(s) to a New York track.

5. Rural Area Participation:

Comments were solicited from industry groups, including representative horsemen’s associations. These associations (generally one per track) are membership organizations that include small businesses in rural areas. No local government comments were solicited because the rules have no impact on local governments.

Job Impact Statement

These amendments will not have a substantial adverse impact on jobs. This is apparent because the amendments merely expand the Board’s equine drug testing program by including the collection of samples from horses at a time other than the existing pre-race and post-race timeframes. The owner/trainer is merely required to make the horse(s) available for testing.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Definition of Resident for Personal Income Tax

I.D. No. TAF-43-09-00023-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 105.20(e)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 697(a), and 605(b)(1)

Subject: Definition of resident for personal income tax.

Purpose: To except dwellings maintained by full-time undergraduate students from the definition of permanent place of abode.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (e) of section 105.20 of such regulations is amended to read as follows:

(1) A permanent place of abode means a dwelling place [permanently] of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. *A dwelling place maintained by a full-time student enrolled at an institution of higher education, as defined in section 606(t)(3) of the Tax Law, in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent*

place of abode with respect to that student. A full-time student is an individual who is carrying a minimum courseload in such program of 12 credit hours per semester for at least 2 semesters, or the equivalent, during the individual's taxable year.

Section 2. These amendments shall take effect on the date that the Notice of Adoption is published in the *State Register*, and shall apply to taxable years ending on or after December 31, 2009.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax_regulations@tax.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.

Summary of Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subdivision First; 697(a); and 605(b)(1). Section 171, Subdivision First authorizes the Commissioner to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and performance of the Commissioner's duties. Section 697(a) authorizes the Commissioner to adopt regulations relating specifically to the personal income tax. Section 605(b)(1) provides that an individual who is not domiciled in New York is considered a resident if the individual maintains a permanent place of abode in the State and spends more than 183 days of the taxable year in the State.

2. Legislative objectives: This rule is being proposed pursuant to this authority to exclude dwelling places maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode under 20 NYCRR 105.20(e)(1).

3. Needs and benefits: The purpose of these amendments is to exclude places of abode maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode for purposes of determining residency status for personal income tax purposes. A dwelling, such as a traditional dormitory room that does not contain basic facilities, such as those for cooking or bathing, is currently not deemed a permanent place of abode for residency purposes under 20 NYCRR 105.20(e)(1).

In 2008, the regulations were amended to eliminate the "temporary stay" concept from the definition of "permanent place of abode". Prior to the 2008 amendment, a place of abode was not considered permanent under section 105.20(e)(1) if it was maintained only during a temporary stay for the accomplishment of a particular purpose. Both a "particular purpose" and "fixed and limited period" test had to be satisfied in order for a stay to be considered temporary. Removing the temporary stay concept from the regulations rendered many college students previously not taxed as residents subject to personal income tax as statutory residents. Students living in traditional dormitories have not been taxed as statutory residents because dormitories lack the facilities to be deemed permanent places of abode under the regulations. This creates artificial distinctions among students who may or may not have the option of choosing between living in a dormitory and living elsewhere.

The Department conducts regular taxpayer outreach programs to assist taxpayers in complying with the Tax Law, and works with New York State colleges and universities to present programs directed toward their students. In the course of these outreach efforts, it became apparent that students were being required to determine their residency status for personal income tax based on subtle distinctions among housing situations.

Undergraduate student housing has evolved so that fine distinctions would have to be made between traditional dormitory housing and other styles of student residence to determine residency for personal income tax purposes. Moreover, students do not always have the option of choosing to live in a dormitory, depending upon the housing situation at a particular institution. These amendments would resolve these issues.

4. Costs:

(a) Costs to regulated parties: The rule does not impose any new compliance costs on the regulated parties, who will continue to be required to file a New York State income tax return as either residents or nonresidents, or be relieved of the obligation to file altogether. The rule may have an impact on the personal income tax liability and reporting responsibilities of particular taxpayers. The impact will depend on the particular circumstances of the taxpayer. Some undergraduate students currently taxed as residents as a result of the 2008 amendments will now be considered nonresidents. Treatment as a nonresident could result in a reduction of tax liability, because unearned income would generally not be considered New York source income. On the other hand, some who are currently eligible to claim the New York State college tuition credit as residents will not be able to

do so because the credit is not available to nonresidents. Additionally, some students currently required to file a New York State income tax return will no longer need to do so.

(b) Costs to the agency and to the State and local governments: It is estimated that the implementation and continued administration of this rule will not impose any compliance costs upon this agency, New York State or its local governments. It is estimated that the implementation and continued administration of the proposed rule will result in a revenue gain to the State of \$375,000 in State fiscal year (SFY) 2009-10 and \$1.5 million annually in subsequent fiscal years and a \$500,000 revenue loss to New York City in SFY 2009-10 and \$2 million annually in subsequent fiscal years. In context, last year's amendments were estimated to result in an annual gain to New York City of \$30 million.

(c) Information and methodology: The methodology employed to estimate the impact of the proposed rule is set forth in detail in the discussion of costs in the Regulatory Impact Statement. This analysis is based on a review of the rule, on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, and Office of Budget and Management Analysis, and on data obtained from the Department's records, the New York State Department of Education's Office of Higher Education, the State University of New York at Buffalo, and the United States Census.

5. Local government mandates: This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties. Certain students may have to file Form IT-203, New York State Nonresident and Part Year Resident income tax return, rather than Form IT-201, Resident Income Tax return. Others will no longer need to file a New York State income tax return.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: The Department considered various alternatives, including extending the exclusion to graduate students, limiting the exclusion to places of abode provided by the educational institution, and taking no action. After assessing comments received from the New York State Bar Association Tax Section, a certified public accountant, and certain institutions of higher education, the Department concluded that the approach in the proposed rule was the most appropriate to achieving the objectives and declined to adopt such alternative approaches. For a detailed discussion of the Department's analysis, see the Regulatory Impact Statement.

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

10. Compliance schedule: These amendments will take effect when the Notice of Adoption is published in the *State Register*, and apply to taxable years ending on or after December 31, 2009.

Regulatory Flexibility Analysis

(1) Effect of rule: This rule amends section 105.20(e)(1) of the personal income tax regulations to except dwelling places maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode.

This rule will not impose any requirements on local governments or small businesses. It will have an effect on New York City personal income tax discussed in the Regulatory Impact Statement. The rule imposes no reporting requirements, forms, or other paperwork upon small businesses beyond those required by existing law and regulations. The impact of the rule is not on small businesses but on certain non-domiciliary full-time undergraduate students who maintain and occupy places of abode while enrolled at institutions of higher education in pursuit of a baccalaureate degree.

(2) Compliance requirements: The promulgation of this rule will not require small businesses or local governments to submit any new information, forms, or other paperwork.

3. Professional services: No small business or local government will be required to employ professional services to comply with this rule.

4. Compliance costs: These changes will place no additional burdens on small businesses and local governments. The change in the definition of permanent place of abode will affect certain full-time undergraduate students who are not domiciled in the State. See the Regulatory Impact Statement for a discussion of the impact on these individuals.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: The rule does not adversely impact small businesses or local governments. It will result in a revenue loss of approximately \$500,000 to New York City in State fiscal year 2009-10 and \$2 million in subsequent fiscal years. This is a result of returning some students to the status quo regarding their resident status as it existed prior

to the 2008 amendments, which were estimated to increase New York City revenue by \$30 million annually.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. The Division also notified the New York City Department of Finance.

The New York State Bar Association Tax Section submitted comments. The Bar Association reiterated the position expressed in its comments on the 2008 amendments, to the effect that the temporary stay rule should not have been eliminated. For the reasons articulated in the Department's Assessment of Public Comment at the time, the 2008 amendments were adopted over this objection. The Bar Association also noted that this rule seems to be a return to the temporary stay concept for certain taxpayers. Notwithstanding these concerns, the Bar Association stated that the exception to the definition of permanent place of abode should be available to all full-time students, including graduate students. A certified public accountant made a similar comment. In a similar vein, the Bar Association recommended that the definition of full-time students contained in the amendments be changed to reduce the number of semesters a student must be enrolled at an institution of higher education during the taxable year from two semesters to one. The Department considered these alternatives and concluded that the exception should be limited.

The Bar Association also voiced concern that the amendments change the basic terminology of section 105.20(e)(1) by focusing on the nature of the place of abode in determining permanency. Section 105.20(e)(1) states that "a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode." The language of the current regulation clearly links permanency to the nature of the abode, rather than the period over which it is maintained. Section 105.20(a)(2) defines a resident individual as one who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year and spends in the aggregate more than 183 days of the taxable year in New York State. The temporal requirements for residency are separate from the requirement that an individual must maintain a permanent place of abode in New York State to be considered a resident. Whether a dwelling is permanent or not hinges on its suitability for habitation on a permanent basis.

The Bar Association also suggested that the Department make clear that the amendments do not require that the student's dwelling be provided by the institution of higher education to be considered non-permanent, and that a domiciliary would continue to be considered a resident whether or not enrolled at an institution of higher education in New York State. We do not believe these changes are necessary.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This rule amends section 105.20(e)(1) of the personal income tax regulations to except dwellings maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode for purposes of determining residency status. The change will affect some students, depending upon their particular circumstances. Some of these students may be enrolled at institutions of higher education in rural areas, and maintaining places of abode in those areas. There are 44 counties in the State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule may affect the reporting requirements on certain students enrolled at institutions of higher education who maintain and occupy a permanent place of abode within the state while pursuing a baccalaureate degree. As a result of this rule, certain students living in rural areas may have to file Form IT-203, New York State Nonresident and Part Year Resident income tax return, rather than Form IT-201, Resident Income Tax return. Others will no longer need to file a New York State income tax return.

3. Costs: These changes will place no additional burdens on rural areas. The impact on tax liability depends on the particular circumstances of the taxpayer. Some undergraduate students currently taxed as residents as a result of the 2008 amendments will now be considered nonresidents. Treat-

ment as a nonresident could result in a reduction of tax liability because unearned income would generally not be considered New York source income. On the other hand, some who are currently eligible to claim the New York State college tuition credit as residents will not be able to do so because the credit is not available to nonresidents. Additionally, some students currently required to file a New York State income tax return will no longer need to do so.

4. Minimizing adverse impact: The rule does not adversely impact rural areas. It will eliminate the need to make fine distinctions among students based on the style of their housing. The rule will provide student taxpayers with clear, objective, and easily applied rules for assessing their residency status for New York State personal income tax purposes.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities.

The primary purpose of these amendments is to except places of abode maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode for purposes of determining residency status. Student housing has evolved to a point at which dormitory and other on-campus residence options may have essentially the same facilities as off-campus housing, making it difficult to distinguish one from another in terms of the permanency of the abode. These amendments will eliminate the need to make such fine distinctions with respect to students living in a dormitory and students living elsewhere.