

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Ash Trees, Nursery Stock, Logs, Green Lumber, Firewood, Stumps, Roots, Branches and Debris of a Half Inch or More**

**I.D. No.** AAM-16-10-00033-P

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

**Proposed Action:** Addition of Part 141 to Title 1 NYCRR.

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

**Subject:** Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more.

**Purpose:** To establish an Emerald Ash Borer quarantine to prevent the spread of the beetle to other areas.

**Public hearing(s) will be held at:** 11:00 a.m., June 17, 2010 at Department of Agriculture and Markets, 10B Airline Dr., 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.

**Text of proposed rule:** Part 141

*Control of the Emerald Ash Borer*

(Statutory Authority: Agriculture and Markets Law sections 18, 164 and 167)

#### Section 141.1. Definitions.

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

(a) *Certificate of inspection.* A valid form certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) *Compliance agreement.* An approved document, executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(c) *Emerald Ash Borer.* The insect known as the Emerald Ash Borer, *Agrilus planipennis*, in any stage of development.

(d) *Firewood.* This term applies to any kindling, logs, chunkwood, boards, timbers or other wood cut and split, or not split, into a form and size appropriate for use as fuel.

(e) *Infestation.* This term refers to the presence of the Emerald Ash Borer in any life stage or as determined by evidence of activity of one or more of the life stages.

(f) *Inspector.* An inspector of the New York State Department of Agriculture and Markets, or cooperator from the New York State Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA), when authorized to act in that capacity.

(g) *Limited permit.* A valid form authorizing the restricted movement of regulated articles from a quarantine area to a specified destination for specified processing, handling or utilization.

(h) *Moved; movement.* Shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved into or through any area of the State.

(i) *Nursery stock.* This term applies to and includes all trees, shrubs, plants and vines and parts thereof.

(j) *Quarantine Area.* This term applies to Chautauqua and Cattaraugus Counties.

(k) *Regulated article.* This term applies to firewood from any species of tree, and any trees and all host material, living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the following genera: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*), and any wood material that is comingled and otherwise indistinguishable from the regulated article.

#### Section 141.2. Quarantine area.

Regulated articles as described in section 141.3 of this Part shall not be shipped, transported or otherwise moved from any point within Chautauqua and Cattaraugus Counties to any point outside of said counties, except in accordance with this Part.

#### Section 141.3 Regulated articles.

(a) *Prohibited movement.*

(1) The intrastate movement of living Emerald Ash Borer in any stage of development, whether moved independent of or in connection with any other article, except as provided in section 141.9 of this Part.

(2) The intrastate movement of nursery stock from the quarantine area to any point outside the quarantine area.

(3) The intrastate movement of regulated articles other than nursery stock from the quarantine area to any point outside the quarantine area, except as provided in section 141.5 of this Part.

(b) *Regulated movement.*

(1) Regulated articles shall not be moved from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom from infestation.

(2) Regulated articles may be moved through the quarantine area if the regulated articles originated outside the regulated area and:

(i) the points of origin and destination are indicated on a waybill accompanying the regulated article; and

(ii) the regulated articles, if moved through the quarantined area during the period of May 1 through August 31 or when the ambient air temperature is 40 degrees F or higher, are moved in an enclosed vehicle or are completely covered to prevent access by the Emerald Ash Borer; and

(iii) the regulated articles are moved directly through the quarantined area without stopping, except for refueling and traffic conditions, or have been stored, packed, or handled at locations approved by an inspector as not posing a risk of infestation by the Emerald Ash Borer.

Section 141.4. Conditions governing the intrastate movement of regulated articles.

(a) Movement from quarantine area. Unless exempted by administrative instructions of the Commissioner of Agriculture and Markets of the State of New York, regulated articles shall not be moved intrastate from the quarantine area to or through any point outside thereof unless accompanied by a valid certificate or limited permit issued by an inspector, authorizing such movement.

Section 141.5. Conditions governing the issuance of certificates and permits.

(a) Certificates of inspection. Certificates of inspection may be issued for the intrastate movement of regulated articles when they have been inspected and determined to have been:

(1) treated, fumigated, or processed by approved methods; or

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

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

(c) Cancellation of certificates of inspection or limited permits. Certificates or limited permits issued under these regulations may be withdrawn or canceled by the inspector and further certification refused whenever in his or her judgment the further use of such certificates or permits might result in the dissemination of infestation.

Section 141.6. Inspection and disposition of shipments.

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the quarantine area, which contains, or which the inspector has probable cause to believe may contain, infestations of the Emerald Ash Borer, or articles or things regulated under this quarantine, may be examined by an inspector at any time or place. When articles or things are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he deems necessary to eliminate the danger of dissemination of the Emerald Ash Borer. If found to be infested, such articles or things must be free of infestation without cost to the State except that for inspection and supervision.

Section 141.7. Assembly of regulated articles for inspection.

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

(b) The New York State Department of Agriculture will not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 141.8. Marking requirements.

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and

shall have securely attached to the outside thereof a valid certificate (or limited permit) issued in compliance with these regulations: provided, that:

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

**Text of proposed rule and any required statements and analyses may be obtained from:** Kevin S. King, Director, Division of Plant Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

**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:

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

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

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

##### 2. Legislative objectives:

The proposed regulations accord with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Emerald Ash Borer.

##### 3. Needs and benefits:

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to twelve other states as well as to two provinces in Canada. The most recent detection of this pest occurred on June 16, 2009 in the Town of Randolph, New York which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County.

The Emerald Ash Borer can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years.

The average adult Emerald Ash Borer is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the Emerald Ash Borer include the following species of North American ash trees: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*).

Since the Emerald Ash Borer is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

To date, 39 infested trees in and around the Town of Randolph in Cattaraugus County have been cut and chipped. As the inspection and survey of susceptible ash trees continues in and around the Town of Randolph, the establishment of a quarantine in Cattaraugus County and in neighboring Chautauqua County is the most effective means of preventing the artificial spread of the Emerald Ash Borer. The proposed regulations establishing the quarantine would help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the movement of infested trees and materials.

The proposed regulations would prohibit the movement of any article infested with Emerald Ash Borer, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles, i.e. trees, firewood and all host material living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the White Ash, Green Ash, Black Ash and Blue Ash genera susceptible to the pest, is restricted under the proposal. The extent of the restrictions depends on the regulated articles in question.

In the case of nursery stock, the proposed regulations would prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area.

In the case of all other regulated articles, the proposed regulations would prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom of infestation.

In the case of all regulated articles, the proposed rule would permit movement of these articles through the quarantine area if the regulated articles originate outside the quarantine area and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate of inspection accompanies the regulated articles; the vehicle moving the regulated articles does not stop in the quarantine area except for refueling or traffic conditions; and the vehicle moving the regulated articles during the period May 1 through August 31 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

Under the proposed regulations, certificates of inspection may be issued when the regulated articles have been inspected and found to be free of infestation or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles.

Limited permits may be issued for the movement of noncertified regulated articles from the quarantine area to a specified destination outside the quarantine area for specified processing, handling or utilization.

Under the proposal, certificates of inspection and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infestation.

The proposed regulations would also provide that persons shipping, transporting, or receiving regulated articles may be required to enter into written compliance agreements. These agreements would allow the shipment of these articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that Emerald Ash Borer is not spread.

The proposed regulations are necessary, since the effective control of the Emerald Ash Borer within the limited areas of the State near and where this insect has been found is important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

#### 4. Costs:

(a) Costs to the State government: None. Annual surveys would be required to monitor the natural spread of the beetle at a cost of \$200,000 to \$250,000. However, it is anticipated that this survey program would be funded by the United States Department of Agriculture (USDA) through a continuing cooperative agreement with the New York State Department of Environmental Conservation (DEC).

(b) Costs to local government: None.

(c) Costs to private regulated parties:

There are 51 nurseries in Cattaraugus County and 28 nurseries in Chautauqua County which would be affected by the quarantine set forth in the proposed regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol for ash nursery stock. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the proposed regulations, other than pursuant to compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option of leaving host materials within the quarantine area or transporting them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None.

(ii) It is anticipated that the Department would be able to administer the quarantine with existing staff.

5. Local government mandate:

None.

6. Paperwork:

Regulated articles inspected and certified to be free of Emerald Ash Borer moving from the quarantine area established by the proposed rule would have to be accompanied by a state or federal certificate of inspection and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to establish a quarantine in Cattaraugus and Chautauqua Counties in and near where the Emerald Ash Borer has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Emerald Ash Borer that could result from the unrestricted movement of White Ash, Green Ash, Black Ash and Blue Ash from the quarantine areas. In light of these factors, there does not appear to be any viable alternative to the quarantine set forth in this proposal.

9. Federal standards:

The proposed regulations do not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

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

#### **Regulatory Flexibility Analysis**

1. Effect on small business:

The small businesses affected by the proposed regulations establishing an Emerald Ash Borer quarantine in Cattaraugus and Chautauqua Counties are the nursery dealers, nursery growers and landscaping companies located within those counties. There are 79 such businesses in those counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, it is anticipated that the appearance of the Emerald Ash Borer and its destructive potential is likely to reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings. There are also approximately 600 firewood dealers and other forest products businesses in these counties. An undetermined number of these businesses are small businesses.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

2. Compliance requirements:

There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. All regulated parties in the quarantine area established by the proposed regulations would be required to obtain certificates and limited permits in order to ship other regulated articles (e.g. firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

3. Professional services:

In order to comply with the regulations, small businesses shipping regulated articles from the quarantine area would require professional inspection services, which would be provided by the Department, the

Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA).

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

4. Compliance costs:

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

(b) Annual cost for continuing compliance with the rule:

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the proposed regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. Regulated parties exporting other types of host materials (e.g. firewood and forest products) from the quarantine area established under the proposed regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the quarantine area to only those parts of New York State near or where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Emerald Ash Borer and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the proposed regulations provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the proposed regulations minimize adverse economic impact as much as is currently possible.

6. Small business and local government participation:

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forrest Products Association hosted an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

Those in attendance at the meetings on July 9th and July 14th appeared to understand the threat posed by the Emerald Ash Borer and expressed support for the proposed regulations. Outreach efforts will continue.

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

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping regulated articles (exclusive of nursery stock) from the

quarantine area, other than pursuant to a compliance agreement, would require an inspection and the issuance of a certificate of inspection. Most shipments, however, would be made pursuant to compliance agreements.

**Rural Area Flexibility Analysis**

1. Type and estimated numbers of rural areas:

The proposed regulations establishing an Emerald Ash Borer quarantine in Cattaraugus and Chautauqua Counties would affect the nursery dealers, nursery growers and landscaping companies located within those counties. There are 79 such businesses in these counties. There are also approximately 600 firewood dealers and other forest products businesses in these counties. All of these businesses are in rural areas as defined by section 481(7) of the Executive Law.

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

There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. All regulated parties in the quarantine area established by the proposal would be required to obtain certificates and limited permits in order to ship other regulated articles (e.g. firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

In order to comply with the proposed regulations, all regulated parties shipping regulated articles from the quarantine area would require professional inspection services, which would be provided by the Department, the Department of Environmental Conservation (DEC) and the United States Department of Agriculture (USDA).

3. Costs:

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the proposal. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the proposed regulations were drafted to minimize adverse economic impact on all regulated parties, including those in rural areas. This is done by limiting the quarantine area to only those parts of New York State near and where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Emerald Ash Borer and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the proposed regulations would provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the proposed regulations were designed to minimize adverse impact. Given all of the facts and circumstances, it is submitted that the proposed rule minimizes adverse economic impact as much as is currently possible.

5. Rural area participation:

The Department has had ongoing discussions with representatives of various nurseries and arborists as well as members of the forestry industry, regarding the general needs and benefits of the Emerald Ash Borer quarantine. These regulated parties are located in rural areas.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forrest Products Association hosted

an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

Those in attendance at the meetings on July 9th and July 14th appeared to understand the threat posed by the Emerald Ash Borer and expressed support for the proposed regulations. Outreach efforts will continue.

**Job Impact Statement**

The proposed rule will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

By establishing an Emerald Ash Borer quarantine in Cattaraugus and Chautauqua Counties, the proposed rule is designed to prevent the further spread of this pest to other parts of the State. There are an estimated 750-million ash trees in New York State (excluding the Adirondack and Catskill Forest Preserves), with ash species making up approximately seven percent of all trees in our forests. A spread of the infestation would have very adverse economic consequences to the nursery, forestry and wood-working (e.g. lumber yard, flooring and furniture and cabinet making) industries of the State, due to the destruction of the regulated articles upon which these industries depend. Additionally, a spread of the infestation could result in the imposition of more restrictive quarantines by the federal government, other states and foreign countries, which would have a detrimental impact upon the financial well-being of these industries.

By helping to prevent the spread of the Emerald Ash Borer, the proposed rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry and wood-working industries.

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## Office of Children and Family Services

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**NOTICE OF ADOPTION**

**Mandatory Disqualification of Foster and Adoptive Parents Based on Criminal History**

**I.D. No.** CFS-06-10-00004-A

**Filing No.** 384

**Filing Date:** 2010-04-06

**Effective Date:** 2010-04-21

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

**Action taken:** Amendment of sections 421.27(d)(1) and 443.8(e)(1), and repeal of sections 421.27(k) and 443.8(k) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 378-a(2), as amended by L. 2008, ch. 623 and L. 1997, ch. 436

**Subject:** Mandatory disqualification of foster and adoptive parents based on criminal history.

**Purpose:** The regulations implement Chapter 623 of the Laws of 2008 relating to criminal history checks of foster and adoptive parents.

**Text or summary was published** in the February 10, 2010 issue of the Register, I.D. No. CFS-06-10-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Civil Service

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

**Jurisdictional Classification**

**I.D. No.** CVS-16-10-00027-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Education Department, by increasing the number of positions of Special Assistant from 5 to 6.

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

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

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

**Jurisdictional Classification**

**I.D. No.** CVS-16-10-00028-P

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

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

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

**Subject:** Jurisdictional Classification.

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

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

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-16-10-00029-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Agriculture and Markets, by adding thereto the position of Assistant Director State Fair.

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-16-10-00030-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office for Technology," by adding thereto the position of Manager Information Services.

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

### **Jurisdictional Classification**

**I.D. No.** CVS-16-10-00031-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "Unemployment Insurance Appeal Board," by increasing the number of positions of Principal Unemployment Insurance Referee from 3 to 4.

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-16-10-00032-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of Homeland Security," by adding thereto the positions of Homeland Security Program Analyst 1 (7) and Homeland Security Program Analyst 2 (3).

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

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

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

## **Department of Environmental Conservation**

### **NOTICE OF ADOPTION**

#### **Parts 204, 237 and 238 Implement Cap-and-Trade Programs that Help Reduce NO<sub>x</sub> and SO<sub>2</sub> Emissions from Major Stationary Sources**

**I.D. No.** ENV-43-09-00004-A

**Filing No.** 390

**Filing Date:** 2010-04-06

**Effective Date:** 30 days after filing

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

**Action taken:** 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 NO<sub>x</sub> and SO<sub>2</sub> 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.

**Text or summary was published in** the October 28, 2009 issue of the Register, I.D. No. ENV-43-09-00004-P.

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

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

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

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

The Department intends to (1) repeal 6 NYCRR Part 204, NO<sub>x</sub> Budget Trading Program, (2) render inoperative 6 NYCRR Part 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program upon completion of the 2009-2010 control period, and (3) render inoperative 6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program, upon completion of the 2010 control period. These rules have essentially been superseded by 6 NYCRR Part 243, CAIR NO<sub>x</sub> Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO<sub>x</sub> Annual Trading Program, and 6 NYCRR Part 245, CAIR SO<sub>2</sub> Trading Program (the NYS CAIR rules). These proposed regulatory revisions will prevent affected sources from needing to comply with duplicative programs.

The Department proposed revisions to Parts 204, 237, and 238 on October 13, 2009. Hearings were held in Albany on December 1, 2009, in Avon on December 2, 2009, and in Long Island City on December 3, 2009. The comment period closed at 5:00 P.M. on December 10, 2009. The Department received written comments on New York's NO<sub>x</sub> Budget Trading Program and Acid Deposition Reduction Budget Trading Programs from two interested parties. These comments are summarized and responded to in this document.

#### **COMMENTS**

1. Comment - NRG agrees with the purpose and goals of these revisions. However, NRG recommends that Parts 237, and 238 be rescinded effective 4/30/2009 for Part 237 and 12/31/2009 for Part 238. As proposed they will remain in effect for the purposes of compliance certifications for the final control periods and any enforcement actions. Because the programs have a large surplus of allowances enforcement is likely an issue only if an affected source forgets to submit paperwork, not because the goals of the programs will not be met. Therefore the programs should be ended as soon as possible. Moreover, there might be savings if the electronic allowance tracking system is turned off sooner rather than later.

NRG strongly endorses the decision that it will not be necessary for subject sources to initiate the removal of permit conditions associated with the repealed regulations.

Response - The Department agrees with this comment and has made

every effort to rescind Parts 237 and 238 as expeditiously as possible. However, the compliance period for Part 237 had begun prior to the Department's adoption of the proposed rule revisions. The Department is not able to retroactively rescind a rule. The Department has revised Parts 237 and 238 to become inoperative as soon as practically possible. The Department cannot assume that there will be no violations associated with the implementation of these rules and must assure compliance with them.

2. Comment - The Adirondack Council supports these regulations and believes that it is likewise important to remove any redundancy that could be viewed as an impediment for businesses in New York. Power plants, both in New York and across the nation, can and should do more to reduce the emissions that cause acid rain, however, having unnecessary regulatory language is not helpful. The Council favors the removal of unnecessary language as long as the overall effectiveness of the programs is in no way compromised.

Response - The Department appreciates this comment and the support of the Adirondack Council.

List of Commenters

1. Roger Caiazza, NRG Energy
2. Scott Lorey, Adirondack Council

## NOTICE OF ADOPTION

### Zero Emission Vehicle (ZEV) Standards

**I.D. No.** ENV-43-09-00005-A

**Filing No.** 391

**Filing Date:** 2010-04-06

**Effective Date:** 30 days after filing

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

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

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0305, 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.

**Text or summary was published** in the October 28, 2009 issue of the Register, I.D. No. ENV-43-09-00005-P.

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

**Text of 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: airregs@gw.dec.state.ny.us

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

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

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

**I.D. No.** ENV-43-09-00006-A

**Filing No.** 387

**Filing Date:** 2010-04-06

**Effective Date:** 30 days after filing

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

**Action taken:** 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.

**Text of final 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)

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 January 1, 2014; 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<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), and particulate matter less than or equal to 10 microns in diameter (PM<sub>10</sub>).

(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<sub>2</sub> or NO<sub>x</sub> and 15 tpy of PM<sub>10</sub>.

(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 January 1, 2014.

(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.

(f) Each BART determination established by the Department will be submitted to the United States Environmental Protection Agency for approval as a revision to the State Implementation Plan.

#### 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<sub>10</sub> and particulate matter less than or equal to 2.5 microns in diameter (PM<sub>2.5</sub>). 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.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 249.1(c)(2) and 249.3(d) and (f).

**Text of 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: airregs@gw.dec.state.ny.us

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

#### Summary of Revised 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<sub>10</sub>), sulfur dioxide (SO<sub>2</sub>), and nitrogen oxides (NO<sub>x</sub>). 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 regulation 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<sub>x</sub> is an ozone precursor, while SO<sub>2</sub> 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. The department solicited comments on an impact level in the range of 0.1 to 0.5 deciviews and ultimately determined that a 0.1 deciview impact level from individual sources was an adequate benchmark to declare a source as contributing to visibility impairment and thus subject to a determination analysis.

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 January 1, 2014.

Many additional environmental and health benefits are inherent in the reductions of NO<sub>x</sub>, PM, and SO<sub>2</sub>. 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<sub>x</sub> 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<sub>2.5</sub> NAAQS, and for which current monitoring data indicate non-attainment with the 24-hour PM<sub>2.5</sub> NAAQS. PM can be emitted directly from stationary sources, or comprised of nitrate and sulfate particles formed through reactions involving NO<sub>x</sub> and SO<sub>2</sub> 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<sub>x</sub> and SO<sub>2</sub> 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. One of the five factors to be considered in the analysis is the costs of compliance. A cost-per-ton metric will be utilized, supplemented by a cost-per-unit of visibility improvement, to fulfill this factor. The department intends to use a cost threshold of \$5,500 per ton of pollutant reduced (which represents the current value of RACT) as one of the five factors for deciding which potential BART controls are appropriate for each visibility-impairing pollutant.

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.

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:

One local government-owned facility, the Samuel A. Carlson Generating Station owned by the Jamestown Board of Public Utilities (JBPU),

was identified as BART-eligible. Otherwise, there are no direct costs to state and local governments associated with this proposed regulation, as it applies only to industrial stationary sources. No other 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

The facility owned by the JBPU will need to comply with the requirements of Part 249. 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 visibility which may reasonably be anticipated to result from the application of controls. These factors must be considered for emissions of PM<sub>10</sub>, SO<sub>2</sub>, and NO<sub>x</sub>, 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 SO<sub>2</sub> or NO<sub>x</sub> and 15 tpy of PM<sub>10</sub>.

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 or 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 January 1, 2014. If an applicable source chooses not to comply with the provisions of Part 249, it must permanently shut down operations by January 1, 2014.

#### Revised 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 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 (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), and particulate matter less than or equal to 10 microns in diameter (PM<sub>10</sub>). 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."

#### EFFECTS ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

The department has identified one local government entity that will be affected by the requirements of Part 249. The Samuel A. Carlson Generating Station, a coal-fired electric generating facility, is owned by the Jamestown Board of Public Utilities (JBPU). In a letter to the department, the JBPU identified one of the boilers at this facility as being potentially subject to Part 249 based on the three criteria for BART eligibility: it belongs to one of 26 specific source categories, commenced operation or underwent reconstruction between August 7, 1962 and August 7, 1977, and has a potential to emit 250 tons per year or more of at least one visibility-impairing pollutant. The requirements placed on this municipally-owned facility under Part 249 will in no way differ from the requirements placed on other subject facilities.

All the facilities subject to Part 249 are major Title V sources. No small businesses will be directly affected by the BART requirements. There may be opportunities for small businesses to lend consulting support as the BART sources undertake their five-factor analysis of controls. There may also be an opportunity for small businesses to benefit by providing construction services where additional control equipment is required at a BART source.

#### COMPLIANCE REQUIREMENTS

Each facility that contains units which are BART-eligible (based on the above criteria) and which are shown through modeling to contribute to visibility impairment in Class I areas will be subject to Part 249. To comply with this regulation, each facility will need to perform a technical analysis of potential emission controls that would reduce the emissions of visibility-impairing pollutants and cause a related improvement in visibility conditions in a Class I area. This BART analysis must consider five factors: 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 use of such technology.

This five-factor BART analysis must be submitted to the department by October 1, 2010, and report the best option for emission control equipment for the purpose of improving visibility conditions. The department, with assistance from the United States Environmental Protection Agency (EPA) and Federal Land Managers (FLMs), will review the facility's conclusion. Upon approval, the department will draft a "BART determination" document, which will include the approved controls and an associated emission limit. This BART determination must be submitted to and approved by EPA prior to January 15, 2011. The established emission limit will be entered into the facility's Title V permit through a modification. The facility will have until January 1, 2014 to install the control equipment or implement other emission reduction methods approved by the department.

A proposal for emissions monitoring technology must accompany the five-factor analysis. Within six months of the commencement of operation of BART controls, the source will also be required to submit to the department an emissions testing protocol. This emissions test will demonstrate that the necessary reductions of visibility-impairing pollutants are being met.

#### PROFESSIONAL SERVICES

The JBPU may choose to use a consulting engineer to help identify potential emission controls and determine their associated technical and economic feasibility. The facility will likely need to rely on a consultant to fulfill the modeling aspect of the analysis (i.e., to gauge the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology). It is possible that several facilities subject to BART could pool their resources and use a common modeling consultant in order to minimize costs.

#### COMPLIANCE COSTS

The facility will incur initial costs in conducting the five-factor BART analysis, particularly through the hiring of consultants. The department will consider control equipment below \$5,500 per ton of pollutant reduced (the current threshold value for Reasonably Available Control Technology (RACT)) as being cost-effective. This isn't to say any control equipment below \$5,500 per ton will be required—the control equipment's affect on visibility will also be considered, and the department intends to supplement the dollar-per-ton metric with a dollar-per-unit of visibility improvement metric. A cheaper piece of control equipment may therefore not be considered acceptable for BART if it leads to insignificant visibility improvement. The other four factors of the BART analysis will also need to be weighed to help decide on appropriate controls.

#### MINIMIZING ADVERSE IMPACT

The five-factor analysis is intended to minimize any adverse impacts that could potentially result from the Part 249 requirements. As stated above, the department will use the current RACT cost-per-ton threshold for determining whether potential controls are cost-effective. Based on modeling of the expected visibility impacts of the potential control equipment, a cost-per-unit of visibility improvement metric will also be used to ensure that controls will only be required if they further the goal of visibility reduction in Class I areas. The existence of pollution control equipment on the eligible unit may also minimize the compliance steps required by the facility.

Because the eligible unit at the Samuel A. Carlson facility is an electric generating unit (EGU), reliability of the power system may be of concern should the unit require expensive controls or limits on operation in order to comply with BART. The second factor of the analysis will take such energy concerns (along with other non-air quality environmental impacts) into consideration.

NESCAUM had previously performed modeling to gauge the impact that emissions from BART-eligible sources had on visibility in Class I areas. The department, with the cooperation of each eligible facility, is in the process of updating this modeling in order to bring the results in line with more recent operating conditions and to more closely follow EPA's recommended modeling protocol. The department included an exemption clause in Part 249 to absolve any facility of the regulation's requirements if that facility had a negligible contribution to visibility impairment in Class I areas. It is possible that the updated modeling will show the Samuel A. Carlson facility to be below the contribution threshold set by the department, in which case it would not be required to take further action in conjunction with Part 249.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The department had initially intended to regulate its BART-eligible EGU facilities under the Clean Air Interstate Rule (CAIR) program, until the CAIR program was remanded to EPA for various flaws. The department then sent letters to parties that had been regulated under CAIR and informed them they would be subject to BART due to the uncertainties now inherent in the CAIR program. The JBPU sent a reply indicating that one of the boilers at the Samuel A. Carlson facility was likely eligible for BART.

A meeting was held on December 14, 2009 between the department and the BART-eligible EGU facilities. The purpose of the meeting was to clarify the requirements of the BART regulation, and to discuss the five-factor analysis and modeling procedures that would be required of each source. This meeting was attended by a representative of the Samuel A. Carlson facility.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The BART analysis, to be conducted by the JBPU and all other facilities subject to BART, will review potential control technology to reduce emissions of visibility-impairing pollutants. The five factors to be considered during the analysis will ensure that the JBPU will be able to comply with the regulation in a manner that is both economically and technologically feasible.

**Revised 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 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 (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), and particulate matter less than or equal to 10 microns in diameter (PM<sub>10</sub>). 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 and eleven 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, six 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; St. Lawrence Cement Corp.-Catskill Quarry in Greene County; Oswego Harbor Power in Oswego County; and Samuel A Carlson Generating Station in Chautauqua County. These six 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.

**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 (SO<sub>2</sub>, NO<sub>x</sub> and PM<sub>10</sub>). 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 SO<sub>2</sub> or NO<sub>x</sub> and 15 tpy of PM<sub>10</sub>. 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 January 1, 2014. 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. One of the five factors to be considered in the analysis is the costs of compliance. A cost-per-ton metric will be utilized, supplemented by a cost-per-unit of visibility improvement, to fulfill this factor. Part 249 applies to existing sources in a fashion similar to the department's Reasonably Available Control Technology (RACT) regulations. The department therefore intends to use a cost threshold of \$5,500 per ton of pollutant reduced (which represents the current value of RACT) as one of the five factors for deciding which potential BART controls are appropriate for each visibility-impairing pollutant. 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 from the four non-EGU facilities, 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. Additionally, a meeting was held with representatives from the BART-eligible EGU sources on December 14, 2009. This meeting included representatives from the two eligible EGU sources which reside in rural areas.

**Revised 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 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 (PM<sub>10</sub>), sulfur dioxide (SO<sub>2</sub>), and nitrogen oxides (NO<sub>x</sub>). 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 and eleven EGU stationary sources within New York State which may require a BART analysis. 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 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 intends to use a cost threshold of \$5,500 per ton of pollutant reduced (which represents the current value of Reasonably Available Control Technology, or RACT) when deciding which potential BART controls are appropriate. The Department expects sources to supplement this cost per ton metric with a cost per deciview reduction metric. Because the goal of the BART program is to improve visibility conditions in Class I areas, it is appropriate to take this value into consideration as well. Control equipment that is shown through modeling to have little or no effect on visibility in Class I areas, and therefore a very high cost per deciview reduction value, will not be considered as appropriate for BART.

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.

#### Assessment of Public Comment

The New York State Department of Environmental Conservation (Department) is proposing to adopt the new 6 NYCRR Part 249, Best Available Retrofit Technology (BART), and amend Section 200.9, Referenced Material, to reduce the emission of visibility-impairing pollutants from certain stationary sources. This regulation is being proposed under the requirements of Clean Air Act (CAA) Section 169A and the U.S. Environmental Protection Agency's (EPA's) Regional Haze Rule (64 FR 35714), which aim to restore visibility in federal Class I areas to their natural conditions.

The Department proposed Part 249 on October 28, 2009. Hearings were held in Albany on December 1, 2009, in Avon on December 2, 2009, and in Long Island City on December 3, 2009. The comment period closed at 5:00 pm on December 24, 2009. The Department received written and oral comments from 13 commenters on the proposed regulation. These commenters were mostly representatives of the facilities that the Department has identified as being eligible for the BART program. All of the comments have been reviewed, summarized, and responded to by the Department.

The Department explicitly solicited comment on a few particular components of the BART regulation. These issues generated the largest number of comments.

The Department solicited comment on its intent to allow BART-eligible sources to undergo "exemption modeling." This would allow a source to show through modeling that its BART-eligible units do not significantly "contribute" to visibility impairment in Class I areas. Such a finding would mean the eligible source would not be required to perform the five-factor BART analysis, since additional control equipment under BART would very likely lead to insignificant improvements in visibility. All commenters that addressed this issue were in agreement with the Department's intent.

The Department also solicited comment on the appropriate level at which a source would be said to be "contributing" to visibility impairment. In EPA's BART Rule (70 FR 39104), states were given the discretion to select an appropriate threshold for contribution. EPA stated that this level should not exceed 0.5 deciviews (where a deciview (dv) is a unit of measurement to gauge relative haziness).

The Department has coordinated its regional haze efforts with the Mid-Atlantic/Northeast Visibility Union (MANE-VU). MANE-VU, with the assistance of the Northeast States for Coordinated Air Use Management association (NESCAUM), did a preliminary study of the visibility impacts from BART-eligible stationary sources in the region and ultimately recommended that sources which are BART-eligible should automatically be subject to perform a BART analysis, regardless of their contribution level. Many states in the MANE-VU region followed this approach. The Department proposed to use a 0.1 deciview contribution threshold, however, due to a finding by NESCAUM that sources with a contribution less than 0.1 dv had a very small impact on visibility impairment.

Most commenters responded by saying EPA's maximum 0.5 dv level should be used as the threshold. The Department disagreed with that assertion, as such a high cutoff would allow many sources to go uncontrolled while their aggregate emissions continued to contribute to elevated visibility impairment in Class I areas. The Department also reminded commenters that merely being subject to the BART analysis is not an indication that controls will be required. Sources would then need to weigh the five factors to determine what control equipment, if any, is appropriate.

Commenters also responded to the Department's proposed cost-per-ton threshold, which is one of the five factors of the analysis ("the costs of compliance"). The Department had proposed to use a cost threshold value between \$5,500 per ton of pollutant reduced, and \$10,000 per ton. Commenters proposed a number of alternative thresholds. The Department agrees with the commenter that stated \$5,500 per ton, which is the current value of the Reasonably Available Control Technology threshold, is appropriate because it similarly affects existing sources. Comments were also received that this threshold should be supplemented with a cost-per-unit of visibility improvement metric, since the purpose of this regulation is to improve visibility and a simple cost-per-ton metric does not factor this in. The Department agrees with this comment and expects sources to analyze both the cost-per-ton and cost-per-unit of visibility improvement for potential controls.

Many comments were received on the Department's proposed time-frame for the BART process. The Department had proposed that the five-factor BART analysis be due by October 1, 2010, and that approved control equipment be installed and operating by July 1, 2013. Most commenters felt it would be difficult to meet such a schedule and requested these dates be extended. Some commenters cited recent advancements in emission reductions as reason to delay the implementation of BART. Others cited uncertainty in the reliability of the bulk power system, and the need for a sufficient study of potential effects to be completed, as justification for pushing back the compliance date.

The Department understands that this is a short timeframe for sources to complete the five-factor analysis, but intends to keep the October 1, 2010 deadline. This deadline has been established in order to provide the Federal Land Managers (FLMs) and EPA with enough time to review and approve each BART determination before January 15, 2011; otherwise, EPA would be required to introduce a Federal Implementation Plan (FIP) and take over the state's BART program. The Department will work with sources on a continuous basis to ensure the analysis is completed on time.

The Department recognizes that the proposed deadline for having approved control equipment installed and operational may be burdensome, and intends to delay the compliance date until January 1, 2014. This will allow each source more than three years from the time of their five-factor BART analysis submittal, and approximately three years from EPA's final approval of the Department's determination, to install any control equipment approved as BART. The Department is unable to delay the installation of BART controls too long, since the Regional Haze Rule calls for periodic assessments of reasonable progress made in reducing visibility impairment in Class I areas.

Some commenters questioned the practical aspects of the visibility goal stated in the Clean Air Act and Regional Haze Rules; that is, a return to natural visibility conditions in these Class I areas by 2064. The commenters suggested the Department take these practical aspects into account when implementing Part 249. The adoption of Part 249 is a federal requirement, and the Department must act in accordance with federal mandates and work to implement the BART program in New York State.

A comment was received that the Department failed to quantify the benefits of Part 249, specifically in the selection of the 0.1 dv contribution threshold, and therefore failed to fulfill a State Administrative Procedure Act requirement. The Department reiterates that the 0.1 dv contribution threshold does not in itself impose any requirements other than mandating that subject sources have to perform and submit a five-factor BART analysis. Consideration of the five factors is meant to prevent any deleterious economic effects or overly burdensome impacts from being imposed on subject sources.

A comment was received that the Department failed to complete an Environmental Impact Statement, which is a State Environmental Quality Review Act (SEQRA) requirement. The Department fulfilled the SEQRA requirement by completing a Negative Declaration document, as the proposed regulation is not expected to cause any significant environmental impacts.

There were numerous comments received regarding the modeling process by which visibility improvements of potential controls will be analyzed. The Department has been finalizing its modeling protocol, based largely on EPA's modeling guidance and with the assistance of the FLMs. The Department has also been communicating with staff from BART-eligible sources as it finalizes its protocol. Commenters also requested that the modeling initially performed by NESCAUM for the initial MANE-VU study be updated to reflect more recent operating conditions. The Department is currently undertaking this task with the assistance of the BART-eligible sources.

Various comments were received which expressed uncertainty over whether BART controls would reduce visibility impairment, and whether such controls would actually be cost-effective. The five-factor BART analysis ensures that controls will only be required if they are cost-effective and likely to result in visibility improvement. A potential outcome of the analysis is that no controls will be required, whether it be due to high costs, negligible visibility improvement, or other factors.

Numerous commenters asked that Part 249 be implemented in such a way that it minimizes potential redundancy from other programs or regulations. One of the five factors of the BART analysis is the existence of pollution control technology already in use at the source. This will allow the source to consider controls installed under the Clean Air Interstate Rule (CAIR) program or the Acid Deposition Reduction Program as potentially sufficient for BART. The Department also plans to minimize the duplication of resources which could result from the recently proposed NO<sub>x</sub> RACT rules for combustion sources, glass plants, and portland cement manufacturers.

A commenter suggested that electric generating units (EGUs) be regulated under CAIR in lieu of BART for NO<sub>x</sub> and SO<sub>2</sub>, which was an option granted by EPA in their BART rule. The Department has discussed this issue with BART-eligible EGUs and maintains its stance that CAIR is not sufficient to regulate BART sources, since it was remanded to EPA by the U.S. Court of Appeals for the D.C. Circuit due to various deficiencies. Any controls that have been installed under the CAIR program will of course be taken into account in the five-factor BART analysis.

A commenter requested that BART sources be given the opportunity to comment on the Department's BART determinations before they are finalized. In the case where the addition of control equipment is required, the BART determinations will be submitted to EPA as SIP revisions, and will undergo an associated public comment period. This will allow sources

an opportunity to review and comment on the Department's BART determination. A comment period will also be offered when the source's Title V permit is modified to include the BART emission limit.

One commenter suggested that small emission units be excluded from consideration in the BART analysis, since their small emissions would have negligible impact on visibility conditions in Class I areas. The Department agrees with this statement, and expects sources to only analyze potential controls for those units whose emissions could be reasonably assumed to have some impact on visibility.

EPA commented on the completeness and approvability of New York State's Regional Haze SIP in the absence of the enforceable BART emission limits. The Department understands EPA's concern, but doesn't consider the state's SIP submission to be complete until it has also submitted the BART determinations (including enforceable emission limits) as single-source SIP revisions. The Department will work with EPA during this process to ensure the determinations are submitted and approved in advance of the FIP deadline.

## NOTICE OF ADOPTION

### The 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-A

**Filing No.** 392

**Filing Date:** 2010-04-06

**Effective Date:** 30 days after filing

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

**Action taken:** 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<sub>x</sub> and SO<sub>2</sub> to help reduce ozone and fine particulate formation in eastern U.S. CAIR states.

**Text or summary was published** in the October 28, 2009 issue of the Register, I.D. No. ENV-43-09-00007-P.

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

**Text of 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: airregs@gw.dec.state.ny.us

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

#### Assessment of Public Comment INTRODUCTION

The New York State Department of Environmental Conservation (the Department) proposes to revise the terms of 6 NYCRR Part 243, CAIR NO<sub>x</sub> Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO<sub>x</sub> Annual Trading Program, and 6 NYCRR Part 245, CAIR SO<sub>2</sub> 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 twenty-seven 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<sub>x</sub> Budget Trading Program, including cement manufacturers, certain large industrial sources, and EGUs with a nameplate capacity equal to or greater than 15 MWe.

The Department proposed revisions to Parts 243, 244, and 245 on October 13, 2009. Hearings were held in Albany on December 1, 2009, in Avon on December 2, 2009, and in Long Island City on December 3, 2009. The comment period closed at 5:00 P.M. on December 10, 2009. The Department received a written comment on New York's Clean Air Inter-

state Program (CAIR) Program from one interested party. This comment is summarized and responded to in this document.

COMMENTS

1. Comment - The Adirondack Council supports these regulations as they seek to comply with federal requirements of the CAIR program and prevent any unnecessary duplication for the regulated sector. While CAIR is far from perfect, as the United States Circuit Court of Appeals for the District of Columbia has shown, it is currently the best program available. While we wait for either a revised CAIR rule or federal legislation, CAIR must be implemented to the best of the state's ability. We applaud the state for taking the necessary steps to be in line with the requirements of CAIR in a timely fashion.

In addition, we believe that it is likewise important to remove any redundancy that could be viewed as an impediment for businesses in New York. Power plants, both in New York and across the nation, can and should do more to reduce the emissions that cause acid rain, however, having unnecessary regulatory language is not helpful. The Council favors the removal of unnecessary language as long as the overall effectiveness of the programs is in no way compromised.

Response – The Department appreciates this comment and the support of the Adirondack Council.

List of Commenters

1. Scott Lorey, Adirondack Council

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

**Asphalt Pavement and Asphalt Based Surface Coatings**

**I.D. No.** ENV-16-10-00013-P

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

**Proposed Action:** Amendment of Parts 200, 205 and 211; and addition of Part 241 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301 and 19-0305

**Subject:** Asphalt Pavement and Asphalt Based Surface Coatings.

**Purpose:** Provide VOC emissions reductions from asphalt paving as part of the effort to reach attainment of the 8-hour ozone NAAQS.

**Public hearing(s) will be held at:** 10:00 a.m., May 24, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; 10:00 a.m., May 25, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-A, Albany, NY; and 10:00 a.m., May 26, 2010 at Department of Environmental Conservation Region 8, Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, 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:** Subdivisions 200.1(a) through 200.1(f) remain unchanged.

The table under 200.1(ag) is revised to remove the following entry:

78933 Methyl ethyl ketone (2 Butanone)

Sections 200.1(ah) through 200.1(cf) remain unchanged.

New paragraphs are added to subdivision 200.1(cg) as follows:

(34) dimethyl carbonate

(35) 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (known as HFE-7000)

(36) 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381)

(37) 1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea)

(38) methyl formate

(39) propylene carbonate

Sections 200.2 through 200.8 remain unchanged.

Table 1 of existing Section 200.9 is amended as follows:

Regulation	Referenced Material	Availability
241.3	ASTM, D977 (Re-approved 2005)	****
	ASTM, D2397 (Re-approved 2005)	****

241.5(a)(2)(iii) 40 CFR Part 60, Appendix A, method 24 \* (July 1, 2009)

Sections 205.1(a) through 205.1(b)(1) remain unchanged.

Paragraphs 205.1(b)(2) and (3) are modified to read as follows:

(2) any aerosol coating product; [and]

(3) any architectural coating that is sold in a container with a volume of one liter (1.057 quart) or less[.]; and

A new section 205.1(b)(4) is added to read as follows:

(4) any asphalt pavement and asphalt based surface coating regulated under Part 241 of this Title.

Sections 205.2 through 205.8 remain unchanged.

Part 211, General Prohibitions

Section 211.1 [Definitions

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

(b) 'Cutback asphalt.' Any asphalt which has been liquefied by blending with petroleum solvents (Diluents) or, in the case of some slow cure asphalts (road oils), which have been produced directly from the distillation of petroleum.

(c) 'Penetrating prime coat.' An application of low viscosity asphalt to an absorbent surface in order to prepare it for paving with an asphalt concrete.

Section 211.2] Air pollution prohibited

No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.

Section 211[3]2 Visible emissions limited

Except as permitted by a specific part of this Subchapter and for open fires for which a restricted burning permit has been issued, no person shall cause or allow any air contamination source to emit any material having an opacity equal to or greater than 20 percent (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity.

[Section 211.4 Volatile organic compounds prohibited

(a) The use of volatile organic compounds to liquefy asphalt used for paving is prohibited, except for:

(1) asphalt used in the production of long-life stockpile material for pavement patching and repair;

(2) asphalt applied at low ambient temperature from October 16th to May 1st; and

(3) asphalt used as a penetrating prime coat for the purpose of preparing an untreated absorbent surface to receive an asphalt surface.

(b) The amount of volatile organic compounds in emulsified asphalt, as determined by testing methods of the ASTM (American Society for Testing and Materials), may not exceed the following amounts in percent by weight:

(1) two percent for ASTM grades RS-1, SS-1, SS-1h, CSS-1, and CSS-1h;

(2) three percent for ASTM grades RS-2, CRS-1, CRS-2, HFRS-2 and HFMS-2h;

(3) 10 percent for ASTM grades MS-2 and HFMS-2; and

(4) 12 percent for ASTM grades CMS-2 and CMS-2h.]

Part 241, Asphalt Pavement and Asphalt Based Surface Coating

241.1 Applicability

This Part applies to:

(a) any person who applies, supplies, sells, offers for sale, or manufactures any asphalt pavement; and

(b) any person who applies, supplies, sells, offers for sale, or manufactures any asphalt-based surface coating.

241.2 Definitions

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

(b) 'Asphalt pavement.' Pavement that is composed of stone, sand, and gravel bound together by asphalt.

(c) 'Cutback asphalt'. Any asphalt which has been liquefied by blending with petroleum solvents (diluents) or, in the case of some slow cure asphalts (road oils), has been produced directly from the distillation of petroleum.

(d) 'Asphalt-based surface coating'. A coating labeled and formulated for application to worn asphalt pavement surfaces including, but not limited to, highway, driveway, parking, curb and/or berm surfaces to perform one or more of the following functions:

- (1) fill cracks,  
 (2) seal, coat, or cover the surface to provide protection or prolong its life, or  
 (3) restore or preserve the appearance.

(e) 'Emulsified asphalt'. An emulsion of asphalt and water that contains an emulsifying agent; it is a heterogeneous system containing two normally immiscible phases (asphalt and water) in which the water forms the continuous phase of the emulsion, and minute globules of asphalt form the discontinuous phase.

(f) 'Penetrating prime coat'. An application of low viscosity asphalt to an absorbent surface in order to prepare the surface for application of asphalt pavement.

241.3 Asphalt pavement. No emulsified asphalt, as classified under ASTM International standard specifications D 977 or D 2397 (see Table 1, section 200.9 of this Title), may be applied, sold, offered for sale, or manufactured that contains oil distillate, as determined by ASTM International standard test method D 6997, in amounts that exceed the following limits (milliliters of oil distillate per 200 gram sample):

- (a) three milliliters for ASTM grades RS-1, SS-1, SS-1h, CRS-1, CSS-1, and CSS-1h;  
 (b) five milliliters for ASTM grades RS-2, CRS-2, and HFMS-2;  
 (c) sixteen milliliters for ASTM grades MS-2, HFMS-2 and HFMS-2h;  
 and  
 (d) twenty milliliters for ASTM grades CMS-2 and CMS-2h.

241.4 Cutback asphalt prohibition. The use of cutback asphalt in paving activities is prohibited except in the following circumstances:

- (a) when the asphalt is used in the production of long-life stockpile material for pavement patching and repair; or  
 (b) when the asphalt is used as a penetrating prime coat for the purpose of preparing a surface to receive asphalt pavement.

241.5 Asphalt based surface coating.

(a) VOC limitation. No asphalt based surface coating may be applied, sold, offered for sale, or manufactured if it contains more than 100 grams of VOC per liter.

(b) VOC content determination.

(1) Except as provided in paragraph (2) of this subdivision, the VOC content of an asphalt based surface coating must be determined through the use of the following equation:

$$\text{VOC Content} = \frac{(Ws)}{(Vm - Vw)}$$

where:

VOC content = grams of VOC per liter of coating

Ws = weight of VOCs, in grams

Vm = volume of coating, in liters

Vw = volume of water, in liters

The VOC content of a tint base shall be determined prior to the addition of the colorant.

(2) An alternative method may be used if approved by the Department and the Administrator.

(3) The Department may additionally require the manufacturer to conduct a 40 CFR part 60, appendix A, method 24 (see Table 1, section 200.9 of this Title) analysis to verify the VOC content.

(c) Product labeling and recordkeeping.

(1) Small container asphalt-based surface coating labeling. Any manufacturer of an asphalt based surface coating that is supplied, sold, or offered for sale in containers less than or equal to ten gallons in size must display on the container the following information:

(i) the product name, and

(ii) the VOC content. Each container must display either the maximum or the actual VOC content of the coating, as supplied, including the maximum thinning as recommended by the manufacturer. VOC content shall be displayed in grams of VOC per liter of coating. VOC content displayed shall be calculated using manufacturer's formulation data, or shall be determined according to paragraph (a)(2) of this section.

(2) Bulk asphalt-based surface coating recordkeeping.

(i) Any person who sells or offers for sale any asphalt-based surface coating in quantities greater than 10 gallons in size must provide to the purchaser, and the Department upon request, the following information regarding the coating:

(a) the invoice sheet, bill of sale, or product manifest document;

(b) the name of the supplier;

(c) the name of the manufacturer;

(d) the product name;

(e) the VOC content; and

(f) the Material Safety Data Sheet.

(ii) Any person who applies an asphalt-based surface coating from

a container greater than 10 gallons in size must have available for inspection by Department staff the documentation described in paragraph (b)(2)(i) of this section until the time that all the relevant coating is applied or discarded.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth Newkirk, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 241asph@gw.dec.state.ny.us

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

**Public comment will be received until:** June 1, 2010.

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

#### Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone national ambient air quality standard (NAAQS) by 2012 in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and volatile organic compounds (VOCs). This rulemaking proposal is aimed at achieving some of the VOC emission reductions necessary to do this.

Under the federal Clean Air Act (CAA), ozone pollution in the Northeast is recognized as a regional problem. Under CAA section 176A(b)(2), the region is required to assess the degree of interstate transport of ozone or its precursors throughout the region, assess strategies for mitigating the interstate pollution, and recommend to EPA measures to reduce pollution.

According to the Environmental Conservation Law (ECL), the Department has the authority to undertake rules and regulations to protect the natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of New York State and their overall economic and social well being. ECL sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303 establish the authority of the Department to regulate air pollution and air contamination sources. ECL section 19-0305 authorizes the Department to enforce the codes, rules and regulations, and ECL sections 71-2103 and 71-2105 set forth the applicable civil and criminal penalty structures. Together, these sections of the ECL set out the overall state policy goal of reducing air pollution and providing clean, healthy air for the citizens of New York and provide general authority to adopt and enforce measures to do so.

In the northeastern United States the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the national ambient air quality standard by mid-afternoon on a summer day. The contiguous metropolitan areas of Washington, D.C., Baltimore, Philadelphia, New York, and Hartford are designated ozone nonattainment areas. Unlike other pollutants, ozone is a secondary pollutant - not emitted directly but formed in the atmosphere by a variety of photochemical reactions involving VOCs and NOx in the presence of sunlight.

The Department is obligated to protect public health and satisfy federal regulatory requirements intended to support that goal. The proposed regulatory revisions are necessary to reduce VOC emissions to improve air quality, protect public health, and meet the State's SIP obligations.

Revisions to Parts 205, 211, and promulgation of the new Part 241.

The Department is proposing to revise 6 NYCRR Parts 205 and 211 and promulgate a new Part 241 that will provide VOC emissions reductions from asphalt pavement and asphalt based surface coatings as part of the effort to reduce ozone pollution in the state and reach attainment of the 8-hour ozone NAAQS. It applies to any entity that manufactures, sells, or supplies asphalt pavement and asphalt based surface coatings.

These revisions are among a series of sustained actions undertaken by New York State, in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and VOCs, so that New York State and States in the Ozone Transport Region may attain the ozone NAAQS. The effective date of the regulation is anticipated to be January 1, 2011.

Hot mix asphalt paving is sometimes "cutback" (thinned) with volatile organic solvents to ensure the mix can be properly applied. Since August 21, 1983, the use of cutback asphalt during the summer months is prohibited pursuant to the provisions of section 211.4(a)(2). The Department intends to retain and clarify this prohibition in the present rule making.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, for the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. The proposal requires that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the products.

The proposed regulatory revision of VOC emissions from asphalt pavement and asphalt based surface coating is expected to have a minimal impact on consumers since formulations already exist that meet the proposed limits. EPA provided guidance on the reduction of VOC from asphalt, and included cost information in their "Control of VOCs from Use of Cutback Asphalt" EPA - 450 / 2-77-037. The reduction of VOC emissions from asphalt formulations is expected to result in either a decrease in the cost of production for manufacturers of asphalt formulations, or no cost impact at all. The Department is not aware of any additional costs that may cause price increases for asphalt formulations.

There are no direct costs to State and local governments associated with the proposed revisions to Parts 205, 200, and the promulgation of the new Part 241, as discussed in the previous paragraph. The regulatory amendments will apply equally to all entities that manufacture, sell, or supply asphalt pavement and asphalt based surface coatings. The regulatory amendments will not impose a mandate on local governments, since compliance obligations of local governments will be no different than those of any other subject entities. The authority and responsibility for implementing and administering Part 241 will reside solely with the Department.

The requirements for recordkeeping and reporting under proposed Part 241 will only be applicable to persons who manufacture, sell, or supply asphalt pavement and asphalt based surface coatings.

Under the proposed regulatory revisions, minor additional paperwork will be imposed on manufacturers of asphalt pavement and sellers and applicators of asphalt based surface coatings. Sellers and applicators of any asphalt based surface coating that is sold in a bulk container (greater than 10 gallons in size) will be required to retain the associated Material Safety Data Sheet as well as other specific information about the coating until such time that the entire amount of the coating in the bulk container is applied or finally discarded.

#### Revisions to Part 200

Concurrently, Part 200 is being revised to incorporate Federal requirements by adding six organic compounds to the section 200.1(cg) list of compounds that are not VOCs. Similarly, the Hazardous Air Pollutant (HAP) listing is being revised to remove methyl ethyl ketone. These revisions are being made to remain consistent with EPA's definition of volatile organic compounds (VOC) for purposes of preparing State implementation plans (SIPs) to attain the NAAQS for ozone under title I of the Clean Air Act (CAA).

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). EPA added various compounds to the list that specifies certain compounds that are not to be considered VOCs. The department is proposing to add these compounds to the section 200.1(cg) list of compounds that are not VOCs. The six added compounds include: dimethyl carbonate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3) (known as HFE-7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381); 1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea); methyl formate (HCOOCH3); and propylene carbonate.

The CAA allows individuals to petition EPA to add or delete chemicals from the HAPs list under CAA section 112(b)(3)(A). Pursuant to such a petition process, methyl ethyl ketone was deleted from the list of HAPs established in CAA 112(b). (See 40 CFR 63.21, Deletion of methyl ethyl ketone from the list of hazardous air pollutants) The Department, as a result, is proposing to revise the list of HAPs at 200.1(ag) in order to remove methyl ethyl ketone to be consistent with EPA. Methyl ethyl ketone has been regulated and billed as both a VOC and a HAP in New York State, but will be removed from the HAP list. Methyl ethyl ketone will continue to be regulated as a VOC.

No new costs are being imposed as a result of these revisions to the VOC and HAP lists in Part 200, necessary to remain consistent with EPA regulations. It is possible that some Title V facilities might experience a small decrease in the amount of their fee bill, and consequently a reduction in operating costs, based upon the removal of the six compounds from the VOC list. In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC.

There are no direct costs to State and local governments associated with the proposed revisions to the VOC and HAP lists in Part 200. The proposed revisions to Part 200 impose no compliance requirements on any entity. These regulatory actions are not expected to impose additional costs, and could potentially result in a decrease in billed amounts.

Due to the addition of the six compounds to the list of compounds that

are not considered to be VOCs, some facilities might experience a small decrease in the amount of paperwork that needs to be maintained.

#### Regulatory Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York is proposing to promulgate regulations designed to limit the VOCs emitted by various grades of asphalt pavement and in asphalt based surface coating in a new Part 241. Concurrently, Department regulations will be revised to align VOC and hazardous air pollutant (HAP) listings with federal requirements in Part 200.

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone NAAQS by 2012 in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State (Buffalo-Niagara Falls, Rochester, Capital District, Poughkeepsie, Jamestown, Jefferson County, and Essex County). These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and VOCs.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, for the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. Proposed section 241.3 contains the new, lower VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coating applied in New York State contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). Six compounds are considered to have negligible photochemical reactivity, and will be added to the list of compounds that are not VOCs. Also, EPA has specified that methyl ethyl ketone will no longer be considered a hazardous air pollutant (HAP), and the Department is revising its regulations to remain consistent. The compound will continue to be regulated as a VOC.

Together, these modifications will ensure that the State achieves the VOC emission reductions from asphalt pavement and asphalt based surface coating needed so the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

1. Effects on Small Businesses and Local Governments. This is not a mandate on local governments. It applies to any entity that manufactures, sells or applies asphalt pavement and asphalt based surface coatings. Asphalt pavement reformulation is anticipated to provide a cost savings for the manufacturers. Any small businesses or local governments contracting to have asphalt paving or asphalt based surface coating performed on their premises will incur potentially lower costs.

No new costs are being imposed as a result of the revisions to the VOC and HAP lists in Part 200. All major facilities in New York State that emit air pollutants are required to obtain a Title V permit under Part 201 and pay a per-ton monetary fee according to the amount of regulated air pollutants they emit. The fee assessment includes all of the compounds listed in Part 200. By removing a pollutant from the list, facilities are able to realize a cost saving if they previously emitted the delisted compound.

In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC. As a result, there will be no additional costs to any regulated entity.

2. Compliance Requirements. Local governments are not directly affected by the revisions to 6 NYCRR Parts 205, 211, or 241. Small businesses are required to comply with the same requirements as larger businesses, individuals, or any others. Anyone specifically contracting for asphalt pavement or asphalt based surface coating, will acquire compliant asphalt with low VOC content from manufacturers. All manufacturers of asphalt pavement and asphalt based surface coating will be required to reformulate their products. Small businesses or local governments contracting for pavement will purchase compliant products from their existing suppliers.

The proposed revisions to Part 200 will not impose a mandate on local governments. The proposed revisions will impose no compliance obligation on any entity.

3. Professional Services. Local governments are not directly affected by the revisions to 6 NYCRR Parts 205, 211 and 241. It is not anticipated that small businesses that manufacture asphalt pavement and asphalt based surface coating will need to contract out for professional services to comply with this regulation. In the few cases where small manufacturers do not already have compliant formulations, alternate asphalt formulations are readily available.

The proposed revisions to Part 200 will not require any entity to obtain any professional services. No additional compliance burden is associated with these regulatory actions, as the Department implements them.

4. Compliance Costs. There are no additional compliance costs for small businesses and local governments as a result of this rule. Since there are compliant asphalt formulations now available, small businesses and local governments are not expected to see a price increase for the purchase of compliant asphalt pavement.

The proposed revisions to Part 200 impose no compliance requirements on any entity. These regulatory actions are not expected to impose additional costs, and could potentially result in a decrease in billed amounts.

It should be noted that the impact to consumers is expected to be minimal since compliant asphalt pavement and asphalt based surface coatings formulations are already available. EPA, in its guidance ("Control of VOCs from Use of Cutback Asphalt" EPA - 450 / 2-77-037) recognizes that existing reformulations will likely reduce costs to manufacturers, and not cause any price increases.

5. Minimizing Adverse Impact. Local governments are not directly affected by the revisions to Parts 205 and 211 and addition of the new 241. The Department does not anticipate any issues regarding reformulation of asphalt products. This regulation will provide manufacturers with consistent VOC formulations, and potentially cost savings.

The revision of the VOC and HAP listings will provide consistency for all areas of the state, and facilities could potentially select compounds with lower photochemical reactivity. The authority and responsibility for implementing and administering the changes to Part 200 will reside solely with the Department.

6. Small Business and Local Government Participation. The requirement for reduced VOC content in asphalt pavement and asphalt based surface coating is consistent for all manufacturers statewide. The Department will also be giving official notice of this rulemaking to the public, including businesses and each of the facilities that manufacture asphalt in the state. The authority and responsibility for implementing and administering Part 241 and the changes to Part 200 will reside solely with the Department.

As a member of the Ozone Transport Commission (OTC), the Department participated in outreach through development of regulatory guidance. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. A specific New York State process will be undertaken, extending public notice, hearing, and comment opportunities to all areas of the state as part of this rulemaking.

7. Economic and Technological Feasibility. Local governments are not directly affected by the revisions to Parts 205 or 211, or the addition of the new Part 241. Compliant asphalt pavement and asphalt based surface coating are available to meet all consumer needs. The VOC content limits are consistent with other OTC states. Asphalt pavement products at or below the specific VOC content limits are currently available.

The revised listing of VOCs in Part 200 that are considered to have negligible photochemical reactivity was determined by a specific EPA process. Similarly, EPA has reviewed sufficient information regarding methyl ethyl ketone to determine that it no longer needs to be considered a HAP.

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

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York is proposing to promulgate regulations designed to limit the VOCs emitted by various grades of asphalt pavement and in asphalt based surface coating in a new Part 241. Concurrently, Department regulations will be revised to align VOC and hazardous air pollutant (HAP) listings with federal requirements in Part 200.

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone NAAQS by 2012

in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State (Buffalo-Niagara Falls, Rochester, Capital District, Poughkeepsie, Jamestown, Jefferson County, and Essex County). These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and VOCs.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, under the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. Proposed section 241.3 contains the new, lower VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

The proposal includes reducing the VOC content of, and consequently emissions from, asphalt pavement and asphalt based surface coatings for all classifications of these products. The reduction is consistent with a regional effort to reduce VOC emissions from asphalt products, agreed upon through the Ozone Transport Commission (OTC).

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). Six compounds are considered to have negligible photochemical reactivity, and will be added to the list of compounds that are not VOCs. Also, EPA has specified that methyl ethyl ketone will no longer be considered a HAP, and the Department is revising its regulations to remain consistent. The compound will continue to be regulated as a VOC.

These changes are a necessary part of the Department's strategy to bring the New York City Metropolitan area into attainment with the ozone NAAQS by 2012 and the upstate nonattainment areas by 2009.

The proposal will ensure that the State achieves the VOC emission reductions from asphalt pavement and asphalt based surface coatings and cutback asphalt needed to make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

1. Types and estimated number of rural areas: Rural areas are not adversely affected by the revisions to Parts 205, 211, and 241. The proposal will apply on a statewide basis. The impact to rural consumers, if any, is expected to be minimal since compliant asphalt formulations are currently available from the existing asphalt pavement production plants.

The revisions to Part 200 do not impose any compliance obligations on any facility. They apply consistently throughout the state, with no adverse impact on rural areas.

2. Reporting, recordkeeping and other compliance requirements: Parts 205, 211, and 241 will apply on a statewide basis. Rural area businesses are not expected to be effected by these revisions. Professional services are not anticipated to be necessary to comply with this rule. Part 241 imposes minor recordkeeping requirements on all manufacturers and suppliers of asphalt pavement and asphalt based surface coatings. These requirements apply consistently statewide.

The revisions to Part 200 do not impose any compliance obligations on any facility, and will not adversely affect rural areas.

3. Costs: The cost of proposed regulations regarding reduction of VOC content in asphalt pavements will be minimal. Compliant asphalt pavement products exist and are readily available to replace higher VOC content asphalt pavement. No additional costs will be incurred by the industry and the elimination of petroleum based VOC content reduces product cost. According to Environmental Protection Agency Control Technology Guidance (EPA-450/2-77-037) the use of lower VOC asphalts are more cost effective for users. The same mixing plant that formulates mixtures can prepare compliant pavement mixtures without any equipment changes.

No new costs are being imposed as a result of the revisions to the VOC and HAP lists in Part 200. All major facilities in New York State that emit air pollutants are required to obtain a Title V permit under Part 201 and pay a per-ton monetary fee according to the amount of regulated air pollutants they emit. The fee assessment includes all of the compounds listed in Part 200. By removing a pollutant from the list, facilities are able to realize a cost saving if they previously emitted the delisted compound.

In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC. As a result, there will be no additional costs to any regulated entity.

4. Minimizing adverse impact: The proposal is not anticipated to have an adverse effect on rural areas. The rule is intended to create air quality

benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants and the allowance of compounds with minimal photochemical reactivity. These revisions are not expected to have adverse impacts on rural areas since compliant asphalt pavement and asphalt based surface coatings will be available statewide. The regulation ensures a fair and level playing field for all asphalt pavement and asphalt based surface coatings manufacturers, and provides consistent VOC and HAP lists for facilities throughout the state.

5. Rural area participation: Rural areas are not specifically affected by the revisions. Reformulations of asphalt pavement will potentially provide a cost savings to asphalt manufacturers and the existing facilities providing asphalt pavement will remain. VOC and HAP listings are consistent for all areas of the state, and facilities could potentially select compounds with lower photochemical reactivity.

As a member of the OTC, the Department participated in outreach through development of regulatory guidance, in the form of a model rule. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. 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 Department of Environmental Conservation (the Department) proposes to revise Parts 205 and 211 and add a new Part 241 to reduce volatile organic compound (VOC) emissions from asphalt pavement and asphalt based surface coatings. Part 200 will be revised to be consistent with federal requirements regarding organic compounds and remove methyl ethyl ketone from the Hazardous Air Pollutants (HAP) list.

The proposal includes reducing the VOC content of, and consequently emissions from, asphalt paving for all classifications of asphalt. The reduction is consistent with a regional effort to reduce VOC emissions from asphalt paving, agreed upon through the Ozone Transport Commission (OTC). These changes are a necessary part of the Department's strategy to bring the New York City Metropolitan area into attainment with the ozone NAAQS by 2012 and the upstate nonattainment areas by 2009.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, under the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. Proposed section 241.3 contains the VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

These efforts will help New York to make immediate progress towards attaining ozone standards statewide. Asphalt formulations which meet the lower VOC content limits are currently available, therefore manufacturers will not be adversely impacted by this rule. These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State. Part 211 has applied Statewide since it was promulgated in 1983. Part 241 will likewise be applied statewide. Since the proposed lower VOC content limits are anticipated to reduce costs to asphalt pavement and asphalt based surface coatings producers, there are no expected adverse impact on jobs.

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). The Environmental Protection Agency (EPA) added various compounds to the list that specifies certain compounds not to be considered VOCs. The Department is proposing to add these compounds to the section 200.1(cg) list of compounds that are not VOCs. The six added compounds include: dimethyl carbonate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3) (known as HFE-7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381); 1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea); methyl formate (HCOOCH3); and propylene carbonate. These compounds are considered to have negligible photochemical reactivity.

The federal Clean Air Act (CAA) allows individuals to petition EPA to add or delete chemicals from the HAPs list under CAA section 112(b)(3)(A). Pursuant to such a petition process, methyl ethyl ketone was deleted from the list of HAPs established in CAA 112(b). (See 40 CFR 63.21, Deletion of methyl ethyl ketone from the list of hazardous air pol-

lutants) The Department is proposing to revise the list of HAPs at 200.1 (ag) in order to remove methyl ethyl ketone and to maintain consistency with the federal list. Methyl ethyl ketone has been regulated and billed as both a VOC and a HAP in New York State, but will be removed from the HAP list. Methyl ethyl ketone will continue to be regulated as a VOC.

2. Categories and numbers affected: This rule will affect approximately 70 in-State asphalt pavement and asphalt based surface coatings manufacturing facilities. The VOC listing and HAP delisting affects any facility utilizing the compounds listed.

3. Regions of adverse impact: The Department does not expect there to be regions of adverse impact in the State. The VOC emission limits in Part 211 have applied state-wide since 1983 and there has been no resulting adverse impact on any particular region of the State. Of the approximately 70 in-state asphalt pavement and asphalt based surface coating manufacturers, three are located in the New York City Metropolitan Area. The Department, however, expects that compliant asphalt products will be readily available and that there will potentially be a cost savings.

The VOC listing revision and removal of methyl ethyl ketone from the HAP list will not adversely impact employment. The facilities utilizing the compounds will be avoid the associated emissions fee, potentially reducing facility operating costs.

There will be no adverse impact on employment as a result of this rulemaking.

4. Minimizing adverse impact: The Department is providing an implementation date of January 1, 2011 in order to provide sufficient time for the regulated community to prepare for compliance with Part 241. The facilities must reformulate asphalt pavement products, but compliant formulations already exist. The Department, therefore, does not anticipate any adverse impacts on employment from the adoption of these rule revisions. The Department, moreover, believes that this rule will have a positive economic impact on the asphalt pavement industry because there is a potential reduction in operating costs.

As a member of the OTC, the Department participated in outreach through development of regulatory guidance, in the form of a model rule. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. A specific New York State process will be undertaken, extending public notice, hearing, and comment opportunities to all areas of the state as part of this rulemaking.

There are no adverse impacts expected from either the listing of VOC compounds or from the elimination of methyl ethyl ketone from the HAP list. Facilities will be allowed to use these compounds, with reduced photochemical reactivity, as alternatives to other compounds, reducing their environmental impact and, potentially, operating costs.

In sum, the Department does not expect this regulation to have an adverse effect on employment in the State.

5. Self-employment opportunities: not applicable.

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

### **Outdoor Wood Boilers Used to Heat Homes and Commercial Establishments**

**I.D. No.** ENV-16-10-00035-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 247 to Title 6 NYCRR.

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

**Subject:** Outdoor wood boilers used to heat homes and commercial establishments.

**Purpose:** Particulate emission standards for new outdoor wood boilers, and stack height requirements for new and existing units.

**Public hearing(s) will be held at:** 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 3, 2010 at Dulles State Office Bldg., 1st Fl. Auditorium, 317 Washington St., Watertown, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 7, 2010 at Department of Environmental Conservation - Region 1, SUNY @ Stony Brook, 50 Circle Rd., Stony Brook, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 8, 2010 at Department of Environmental Conservation Central Office, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 9, 2010 at Rockland County Fire Training Center, 35 Fireman's Memorial Dr.,

Pomona, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 10, 2010 at Herkimer County Community College, Robert McLaughlin College Center, Hummel Corporate Center, 100 Reservoir Rd., Herkimer, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 14, 2010 at Genesee Community College, College Dr., Conable Technology Bldg., Rm. T102, Batavia, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 15, 2010 at Cortland County Office Bldg., 2nd Fl. Auditorium, 60 Central Ave., Cortland, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 16, 2010 at Allegany County Office Bldg., Legislative Board Chambers, 7 Court St., Belmont, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 17, 2010 at Jamestown Community College, Training Center, Rm. 117, 10785 Bennett Rd. (Rte. 60), Dunkirk, NY; 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 21, 2010 at Norrie Point Environmental Center, Margaret Lewis Norrie State Park, 256 Norrie Point Way, Staatsburg, NY; and 6:00 p.m.-8:00 p.m., Public Hearing; 5:00 p.m.-6:00 p.m., Information Session, June 23, 2010 at Harrietstown Town Hall, 39 Main St., Saranac Lake, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The Department of Environmental Conservation (Department) proposes to adopt 6 NYCRR Part 247, Outdoor Wood Boilers, and revise 6 NYCRR Part 200, General Provisions, to conform to the new rule. Outdoor wood boilers (OWBs) are defined in Part 247 as fuel burning devices (1) designed to burn wood or other fuels; (2) that the manufacturer specifies for outdoor installation or installation in structures not normally occupied by humans; and (3) that are used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device.

General Provisions applicable to all OWBs

Definitions of terms used in Part 247 are presented in Section 247.2. An OWB commencing operation on or after April 15, 2011 is defined as a 'new' OWB. Conversely, an 'existing' OWB is defined as an OWB that commenced operation prior to April 15, 2011. The term 'commence operation' is defined as the initial start-up of the combustion chamber of an OWB after all piping and electrical connections between the OWB and structure(s) it serves have been completed. New OWBs are further classified based upon the useful heat generated in the unit. Residential-size new OWBs are units with a thermal output rating of 250,000 British thermal units per hour (Btu/h) or less. Commercial-size new OWBs are units with a thermal output rating greater than 250,000 Btu/h. The term 'Northern Heating Zone' is defined as the area including the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Oneida, Oswego, St. Lawrence, Saratoga, Warren and Washington.

A list of fuels which may be burned in OWBs is contained in Section 247.4. Seasoned clean wood may be burned in a new OWB. 'Clean wood' is defined in section 247.2 as wood that has not been painted, stained, or treated with a coating, glue or preservative. In addition, natural gas and heating oil that meets the sulfur content limits set forth in Subpart 225-1, and non-glossy, non-colored papers, including newspaper, may be used as starter fuels. The Department may approve additional fuels for specific models of new OWBs provided that the models have been tested via United States Environmental Protection Agency (EPA) Test Method 28-OWHH with the fuels in question. A list of prohibited fuels is contained in subdivision 247.3(b). The list of prohibited fuels includes, but is not limited to, garbage, yard waste, household chemicals and animal carcasses.

Subdivision 247.3(c) prohibits the operation of an OWB in such a manner as to cause or allow emissions from such OWB that are injurious to human, plant or animal life or which unreasonably interfere with the comfortable enjoyment of life or property. Examples of situations that would trigger subdivision 247.3(c) include, but are not limited to:

- activating smoke detectors in neighboring structures;
- impairing visibility on a public highway; or
- causing a visible plume migrating from an OWB and contacting a building on an adjacent property.

Subdivision 247.3(d) prohibits the operation of an OWB in such a manner as to create a smoke plume with an opacity of 20 percent or greater (six minute mean) as determined via EPA Reference Method 9 (or equivalent).

Requirements applicable to New OWBs

The particulate emission limits, stack height and setback requirements for residential-size new OWBs are set forth in Section 247.5. Residential-

size new OWBs will be subject to a weighted average particulate emission limit of 0.32 pounds per million British thermal units (mmBtu) heat output. In addition, the particulate emission rate for any test run conducted pursuant to Test Method 28-OWHH may not exceed 15.0 g/h when the burn rate is 1.5 kilograms per hour (kg/h) or less and 18.0 g/h when the burn rate is greater than 1.5 kg/h. Further, residential-size new OWBs must be located 100 feet or more from the nearest property boundary line and must be equipped with a permanent stack extending a minimum of two feet above the peak of any roof structure located within 150 feet of the OWB and no less than 18 feet above ground level.

Commercial-size new OWBs (Section 247.6) will be subject to a weighted average particulate emission limit of 0.32 pounds per million mmBtu heat output. In addition, the particulate emission rate for any test run conducted pursuant to Test Method 28-OWHH may not exceed 20.0 g/h. A commercial-size new OWB must be equipped with a permanent stack extending a minimum of two feet above the peak of any roof structure located within 150 feet of the OWB and no less than 18 feet above ground level. Finally, a commercial-size new OWB must be located 200 feet or more from the nearest property boundary line, 300 feet or more from the nearest residential property boundary line, and 1000 feet or more from a school.

Requirements that Apply to Manufacturers

Sections 247.7 and 247.8 contain provisions that apply to manufacturers of new OWBs. A permanent label (Section 247.7) must be affixed to all new OWBs. The label must be made of a material that is sufficiently durable to last the lifetime of the new OWB and must contain the following information:

- name and address of the manufacturer;
- date the new OWB was manufactured;
- model name and number;
- serial number;
- thermal output rating in Btu/h; and
- certified particulate emission rate (per Section 247-1.8).

Beginning April 15, 2011, all new OWBs must be of a model certified by the Department. A model is defined in Section 247.2 as all new OWBs manufactured by a single manufacturer that are similar in all material and design respects. The certification process is set forth in Section 247.8.

Two copies of the certification application must be submitted to the Department. The following information must be contained in a manufacturer's application for certification of a model as set forth in subdivision 247.8(c):

- name and address of the manufacturer, model name and number, serial number, date of manufacture and the thermal output rating, in Btu/h, of the new outdoor wood boiler tested;
- four individual color photographs of the tested unit showing the front, back and both sides of the unit;
- engineering drawings and specifications for each of the following components:
  - firebox including a secondary combustion chamber;
  - air induction systems;
  - baffles;
  - refractory and insulation materials;
  - catalysts;
  - catalyst bypass mechanisms;
  - flue gas exit;
  - door and catalyst bypass gaskets;
  - outer shielding and coverings;
  - fuel feed system; and
  - blower motors and fan blade size.
- final test report prepared by the testing laboratory; and
- a copy of the operation and maintenance instructions.

In order for a model to be certified, the particulate emission rate must be determined by a test laboratory via Test Method 28-OWHH or other test method approved in writing by the Department. A test laboratory must be accredited by the EPA for testing wood-burning residential space heaters in accordance with 40 CFR 60 Subpart AAA, Section 60.535 or another organization approved by the Department. A test laboratory must have no conflict of interest or financial gain in the outcome of the testing of new OWBs.

The Department shall issue a certificate of compliance if the application is deemed complete and the model is determined to be compliant with the particulate emission limits set forth in Section 247.5 or Section 247.6 (as appropriate). The certificate of compliance will be valid for five years and may be renewed by the manufacturer. If a manufacturer makes a change in the design of a model resulting in a change in the thermal output rating of the model, that change constitutes the creation of a new model.

Requirements that Apply to Distributors

Section 247.9 applies to distributors. The term 'distributor' is defined in Section 247.2 as any person who sells or leases a new OWB to an end user. Distributors are required to provide a prospective buyer or lessee of a

new OWB with a 'Notice to Buyers' (Notice). The following must be included in the Notice:

a. an acknowledgement that the buyer or lessee was provided a copy of Part 247;

b. a list of fuels that may be burned in the OWB as set forth in paragraph 247.8(d)(1) of Part 247; and

c. a statement that even if the requirements set forth in Part 247 are met, there may be conditions or locations in which the use of a new outdoor wood boiler unreasonably interferes with another person's use or enjoyment of property or even damage human health, and if such a situation occurs the owner or lessee of the new outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.

The Notice must be signed and dated by both the buyer (or lessee) and the distributor when the sale (or lease) of the new OWB is completed. In addition, the following information must be added to the Notice:

a. name and address of the owner (or lessee) of the new OWB;

b. street address where the OWB was installed (if different from item (a) above);

c. name of the manufacturer, model and date of manufacture of the new OWB;

d. height of the peak of the highest roof structure within 150 feet of the new OWB;

e. height of the permanent stack for the new OWB; and

f. distance to the nearest property boundary line to the new OWB.

The distributor must submit the completed Notice to the Department's regional office for the area where the OWB is installed within seven (7) days of making delivery of the new OWB into the possession of the buyer or lessee.

Requirements applicable to Existing OWBs (Section 247.10)

All existing OWBs must be equipped with a permanent stack extending a minimum of two feet above the peak of any roof structure located within 150 feet of the OWB and no less than of 18 feet above ground level effective October 1, 2011. An existing outdoor wood boiler that commenced operation prior to September 1, 2005 must be replaced with a new outdoor wood boiler meeting the requirements of this Part or must be permanently removed from service no later than August 31, 2015. An existing outdoor wood boiler that commenced operation between September 1, 2005 and April 14, 2011 must be replaced with a new outdoor wood boiler meeting the requirements of this Part or must be permanently removed from service within ten years of the commence operation date but not later than August 31, 2020. In the event that an owner of an existing outdoor wood boiler cannot provide sufficient documentation, to the satisfaction of the Department, regarding the commence operation date of their existing outdoor wood boiler, such owner must replace their existing outdoor wood boiler with a new outdoor wood boiler meeting the requirements of this Part or must permanently remove the existing outdoor wood boiler from service no later than August 31, 2015.

No person shall operate an existing OWB in the Northern Heating Zone between May 15 and August 31 of each year or between April 15 and September 30 elsewhere in the State. There are three exceptions to this provision (subdivision 247.10(b)):

1. OWBs certified under Section 247.8 and sited 100 feet or more from the nearest property boundary line;

2. OWBs sited 500 feet or more from the nearest property boundary line; or

3. OWBs located on contiguous agricultural lands<sup>1</sup> greater than five acres sited 500 feet or more from the nearest residence not served by the OWB or 500 feet or more from the nearest property boundary line that is not agricultural land and 1000 feet or more from a school.

Severability Clause

Section 247.11 contains a severability clause stating that in the event any provision of Part 247 is held to be invalid, the remainder of Part 247 shall continue in full force and effect.

Part 200 – General Provisions

Section 200.9 will be amended to incorporate by reference EPA Test Method 28-OWHH and Reference Method 9. Further, test laboratories that conduct the Test Method 28-OWHH testing must be accredited by EPA pursuant to Section 60.535. Therefore, the Department is incorporating Section 60.535 by reference in this regulation.

<sup>1</sup> The term 'agricultural land' is defined in Section 247.2 as the "land and on-farm buildings, equipment, manure processing and handling facilities, and practices that contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a 'commercial horse boarding operation' and 'timber processing'. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other."

*Text of proposed rule and any required statements and analyses may be obtained from:* John Barnes, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 247owb@gw.dec.state.ny.us

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

*Public comment will be received until:* July 2, 2010.

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

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

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations.

Outdoor wood-fired boilers are fuel burning devices (1) designed to burn wood or other fuels; (2) that the manufacturer specifies for outdoor installation or installation in structures not normally occupied by humans; and (3) that are used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device. A typical unit looks like a small metal storage shed with a stack. Outdoor wood boilers can also be used to heat swimming pools.

The Department is proposing to establish stack height and operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

#### **Needs and Benefits**

Outdoor wood boilers have become more popular in recent years as a means to reduce home energy costs. In New York State, OWB sales increased from 606 units in 1999 to 1,880 units in 2004.<sup>1</sup> The increased use of OWBs has resulted in numerous complaints filed by neighbors of OWB owners. Complaints have been filed with the Department, the New York State Department of Health, the Office of the Attorney General and local municipalities, many of which have adopted ordinances to regulate OWBs.

During the winter months, the Department's regional offices receive numerous complaints regarding smoke from OWBs. Some complaints are filed during the summer months as well since some OWBs are used to heat swimming pools and provide hot water for the residences they serve. At this time, the Department uses the provisions in Part 211, "General Prohibitions", to initiate an enforcement action against the owner/operator of an OWB subject to a complaint(s). In order to prosecute an enforcement action under Part 211, Department staff must observe an opacity violation via EPA Federal Reference Method 9 or document conditions that clearly "interfere with the comfortable enjoyment of life or property." Department staff must be present when the OWB is operating to meet the heat demand of the building it services and under the proper daylight conditions in order to conduct a Method 9 analysis. Due to the cyclical nature of the operation of an OWB, collecting evidence for an enforcement action is a labor-intensive activity. A regulation detailing the compliance requirements that owners/operators must meet is necessary in order for Department staff to effectually resolve nuisance complaints.

In general, the Department continues to support the use of renewable resources such as wood, and the proposed rule will allow the continued use of OWBs while minimizing the environmental impacts. The primary benefit of the proposed rule, if promulgated, would be a significant improvement in the quality of life for those impacted by a plume from a neighbor's OWB. This will be accomplished by reducing the potential exposures to wood smoke, thus mitigating both the public nuisance and adverse health effects that have led to the complaints filed with government agencies. In addition, the promulgation of Part 247 would give the Department a tool to effectually resolve complaints. These benefits will be achieved by implementing the provisions described in the following five sections.

#### **1. General Provisions**

Only seasoned clean wood<sup>2</sup> and wood pellets made from clean wood may be burned in an OWB. Natural gas, heating oil that complies with the fuel sulfur limits set forth in Subpart 225-1 and non-glossy, non-colored paper, including newspaper, may be used as starter fuels if so recommended by the manufacturer. A list of prohibited fuels is incorporated into Section 247.3. The list of prohibited fuels includes garbage, household chemicals, plastics, plywood and coal<sup>3</sup> and is incorporated into the rule to provide guidance to OWB operators.

A nuisance provision is included in Part 247 which prohibits the opera-

tion of an OWB in a manner that may cause injury or damage to human life or which unreasonably interferes with another person's enjoyment of life or property. Examples of situations where this provision would apply are set forth in Section 247.3. However, this list is not intended to be exhaustive and other situations may trigger the nuisance provision. This provision is designed to make it easier for the Department to resolve complaints regarding the operation of an OWB.

No OWB may be operated in a manner that causes a plume with an opacity greater than 20 percent (six minute mean) as determined using EPA Reference Method 9 (or equivalent). An opacity reading greater than this standard may be an indication that an OWB is not being operated properly (e.g., improper fuel(s) being used). This provision is included in Part 247 to give the Department another tool to effectually resolve complaint situations.

#### 2. Requirements for New OWBs

New OWBs (those units that commence operation on or after April 15, 2011) must be equipped with a permanent stack extending a minimum of two feet above the peak of any roof structure within 150 feet of an OWB and not less than 18 feet above grade. Based upon location-specific factors such as the height of nearby buildings, terrain, etc., the permanent stack may need to be taller than 18 feet in order to avoid creating nuisance conditions.

There are two classifications of new OWBs in Part 247. Units with thermal output ratings of 250,000 British thermal units per hour (Btu/h) or less are classified as 'residential-size' OWBs. Units with thermal output ratings greater than 250,000 Btu/h are classified as 'commercial-size' OWBs. New residential-size OWBs must meet a weighted average particulate matter emission limit of 0.32 pounds per million Btu heat output. The particulate matter emission rate for any burn category with a burn rate less than or equal to 1.5 kilograms per hour (kg/h) may not exceed 15.0 g/h. The particulate matter emission rate for any burn category with a burn rate greater than 1.5 kg/h may not exceed 18.0 g/h. New commercial-size OWBs must meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output. In addition, the particulate emission rate for any one burn category may not exceed 20.0 g/h. These emission standards are comparable to the standards promulgated by the states of Vermont, Massachusetts and Maine and the standards proposed by the state of Pennsylvania.

Setback requirements are set forth in Part 247 for new OWBs. A new residential-size OWB must be located 100 feet or more from the nearest property boundary line. A new commercial-size OWB must be located 200 feet or more from the nearest property boundary line, 300 feet or more from the nearest property boundary line of a residentially zoned property and 1000 feet or more from a school.

#### 3. Requirements that Apply to Manufacturers

There are two provisions in Part 247 that apply to OWB manufacturers. Manufacturers are responsible for applying for a certificate of compliance for each model line they plan to sell in New York. Second, manufacturers are responsible for affixing a permanent label on each OWB to be sold in New York. The following information must be included on the permanent label is set forth in Section 247.7:

- a. name and address of the manufacturer;
- b. date the OWB was manufactured;
- c. model name and number;
- d. serial number;
- e. thermal output rating of the OWB in British thermal units per hour; and
- f. certified particulate emission rate.

These provisions are included in Part 247 to help ensure that only certified OWBs are sold in New York from April 15, 2011 forward.

#### 4. Requirements that Apply to Distributors

Distributors must provide a 'Notice to Buyers' (Notice) to prospective buyers or lessees of OWBs. The following must be included in the Notice:

- a. an acknowledgement that the buyer or lessee was provided with a copy of Part 247;
- b. a list of the fuels that may be burned in the OWB as set forth in the certificate of compliance issued to the manufacturer; and
- c. a statement that even if the requirements set forth in Part 247 are met, there may be conditions or locations in which the use of an OWB unreasonably interferes with another person's use or enjoyment of property or even damage human health, and if such a situation occurs the owner or lessee of the outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.

The Notice must be signed by the distributor and buyer (or lessee) when the sale (or lease) is completed. At that time, the following information must be incorporated into the Notice:

- a. name and address of the owner or lessee of the OWB;
- b. street address where the OWB was installed (if different from item (a) above);

- c. name of manufacturer, model line and date of manufacture of the OWB;
- d. height of the peak of the highest roof structure within 150 feet of the new OWB;
- e. height of the permanent stack for the OWB; and
- f. distance from the OWB to the nearest property boundary line.

The distributor must submit the completed Notice to the Regional Air Pollution Control Engineer for the location where the OWB was installed within seven (7) days of making delivery of the new OWB to the buyer or lessee. These provisions are included in Part 247 to help ensure that only certified OWBs are sold in New York beginning on April 15, 2011 and that the stack height and setback requirements for new OWBs are met.

#### 5. Requirements for Existing OWBs

Existing OWBs must be equipped with a permanent stack extending a minimum of two feet above the peak of any roof structure within 150 feet of an OWB and not less than 18 feet above grade effective October 1, 2011. Based upon location-specific factors such as the height of nearby buildings, terrain, etc., the permanent stack may need to be taller than 18 feet in order to avoid creating nuisance conditions.

The purposes of the phase out provisions (subdivision 247.10(b)) are to remove OWBs from densely populated areas and replace existing OWBs with lower emitting and more efficient new OWBs. This provision is expected to result in a significant reduction in the number of complaints filed regarding OWBs as well as environmental and health benefits in areas where older model OWBs were installed.

Under the phase out provisions, existing OWBs must be replaced with a new OWB or must be permanently removed within 10 years of the commencement operation date. After August 31, 2020, no existing OWBs may be operated in New York. This provision establishes an end date when existing OWBs must be replaced or removed from service. The 10-year phase out period is based upon the useful life of OWBs. At the end of the useful life, an OWB will need to be replaced. The Department estimates that the useful life of OWBs is ten years based upon a review of four manufacturer warranties available on the internet. Woodmaster (woodmaster.com) offers a limited 10-year warranty the details of which are available after the purchase of an OWB. Greenwood (GreenwoodFurnace.com) offers a limited 20-year warranty on the firebox and a 10-year limited warranty for all other components. Aqua-Therm (aqua-therm.com) and Heatmor (heatmor.com) provide credits of 10 or 15 percent towards the cost of a new OWB when the original OWB is ten years old. The 10-year phase out period will allow owners of existing OWBs the opportunity to recover the costs of their investment without forcing a pre-mature replacement of their home furnaces.

In cases where an existing OWB commenced operation prior to September 1, 2005 or an owner cannot provide sufficient documentation (e.g., purchase or installation contracts) regarding the date their OWB commenced operation, the affected existing OWBs must be replaced with a new OWB or removed from service no later than August 31, 2015. The purpose of this provision is to provide the affected public regulatory certainty regarding the enforcement of the phase out provisions and to allow OWB owners sufficient time to plan for the cost of replacing their OWBs.

Existing OWBs located in the Northern Heating Zone<sup>4</sup> may not be used during the period of May 15 through August 31 of each year. Elsewhere in the state, existing OWBs may not be used during the period of April 15 through September 30 of each year. Some OWBs are used during late-spring and summer to provide hot water and heat swimming pools. These OWBs operate at very low burn rates and smolder most of the time. The emissions from OWBs do not disperse well during long hot spells when the air is calm (air stagnation periods). Further, people spend time outside during summer months and smoke from one's OWB can prevent their neighbors from enjoying outdoor activities. An existing OWB that meets a 500-foot setback (as defined in paragraphs 247.10(b)(2) and (3)) or meets a 100-foot setback and is a model certified by the Department pursuant to Part 247, may operate year-round provided the operation of such OWB does not cause a nuisance condition.

#### Costs

Manufacturers will incur research and development costs to develop new OWBs that can meet the emission limits set forth in Part 247. In order for a new OWB model line to be certified under Part 247, it must be tested per the protocols of Method 28-OWHH by an independent laboratory. The cost to manufacturers to have units tested is approximately \$15,000 to \$20,000 per certification test. Most New England states are in the process of promulgating rules similar to Part 247. Therefore, the costs for manufacturers to comply with Part 247 will be the same as the costs to comply with OWB regulations promulgated in other northeastern states. As a result, the cost of new OWBs in New York is expected to be commensurate with other northeastern states.

All OWBs will be subject to an 18-foot minimum stack height requirement. Stack extensions will need to be installed on most OWBs.

The estimated cost for stack extensions is \$200 for each four foot section. A typical cost for extending an OWB stack is expected to be \$600 but could be more if a stack needs to be higher than 18 feet high in order to extend two feet above a roofline within 150 feet of the OWB or to avoid creating a nuisance condition or both.

Owners of existing OWBs subject to the seasonal prohibition provision (Section 247.10(b)) will need to purchase a hot water heater if they were relying solely on the OWB for domestic hot water and have either built their house without another hot water source or have removed the hot water heater that was in use prior to the installation of the OWB. The capital costs to affected homeowners are expected to range from \$300 to \$350 for an electric heater and \$500 to \$600 for a natural gas-fired heater.<sup>5</sup> High efficiency electric heat pump water heaters are estimated to cost three times more than a conventional electric hot water heater with a long-term savings due to lower operating costs.<sup>6</sup> Further, homeowners purchasing high efficiency water heaters may be eligible for tax incentives from the American Recovery and Reinvestment Act of 2009<sup>7</sup> as well as utility rebates from New York's Energy Efficiency Portfolio Standard ([www.dps.state.ny.us/Phase2\\_Case\\_07-M-0548.html](http://www.dps.state.ny.us/Phase2_Case_07-M-0548.html)).

#### Paperwork

All new OWBs must be of a model certified by the Department. Every five years, manufacturers will need to apply for certification for each model they want to sell in New York. The Department will develop an application form which manufacturers will need to complete and submit with a certification package. The information that must be included in each application package is set forth in Section 247.8.

The distributor and owner (or lessee) of a new OWB must sign and date a "Notice to Buyers" (Notice) form supplied by the distributor. The original copy of the signed Notice must be submitted to the appropriate regional office within seven (7) days of delivery of the OWB to the owner/operator. The information that must be included in the Notice is specified in Section 247.9.

<sup>1</sup> "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., p. 4 (Oct. 2005).

<sup>2</sup> The term 'clean wood' is defined in Section 247.2 as wood that has not been painted, stained or treated with any other coatings, glues or preservatives, including, but not limited to, chromated copper arsenate, creosote, alkaline copper quaternary, copper azole or pentachlorophenol.

<sup>3</sup> See Section 247.3(b) for the complete list of prohibited fuels. This list should not be considered the complete list of prohibited fuels since any fuel not authorized under Section 247.4 (Approved Fuels) will be considered a prohibited fuel.

<sup>4</sup> The term 'Northern Heating Zone' is defined in Section 247.2 as the area including the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Oneida, Oswego, St. Lawrence, Saratoga, Warren and Washington.

<sup>5</sup> These costs are for 40 or 50 gallon capacity heaters. Source: [www.Kenmore.com](http://www.Kenmore.com), July 3, 2009.

<sup>6</sup> Source: [www.ieca.coop/PRODUCTS/MARATHONWATERHEATER/tabid/118/Default.aspx](http://www.ieca.coop/PRODUCTS/MARATHONWATERHEATER/tabid/118/Default.aspx)

<sup>7</sup> A new water heater must be installed prior to December 31, 2009. (H.R. 1-208, Section 1121).

#### Regulatory Flexibility Analysis

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. Part 247 is intended to regulate OWBs at the statewide level under the jurisdiction of the Department of Environmental Conservation (Department) and remove the regulatory burden from municipal governments.

The Department is proposing to establish stack height and operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

#### EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS

The greatest impacts of the provisions in Part 247 will be felt by manufacturers of new OWBs. The Department anticipates that the statewide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

There are more than 20 OWB manufacturers in the United States and

Canada.<sup>1</sup> Most OWB manufacturers will need to redesign their models in order to comply with the particulate emission standards set forth in Sections 247.5 and 247.6. Manufacturers that develop model lines that meet the particulate emission standards for new OWBs will be able to compete in the New York market after the new requirements take effect on April 15, 2011. Manufacturers that do not develop model lines that meet the particulate emission standards for new OWBs will not be able to compete in the New York market.

Distributors working with manufacturers that develop models certified under Part 247 will be able to continue doing business in New York April 15, 2011 and beyond so long as they only sell models that comply with Part 247.

#### COMPLIANCE REQUIREMENTS

Part 247 sets forth compliance requirements that apply to OWB owners, manufacturers and distributors of new OWBs. A new OWB is defined as one that commences operation on or after April 15, 2011. The requirements that will apply to small businesses, specifically manufacturers and distributors, are discussed in the following two sections. There are no compliance requirements set forth in Part 247 that will specifically apply to local governments.

#### Requirements for Manufacturers

Sections 247.7 and 247.8 contain provisions that apply to OWB manufacturers. A permanent label (Section 247.7) must be affixed to all new OWBs. The label must be made of a material that is sufficiently durable to last the lifetime of the OWB and must contain the following information:

- a. name and address of the manufacturer;
- b. date the OWB was manufactured;
- c. model name and number;
- d. serial number;
- e. thermal output rating in Btu/h; and
- f. certified particulate emission rate (per Section 247.8).

Effective April 15, 2011, all new OWBs sold in New York must be of a model certified by the Department. A model is defined in Section 247.2 as all new OWBs manufactured by a single manufacturer that are similar in all material and design respects. The certification process is set forth in Section 247.8.

Two copies of the certification application must be submitted to the Department. The following information must be contained in a manufacturer's application for certification of a model as set forth in paragraph 247.8:

- a. name and address of the manufacturer, the model name and number, serial number, date of manufacture and the thermal output rating, in Btu/h, of the outdoor wood boiler tested;
- b. four color photographs of the tested unit showing the front, back and both sides of the unit;
- c. engineering drawings and specifications for each of the following components:
  1. firebox including a secondary combustion chamber;
  2. air induction systems;
  3. baffles;
  4. refractory and insulation materials;
  5. catalysts;
  6. catalyst bypass mechanisms;
  7. flue gas exit;
  8. door and catalyst bypass gaskets;
  9. outer shielding and coverings;
  10. fuel feed system; and
  11. blower motors and fan blade size.
- d. final test report prepared by the testing laboratory; and
- e. a copy of the operation and maintenance instructions.

In order for a model to be certified, the particulate emission rate must be determined by a test laboratory using Test Method 28-OWHH, which was developed by the EPA. Alternative methods may be used upon the written approval of the Department. A test laboratory must be accredited by the EPA for testing wood-burning residential space heaters in accordance with 40 CFR 60 Subpart AAA, Section 60.535 or another organization approved by the Department. A test laboratory must have no conflict of interest or financial gain in the outcome of the testing of OWBs.

The Department will issue a certificate of compliance if the application is deemed complete and the model is determined to be compliant with the particulate emission limits set forth in Section 247.5 or Section 247.6 (as appropriate). The certificate of compliance will be valid for five years. A change in the design of a model resulting in a change in the thermal output rating of the model constitutes the creation of a new model.

#### Requirements for Distributors

Section 247.9 applies to distributors. The term 'distributor' is defined in Section 247.2 as any person who sells or leases an OWB to an end user. Distributors are required to provide a prospective buyer or lessee of an OWB with a 'Notice to Buyers' (Notice). The following must be included in the Notice:

a. an acknowledgement that the buyer or lessee was provided a copy of Part 247;

b. a list of the fuels that may be burned in the OWB as set forth in the certificate of compliance issued to the manufacturer; and

c. a statement that even if the requirements set forth in Part 247 are met there may be conditions or locations in which the use of an outdoor wood boiler unreasonably interferes with another person's use or enjoyment of property or even damage human health and if such a situation occurs the owner or lessee of the outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.

The Notice must be signed and dated by the buyer (or lessee) and the distributor when the sale (or lease) of the OWB is completed. In addition, the following information must be added to the Notice:

- a. name and address of the owner (or lessee) of the OWB;
- b. street address where the OWB was installed (if different from item (a) above);
- c. name of the manufacturer, model and date of manufacture of the OWB;
- d. height of the peak of the highest roof structure within 150 feet of the new OWB;
- e. height of the permanent stack for the OWB; and
- f. distance from the OWB to the nearest property boundary line.

The distributor must submit the completed Notice to the Department's regional office for the location where the OWB is installed within seven (7) days of making delivery of the OWB into the possession of the buyer (lessee).

#### PROFESSIONAL SERVICES

Manufacturers must have a model line tested by an independent test laboratory in order to generate the emissions data that need to be included in a certification application.

#### COMPLIANCE COSTS

All OWBs must be equipped with a permanent stack extending 18 feet above ground level. Stack extensions will need to be installed on most OWBs. The estimated cost for stack extensions is \$200 for each four foot section. A typical cost for extending an OWB stack is expected to be \$600 but would be higher if a stack needs to be greater than 18 feet high in order to avoid creating a nuisance condition.

Manufacturers will incur research and development costs to develop new OWBs that can meet the particulate emission limits set forth in Part 247. In order for a new OWB model line to be certified under Section 247.8, it must be tested per the protocols of Method 28-OWHH by an independent laboratory. The cost to manufacturers to have units tested is approximately \$15,000 to \$20,000 per certification test. New York State is not the only state promulgating emission standards for new OWBs. Most New England states have promulgated rules similar to Part 247. Therefore, the costs to comply with Part 247 will be similar to those in the New England states with OWB regulations. As a result, the cost of new OWBs in New York is expected to be commensurate with such costs in other northeastern states.

Distributors who purchased OWBs wholesale from manufacturers will not be able to sell non-compliant OWBs after April 14, 2011. Therefore, any unsold inventory of non-compliant OWBs would need to be sold to distributors in other states, sold back to the manufacturers or taken as a business loss.

#### MINIMIZING ADVERSE IMPACT

Part 247 is based upon a model rule developed by the Northeast States for Coordinated Air Use Management (NESCAUM) in January 2007. This model rule was developed as a guide for member states<sup>2</sup> as they draft their OWB regulations.

One of the key aspects of the NESCAUM model rule is that new OWB models must be certified by the state environmental agency. There are recertification and quality assurance provisions in the model rule along with a requirement that a model be recertified if a design change is made. In Part 247, the certification of a model is valid for five years. Manufacturers may make minor changes to their models without the expense of recertifying the model as long as the thermal output rating of the model does not change. In this way, a manufacturer does not have to submit design specification changes to the Department to determine if the model needs to be recertified.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

Department staff met with representatives of OWB manufacturers on June 15, 2007, April 16, 2009 and December 2, 2009. A copy of the draft rule was sent to stakeholders on November 14, 2007 and a stakeholder meeting was held on November 29, 2007 in Albany.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY

As of December 2, 2009, there are 10 models that may meet the proposed PM limits for new residential OWBs. The Department has not reviewed the test reports prepared by independent test laboratories and

other documentation for these models. The EPA has reviewed the test reports and determined that the models meet the requirements of the EPA's Outdoor Wood-fired Hydronic Heaters Program (see [www.epa.gov/woodheaters/models.htm](http://www.epa.gov/woodheaters/models.htm)).

<sup>1</sup> "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., pp. 31-32 (Oct. 2005).

<sup>2</sup> The NESCAUM member states are New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine.

#### Rural Area Flexibility Analysis

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. The Department anticipates that the state-wide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

The Department is proposing to establish stack height and operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

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

Part 247 will apply statewide. The Department and other governmental agencies<sup>1</sup> have received numerous complaints regarding smoke emissions from OWBs. The Department does not know how many OWBs have been installed in the state. The Office of the Attorney General estimated that 7,463 OWBs were installed in the state between 1999 and 2004.<sup>2</sup>

#### COMPLIANCE REQUIREMENTS

The compliance requirements for new OWBs are set forth in Part 247. Outdoor wood boilers that commence operation on or after April 15, 2011 are considered new OWBs. Conversely, existing OWBs are defined as those that commenced operation prior to April 15, 2011. The requirements that apply to manufacturers and distributors of new OWBs in rural areas are presented in the "Regulatory Flexibility Analysis for Small Businesses and Local Governments" for this rulemaking.

The compliance requirements that apply to end users of OWBs are presented in the following three sections.

#### General Provisions

The approved fuels that may be burned in an OWB are listed in Section 247.4. Seasoned clean wood<sup>3</sup> and wood pellets made from clean wood may be burned in an OWB. Natural gas, heating oil that complies with the fuel sulfur limits set forth in Subpart 225-1 and non-glossy, non-colored paper, including newspaper, may be used as starter fuels.<sup>4</sup>

A list of prohibited fuels is included in Section 247.3 as guidance to OWB operators. The list of prohibited fuels includes, but is not limited to, garbage, household chemicals, plastics, plywood and coal.<sup>5</sup>

A nuisance provision is included in Section 247.3 which prohibits the operation of an OWB in a manner that may cause injury or damage to human life or which unreasonably interferes with another person's enjoyment of life or property. Examples of situations where this provision would apply are set forth in Part 247 (see subdivision 247.3(c)). However, this list is not intended to be exhaustive and other situations may trigger the nuisance provision. This provision is designed to make it easier for the Department to resolve complaints regarding the operation of an OWB.

No OWB may be operated in a manner that causes a plume with an opacity greater than 20 percent (six minute mean) as determined using EPA Reference Method 9 (or equivalent). An opacity reading greater than this standard may be an indication that an OWB is not being operated properly (e.g., improper fuel(s) being used). This provision is included in Part 247 to give the Department another tool to effectually resolve complaint situations.

#### New OWBs

There are two classifications of new OWBs in Part 247. Units with thermal output ratings of 250,000 British thermal units per hour (Btu/h) or less are classified as 'residential-size' OWBs. Units with thermal output ratings greater than 250,000 Btu/h are classified as 'commercial-size' OWBs. All new OWBs must be equipped with permanent stacks extending a minimum of two feet above the peak of any roof structure located within 150 feet of an OWB and no less than 18 feet above ground level. The particulate emission limits are slightly different for each classification.

New residential-size OWBs must meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output as determined

using Test Method 28-OWHH. The particulate matter emission rate for any burn category with a burn rate less than or equal to 1.5 kilograms per hour (kg/h) may not exceed 15.0 g/h.<sup>6</sup> The particulate matter emission rate for any burn category with a burn rate greater than 1.5 kg/h may not exceed 18.0 g/h. These emission standards are analogous to the EPA's standards for indoor woodstoves (40 CFR 60 Subpart AAA). New commercial-size OWBs must also meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output, but the particulate emission rate for any one burn category may not exceed 20.0 g/h.

A new residential-size OWB must be located 100 feet or more from the nearest property boundary line. A new commercial-size OWB must be located 200 feet or more from the nearest property boundary line and 300 feet or more from the nearest property boundary line of a residentially zoned property and 1000 feet or more from the nearest school.

#### Existing OWBs

Existing OWBs must be equipped with a permanent stack extending a minimum of two feet above the peak of a roof structure located within 150 feet of an OWB and no less than 18 feet above grade effective October 1, 2011. Based upon location-specific factors such as terrain, etc., the permanent stack may need to be higher than the minimum requirements in order to avoid creating nuisance conditions. There may be situations where extending the stack height may not be sufficient to remediate nuisance conditions.

All existing outdoor wood boilers must be replaced with a new outdoor wood boiler meeting the requirements of this Part or must be permanently removed from service within ten years of the commence operation date or August 31, 2020, whichever is earlier. In cases where an existing OWB commenced operation prior to September 1, 2005 or an owner cannot provide sufficient documentation (e.g., purchase or installation contracts) regarding the date their OWB commenced operation, the affected existing OWB must be replaced with a new OWB or removed from service no later than August 31, 2015.

Existing OWBs located in the Northern Heating Zone may not be used during the period of May 15 through August 31 of each year. Elsewhere in the state, existing OWBs may not be used during the period of April 15 through September 30 of each year. Some OWBs are used during late-spring and summer to provide hot water and heat swimming pools. These OWBs operate at very low burn rates and smolder most of the time. The emissions from OWBs do not disperse well during long hot spells when the air is calm (air stagnation periods). Further, people spend time outside during summer months and smoke from one's OWB can prevent their neighbors from enjoying outdoor activities. An existing OWB that meets a 500-foot setback (as defined in paragraphs 247.10(b)(2) and (3)) or meets a 100-foot setback and is a model certified by the Department pursuant to Part 247, may operate year-round provided the operation of such OWB does not cause a nuisance condition.

The term 'Northern Heating Zone' is defined in Section 247.2 as the area including the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Oneida, Oswego, St. Lawrence, Saratoga, Warren and Washington. These counties lie along or north of the southern boundary (and similar latitude) of the Adirondack State Park. The Department chose to delineate the Northern Heating Zone along county boundaries in order to make regulatory determination easier for the public. This area not only includes the northernmost region of the State but also the highest elevations in the State. People living in this region need to operate their furnaces for longer periods each year than those living elsewhere in the State. This is evident by comparing heating degree days data for the Northern Heating Zone versus Albany and Syracuse which lie south of the Adirondack State Park (see Figure 1 in Appendix in this issue of the *State Register*).

Figure 1. Comparison of Monthly Heating Degree Days: Adirondacks vs. Albany/Syracuse<sup>7</sup>

A heating degree day is an indicator of the demand for energy to heat a home or business. For a given location each day, the number of heating degree days is determined by subtracting the average daily temperature from a baseline temperature of 65 degrees Fahrenheit.<sup>8</sup> For example, if the average daily temperature at a location was 15 degrees Fahrenheit, then 50 heating degree days would be recorded for that day. When comparing the data for two or more regions, the region with the higher number of heating degree days during a period of time was the colder region and thus the region with the higher energy demand per household. The data shown on Figure 1 for the Adirondack stations represent the combined average monthly heating degree days recorded for three locations: Saranac Lake, Long Lake and Chestertown during the period of June 2006 through June 2009. On average during the months of May and September, the Adirondack stations recorded 50 percent additional heating degree days than the combined average recorded for the Albany and Syracuse stations. Therefore, in the opinion of the Department, existing OWBs located in the Northern Heating Zone should be allowed to operate for a longer period of time than those located elsewhere in the State.

#### COSTS

All OWBs must be equipped with a permanent stack extending at least 18 feet above ground level. Stack extensions will need to be installed on most OWBs. The estimated cost for stack extensions is \$200 for each four foot section.<sup>9</sup> A typical cost for extending an OWB stack is expected to be \$600 but could be more if a stack needs to be higher than 18 feet high in order to extend two feet above a roofline within 150 feet of the OWB or to avoid creating a nuisance condition or both.

Owners of existing OWBs subject to the seasonal prohibition provision (Section 247.10(b)) will need to purchase a hot water heater if they were relying solely on the OWB for domestic hot water and have either built their house without another hot water source or have removed the hot water heater that was in use prior to the installation of the OWB. The capital costs to affected homeowners are expected to range from \$300 to \$350 for an electric heater and \$500 to \$600 for a natural gas-fired heater.<sup>10</sup> The monthly operating costs are expected to range from \$25 to \$45.<sup>11</sup> High efficiency electric heat pump water heaters are estimated to cost three times more than a conventional electric hot water heater with a long-term savings due to lower operating costs.<sup>12</sup> Further, homeowners purchasing high efficiency water heaters may be eligible for tax incentives from the American Recovery and Reinvestment Act of 2009<sup>13</sup> as well as utility rebates from New York's Energy Efficiency Portfolio Standard ([www.dps.state.ny.us/Phase2\\_Case\\_07-M-0548.html](http://www.dps.state.ny.us/Phase2_Case_07-M-0548.html)).

#### MINIMIZING ADVERSE IMPACTS

The Department considered proposing setback requirements for existing OWBs which would have taken effect a couple of years after the effective date of Part 247. This alternative was rejected for the following reasons:

a. The vast majority of existing OWBs are operated properly and do not pose nuisance conditions for neighbors. It would not be fair to establish setback requirements that would force OWB owners who are not creating nuisance conditions to replace their OWB before the end of the useful life of their OWBs and at significant expense.

b. With the high cost of fuel oil, many homeowners have recently invested in OWBs in order to keep winter heating costs at manageable levels. These homeowners should be given an opportunity to obtain a sufficient return on their investment as long as nuisance conditions are not created.

It is the Department's position that the provisions of Part 247 (i.e., seasonal prohibition and nuisance provisions) are sufficient to resolve situations where the operation of an existing OWB causes adverse impacts to a neighbor(s). In the event that these provisions are not sufficiently protective of public health and the environment, the Department may reconsider the need for setback requirements for existing OWBs.

#### RURAL AREA PARTICIPATION

The Department conducted a stakeholder meeting on November 29, 2007. Among the stakeholders that attended were representatives of the New York Farm Bureau and the Empire State Forest Products Association. In addition, the Department will hold public hearings on Part 247 throughout the state and will notify interested parties of this proposed rulemaking.

<sup>1</sup> The New York State Department of Health, the Office of the Attorney General and municipal governments have received complaints regarding smoke emanating from OWBs.

<sup>2</sup> "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., p. 4 (Oct. 2005).

<sup>3</sup> The term 'clean wood' is defined in Part 247 as wood that has not been painted, stained or treated with any other coatings, glues or preservatives, including, but not limited to, chromated copper arsenate, creosote, alkaline copper quaternary, copper azole or pentachlorophenol.

<sup>4</sup> The Department may approve the use of additional fuels on a model-by-model basis if data becomes available showing that the emission limits set forth in Part 247 can be met.

<sup>5</sup> See Section 247.3(b) for the complete list of prohibited fuels. This list should not be considered the complete list of prohibited fuels since any fuel not authorized under Section 247.4 (Approved Fuels) will be considered to be a prohibited fuel.

<sup>6</sup> A discussion regarding Test Method 28-OWHH and the burn categories is presented in the "Regulatory Impact Statement" for this rulemaking.

<sup>7</sup> Source: [www.degree-days.net](http://www.degree-days.net). Data obtained July 3, 2009.

<sup>8</sup> Source: [www.cpc.ncep.noaa.gov/products/analysis\\_monitoring/cdus/degree\\_days/dayexp.shtml](http://www.cpc.ncep.noaa.gov/products/analysis_monitoring/cdus/degree_days/dayexp.shtml)

<sup>9</sup> [www.VentingPipe.com](http://www.VentingPipe.com). Part number 9607. Downloaded September 12, 2007.

<sup>10</sup> These costs are for 40 or 50 gallon capacity heaters. Source: [www.Kenmore.com](http://www.Kenmore.com), July 3, 2009.

<sup>11</sup> Source: Sears.com (July 15, 2009).

<sup>12</sup> Source: www.ieca.coop/PRODUCTS/MARATHONWATER HEATER/tabid/118/Default.aspx

<sup>13</sup> A new water heater must be installed prior to December 31, 2009.(H.R. 1-208, Section 1121).

#### Job Impact Statement

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. The Department anticipates that the state-wide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

The Department is proposing to establish particulate emission limits for new OWBs (units commencing operation on or after April 15, 2011). Siting, stack height and operational requirements are incorporated into the proposed rule. The process by which manufacturers may apply to certify their OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors<sup>1</sup> are also set forth in the proposed rule. Finally, the Department is proposing stack height and operational requirements for existing OWBs (units that commenced operation prior to April 15, 2011).

#### NATURE OF IMPACT

Most OWB manufacturers will need to redesign their models in order to comply with the particulate matter emission standards set forth in Sections 247.5 and 247.6. In the opinion of the Department, the technology exists for manufacturers to develop compliant OWB models.<sup>2</sup> Manufacturers that develop model lines that meet the particulate emission standards for new OWBs will be able to compete in the New York market after the new requirements take effect on April 15, 2011. Manufacturers that do not develop model lines that meet the particulate emission standards for new OWBs will not be able to compete in the New York market.

Distributors working with manufacturers that develop models certified under Part 247 will be able to continue doing business in New York after April 15, 2011, so long as they only sell models that comply with Part 247.

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

The jobs and employment opportunities affected by this rulemaking are those associated with manufacturers and distributors of OWBs in New York. There are more than 20 OWB manufacturers in the United States and Canada.<sup>3</sup> The number of distributors in New York is not known. The Department anticipates that the net effect on employment opportunities will be small since the technology needed to meet the particulate emission limits existed as of May 2008.

#### REGIONS OF ADVERSE IMPACT

Part 247 will apply state-wide. All OWB manufacturers and distributors in New York will be required to comply with the proposed regulations, if adopted.

#### MINIMIZING ADVERSE IMPACT

The proposed particulate emission limits for new OWBs can be met with current technology.

#### SELF-EMPLOYMENT OPPORTUNITIES

The net effect on business opportunities for self-employment (distributors or OWB installers) is expected to be small because OWBs may continue to be sold and installed in New York under the proposed regulations after April 15, 2011, so long as the OWBs meet the requirements of this proposal.

<sup>1</sup> The term 'distributor' is defined in Part 247 as any person who sells or leases new OWBs to end users.

<sup>2</sup> As of December 2, 2009, there are ten models which may meet the proposed particulate matter limits for new residential OWBs. The Department has not reviewed the test reports prepared by the independent test laboratories and other documentation for these models. The United States Environmental Protection Agency (EPA) has reviewed the test reports and determined that these model meet the requirements of the EPA's Outdoor Wood-fired Hydronic Heaters Program (see www.epa.gov/woodheaters/models.htm).

<sup>3</sup> Schreiber, Judith, et. al., "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State", October 2005, pages 31-32.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Salmon River Falls Unique Area

I.D. No. ENV-16-10-00011-P

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

**Proposed Action:** Addition of section 190.10(d) to Title 6 NYCRR.

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

**Subject:** Salmon River Falls Unique Area.

**Purpose:** Protect public safety and natural resources on the Salmon River Falls Unique Area.

**Text of proposed rule:** Section 190.10 Unique Areas

A new subdivision (d) is added to 6NYCRR section 190.10 to read as follows:

(d) *Salmon River Falls Unique Area Description: For the purposes of this section, Salmon River Falls Unique Area refers to all those State lands lying and situated in the Town of Orwell, Oswego County, being a portion of Lots 73 and 74 of Township 11 of Constable's Purchase, the same lands as more particularly described as project "OS - Oswego 95.08, Salmon River Falls Parcel" in Liber 1237 of Deeds on Pages 215, 216 and 217. Said Salmon River Falls Unique Area shall be hereinafter referred to in this section as "area".*

(1) *The area is closed to any and all public use of any kind between the hours of sunset and sunrise.*

(2) *The possession of alcoholic beverages, glass containers, except for prescription medications and paint are prohibited on the area.*

(3) *Campfires and rock climbing are prohibited on the area.*

(4) *No person shall throw or cast any object or item into the river gorge on the area.*

(5) *Motorized vehicles, snowmobiles and horses are prohibited on the area.*

(6) *A restricted area has been established which includes the cliff face of the waterfalls and adjacent gorge; a 15 foot strip along the cliff edge; the plunge pool and falling rock zone. All public access is prohibited in the restricted area.*

(7) *The Gorge Trail is closed to the public from November 15th to May 1st, except to registered ice climbers.*

(8) *The Gorge Trail, Riverbed Trail and Upper Falls Trail is closed during high water events.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Dave Forness, Bureau of State Land Management, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-9433, (518) 402-9428, email: dmforness@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** A Negative Declaration has been prepared in compliance with Article 8 of the Environmental Conservation Law.

#### Regulatory Impact Statement

##### 1. Statutory authority

"ECL" section 1-0101(3)(b) directs the Department of Environmental Conservation (Department) to guarantee "that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 3-0301(1)(b) gives the Department the responsibility to "promote and coordinate management of...land resources to assure their protection...and take into account the cumulative impact upon all such resources in...promulgating any impact upon all such resources...in promulgating any rule or regulation." ECL section 9-0105(1) authorizes the Department to "exercise care, custody, and control" of State lands. ECL section 3-0301(2)(m) authorizes the Department to adopt rules and regulations "as may be necessary, convenient or desirable to effectuate the purposes of (the ECL)," and ECL 9-0105(3) authorizes DEC to "make necessary rules and regulations to secure proper enforcement of (ECL Article 9)".

##### 2. Legislative objectives

In adopting various articles of the ECL, the legislature has established forest, fish, and wildlife conservation to be policies of the State and has empowered DEC to exercise "care, custody, and control" over certain State lands and other real property. Consistent with these statutory interests, the proposed regulations will protect natural resources and the safety and welfare of those who engage in recreational activities on

Department managed lands. The proposed regulations will protect the public by establishing a restricted area where all public access will be prohibited. Trails will be closed during high water events and during certain times of the year. Open fires will be prohibited as well as alcoholic beverages. Other restrictions will apply as well. Natural resources will be protected by restricting the area where threatened plant species and their habitat occurs.

### 3. Needs and benefits

The proposed regulations will implement unit management plan (UMP) provisions needed to address public safety issues and natural resource protection. The Salmon River Falls Unique Area is a high use recreational destination area consisting of a 110 foot waterfall and an extensive natural gorge with steep banks, sheer cliffs, plunge pool and unstable rock formations that pose a safety hazard to the visiting public. Years of freezing and thawing cycles along with water action have loosened many rocks on exposed cliff faces of the falls and gorge. In addition, this area is downstream from a hydroelectric project. During high water releases, the flow rate of the river can rise dramatically with very little warning. Due to the hazardous terrain, there have been numerous accidents at this site over the past fourteen years (the period of time this property has been in State ownership), resulting in serious injuries and in four fatalities. Furthermore, the local volunteer rescue squad has expressed serious concerns over their own safety while trying to rescue injured people from the base of the falls. One individual fell to their death while taking a picture at the cliff edge. Two fatalities involved alcohol with one occurring at night. The last fatality involved two youths jumping off the falls, one surviving and the other not. In addition, there have been a number of serious and life threatening injuries on the property related to individuals jumping off the falls.

The proposed regulations will restrict public access to an area including the cliff face of the waterfalls and adjacent gorge, a 15 foot strip along the cliff edge, the plunge pool and falling rock zone. This will provide for public safety as well as protection to the State threatened Birds-eye primrose and Yellow mountain saxifrage plants along with their natural habitat, the "Shale Cliff Talus Community". The ice climbing community has emphasized the importance of this unique area because of the high quality ice formations found within the gorge and the close proximity to the Syracuse area. As noted above, the falls and surrounding gorge will remain restricted to all activities including ice climbing for safety reasons as well as for natural resource protection, however, accommodations have been made to allow ice climbing away from the falls.

Regulations will include the prohibition of possessing alcoholic beverages and glass containers, except for medicinal purposes, in order to promote public safety and protect the property from excessive littering. Past history has shown that consumption of alcoholic beverages has contributed to serious injuries and deaths on the property. The gorge running through the property is framed by cliffs ranging up to 110 feet in height. Trails closely follow some of the drop-offs providing spectacular views for visitors, however this has resulted in dangerous conditions resulting in serious accidents for intoxicated hikers. On similar properties administered by the Department, prohibiting alcoholic beverages has been shown to save lives.

Motorized vehicles, snowmobiles and horses will be prohibited on the unique area due to steep terrain and soils prone to erosion. Because of these site conditions and the small acreage of this unique area, which totals 112 acres, these types of recreational uses cannot be supported.

The proposed regulations will require that the unique area be closed from sunset to sunrise and will be prohibit camp fires on the area. This is necessary to protect public health and safety and to reduce related problems associated with littering and underage drinking. Also prohibited will be rock climbing, possession of paint and the throwing or casting any object or item into the river gorge. In addition, the Gorge Trail will be closed to the public from November 15th to May 1st, except to registered ice climbers. The Gorge Trail, Riverbed Trail and Upper Falls Trail will be closed during high water events. All of these prohibitions and restrictions will provide for public safety.

These regulations for the Salmon River Falls Unique Area were addressed in the Unit Management Plan. The plan underwent a lengthy public review process including a public meeting, direct mailings, a press release, public distribution, a responsiveness summary and web postings. This was designed to assure public participation in the planning process by all stakeholders including the following: New York Rivers United, Brookfield Power Inc. (formally Reliant Energy), individual landowners, recreationists and government officials. In addition to the above there were numerous individuals that provided comments on the plan. All of these comments were addressed in a responsiveness summary that is part of the final Unit Management Plan. During the public meeting for the Salmon River Falls Unique Area Unit Management Plan and in subsequent written comments, the majority of the public were supportive of the plan, therefore there is not expected to be opposition to the proposed regulations. The restrictions incorporated into this regulation have been enforced on

the property by posted signs for the past 5 years and have proven to provide adequate protection for the resource and public safety and continued support from the general public. Converting the existing restrictions into regulations will enable more effective enforcement and will fulfill the commitments the Department made in the Unit Management Plan.

### 4. Costs

There would be no increased staffing, construction or compliance costs projected for State or local governments or to private regulated parties. Costs to the regulating agency would be minimal, since the necessary signage is already in place. Costs incurred by rescue squads and EMTs should continue to be reduced by the rulemaking as it continues to protect public safety and minimizes the potential for accidents.

### 5. Paperwork

The Department of Environmental Conservation must monitor the registration for ice climbing as part of the program. This requirement can be conducted through already existing Law Enforcement program activities. The proposed regulations will not impose any reporting requirements or other paperwork or any private or public entity.

### 6. Local government mandates

This proposal will not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district and may lessen the burden for local government with respect to rescue squads and EMT's.

### 7. Duplication

There is no duplication, overlap, or conflict with State or Federal rules. The proposed regulations will not duplicate, overlap or conflict with other rules and legal requirements of State and Federal governments.

### 8. Alternatives

The "no action" alternative or "status quo" is not feasible since it does not address public safety issues and natural resource protection. Enforcement by posted signs is problematic as signs can be vandalized or stolen, and the burden is on the Department to prove in each case that the signs were present on the property when an infraction occurred. Failure to effectively restrict use as well as prohibit alcoholic beverages has the potential to contribute to additional accidents on the property.

Failure to effectively prohibit camp fires and certain recreational uses has the potential to lead to degradation of the natural resources.

### 9. Federal standard

The proposed regulations do not exceed any minimum standards of the Federal government. There are no relevant Federal standards related to these regulations.

### 10. Compliance schedule

The proposed regulations do not impose any compliance requirements or mandates, therefore, there is no compliance schedule. The proposed regulation will become effective on the date of publication of the rulemaking in the State Register. Once the regulations area adopted, they are effective immediately.

### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with these regulations because the proposal will not impose any reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Since there are no identified cost impacts for compliance with the proposed regulations on the part of small businesses and local governments, they would bear no economic impact as a result of this proposal. The proposed rule relates solely to protecting public safety and natural resources on the Salmon River Falls Unique Area.

### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on rural areas. The proposed rule relates solely to protecting public safety and natural resources on the Salmon River Falls Unique Area.

### Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs and employment opportunities. The proposed rule relates solely to protecting public safety and natural resources on the Salmon River Falls Unique Area.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Black Bear Feeding

I.D. No. ENV-16-10-00014-P

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

**Proposed Action:** Amendment of Part 187 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0521, 11-0903 and 11-0928

**Subject:** Black bear feeding.

**Purpose:** To reduce conflicts between bears and people.

**Text of proposed rule:** Section 187.1 of 6 NYCRR is repealed and a new section 187.1 adopted as follows:

**187.1 Black bear feeding.**

(a) "Purpose." The purpose of this section is to protect public safety while conserving New York's black bear populations. The deliberate, intentional feeding of black bears is prohibited. The incidental, indirect feeding of black bears becomes unlawful once a written warning has been issued by the department.

(b) "Definitions."

(1) "Feeding" means using, placing, giving, exposing, depositing, distributing or scattering any material to attract one or more black bears.

(2) "Incidental or indirect feeding" means using, placing, giving, exposing, depositing, distributing or scattering any material for a different purpose but which attracts one or more black bears. This includes storage of garbage or refuse and use and storage of birdseed in a manner that is accessible to black bears.

(c) Prohibited activities. It is a violation for any person to:

(1) Feed black bears, except as authorized by section 187.2 of this Part, and except a licensed hunter may use up to 1.5 fluid ounces of a scent or lure to hunt black bears,

(2) Incidentally or indirectly feed black bears after the department has issued a written notice to the person or persons directly responsible for the incidental or indirect feeding of a black bear.

Section 187.2 of 6 NYCRR is repealed and a new section 187.2 adopted as follows:

**187.2 Training of dogs on black bears.**

(a) "Purpose." The purpose of this section is to allow the use of certified black bear tracking dogs by persons possessing a black bear tracking dog license issued by the department.

(b) "Definitions."

(1) "Certified black bear tracking dog" means a dog that is used to track, trail, pursue and tree black bears pursuant to a black bear tracking dog license, issued as provided by this section; that is licensed, collared, identified and vaccinated against rabies in accordance with the Agriculture and Markets Law; and that is one of the following breeds or a cross among these breeds: Airedale, American Black and Tan Coonhound, Bluetick Coonhound, Majestic Tree Hound, Mountain Cur, Leopard Cur, English Coonhound, Plott Hound, Redbone Coonhound, Treeing Walker, Black Mouth Yellow Cur, and Karelian Bear Dog.

(2) "License" means a black bear tracking dog license issued pursuant to this section, authorizing the use of certified black bear tracking dogs as specified in this section and subdivision 6 of section 11-0923 of the Environmental Conservation Law.

(3) "Licensee" means a person who is the holder of a black bear tracking dog license.

(4) "Agent" means any person authorized by the licensee to place baits to attract a black bear, who is listed on the licensee's agent list, and who possesses a copy of the license.

(5) "Relaying" means the act of replacing dogs or a pack of dogs during a chase or pursuit of a black bear.

(6) "Reversible attractants" means conditions that attract black bears where the conditions can be removed, made unattractive, or inaccessible to black bears.

(c) Black bear tracking dog license.

(1) Qualifications. An applicant for a license must:

(i) Possess a current license authorizing the applicant to hunt black bear in New York; and

(ii) Not have been convicted of, pled guilty to, or settled by civil settlement or otherwise for, the illegal taking of a black bear or the illegal sale of black bear parts within the last five years.

(2) Issuance. Applicants who meet the qualifications for a license must submit a completed, signed application and:

(i) a \$25 fee for a license valid for one year; or

(ii) a \$100 fee for a license valid for five years.

(3) Entitlements.

(i) A black bear tracking dog license issued by the department entitles the licensee to train and use certified black bear tracking dogs to track, trail, pursue and tree black bears from July 1 until nine days before the opening of any bear hunting season in the wildlife management unit where certified black bear tracking dogs are being used. The licensee must also possess a current license authorizing him or her to hunt black bear in New York. A licensee may also assist with controlling damage caused by black bears as provided in subdivision (e) of this section.

(ii) Residents of any age and non-residents under the age of 18,

who have not been issued a black bear tracking dog license and have not been convicted of, pled guilty to, or settled by civil settlement or otherwise for, the illegal taking of a black bear or the illegal sale of black bear parts within the last five years may accompany a licensee during the training and use of certified black bear tracking dogs to track, trail, pursue and tree black bears. They may also act as an agent of the licensee to place baits pursuant to subdivision (d) of this section.

(iii) Non-residents 18 years old and older who have not been issued a black bear tracking dog license, but do possess a current New York license authorizing black bear hunting, and have not been convicted of, pled guilty to, or settled by civil settlement or otherwise for, the illegal taking of a black bear or the illegal sale of black bear parts within the last five years, may accompany a licensee during the training and use of certified black bear tracking dogs to track, trail, pursue and tree black bears. They may also act as an agent of the licensee to place baits pursuant to subdivision (d) of this section.

(4) Conditions.

(i) No person may capture, take, kill or attempt to kill a black bear with the aid of a dog except by permit issued pursuant to subdivision 1 of section 11-0521 of the Environmental Conservation Law.

(ii) No person may possess a longbow, pistol, rifle, shotgun or firearm of any kind while using dogs to track, trail, pursue or tree a black bear except under a permit issued pursuant to subdivision 1 of section 11-0521 of the Environmental Conservation Law.

(iii) Black bear tracking dog training hours will be from one half hour before sunrise to sunset.

(iv) Only certified black bear tracking dogs may be used to track, trail, pursue or tree black bears.

(v) At least two but no more than eight certified black bear tracking dogs must be used to track, trail, pursue or tree black bears, except an additional four certified black bear tracking dogs may be brought to the tree for purposes of training after the chase has ended and the black bear is treed.

(vi) No relaying of packs or dogs is allowed when tracking black bear.

(vii) Each black bear tracking dog must have a tag which includes the owner's name, address, and telephone number.

(viii) No more than 12 people may accompany a pack of dogs during the tracking, trailing, pursuit or treeing of black bears.

(ix) At least one person accompanying the pack must be a licensee.

(x) No licensee may release dogs after a black bear when the reported ambient air temperature is above 85 degrees Fahrenheit.

(xi) Licensees will make every effort to end any black bear chase or to remove their dogs and leave a treed black bear whenever the reported ambient air temperature is above 90 degrees Fahrenheit or when the black bear is panting.

(xii) Licensees must complete and return any survey, questionnaire, agent list or daily diary requested by the department.

(xiii) Licensees will maintain a list with names and addresses of agents who are authorized to place baits and provide all agents with a copy of their license.

(xiv) Licensees will maintain a map of all bait locations and show this map to any department official upon request;

(xv) Licensees will identify each bait site with their 12-digit Department of Environmental Conservation Automated Licensing System (DECALS) identification number or their name and address clearly legible on a metal tag, plastic tag, stake, or container for bait;

(xvi) The department may at any time amend license conditions establishing reporting requirements. Licensees will be notified in writing of any license condition amendments and the period of time during which they are in effect.

(d) "Deployment of bait used for black bear tracking dog training." It is a violation for any licensee or agent to:

(1) place any bait within 500 feet of any occupied building (unless the building is owned or leased and occupied by that person), school, playground, paved public road, trailhead, designated or established campsite, landfill, dump or municipal waste transfer site or dumpster;

(2) place any bait within 100 feet of any other building, any unpaved public road or trail, or body of water;

(3) place any bait or use any substance containing metal, glass, plastic, paper, cardboard or porcelain;

(4) place any bait during an open black bear hunting season or after the close of the black bear tracking dog training season as defined in subdivision (c) of this section;

(5) act as an agent of the licensee unless the person:

(i) is listed on the licensee's agent list;

(ii) has agreed to the conditions and signed a copy of the license;

(iii) carries that copy of the license on their person when placing bait;

(iv) follows all other conditions of the license.

(6) fail to remove all baits by the close of the black bear tracking dog training season as defined in subdivision (c) of this section.

(e) "Deployment of black bear tracking dogs pursuant to a chase permit."

(1) In addition to training seasons established by this section, the department may also issue permits to chase nuisance black bears with trained, certified black bear tracking dogs when all of the following conditions are met:

(i) The department receives a complaint of damage to property or threat to public health or safety caused by one or more black bears;

(ii) The department examines the evidence of damage or threat and identifies any reversible attractants and all practical non-lethal control methods for the complainant;

(iii) The complainant has removed any reversible attractant and tried all practical non-lethal control methods, but the damage or threat continues;

(iv) The department determines that tracking dogs are essential to manage the nuisance black bear or bears.

(2) If, after two or more chases, pursuant to a chase permit, the damage or threat still continues, the department may issue a permit to destroy the nuisance black bear if there is a strong likelihood that the nuisance black bear can be identified. This destroy permit may, at the department's discretion, include the use of trained, certified black bear tracking dogs to tree the black bear for identification prior to destruction.

(3) After the above conditions are met, chase and destroy permits may be issued by the department at any time and any place.

(4) Nothing in this section may be construed to prohibit the use of dogs by the department or by persons authorized by the department pursuant to Environmental Conservation Law section 11-0515 or 11-0521 to aid in the capture or taking of black bears for management or research purposes or damage abatement.

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

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

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

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

Environmental Conservation Law (ECL) section 11-0903 provides that the department may regulate the intentional and incidental feeding of bears. ECL section 11-0928 allows the use of specially trained dogs by persons licensed by the department to track bears in accordance with the provisions of ECL section 11-0521. ECL section 11-0521 allows the use of trained dogs to control bears that are damaging public or private property, or threatening public health or safety.

##### 2. Legislative objectives:

The Department of Environmental Conservation (DEC or department) is directed to promote desirable species in ecological balance, and to recognize the importance of wildlife for recreational purposes. The department also is directed to provide for the requirements of public safety. The laws cited above are designed to provide the authority to control damage associated with black bears while ensuring that black bear populations remain healthy.

##### 3. Needs and benefits:

The department proposes two separate, but related, amendments:

##### Bear feeding

The DEC proposes to amend the department's black bear feeding regulations under the statutory authority of ECL 11-0903(8). This amendment would establish a comprehensive, state-wide prohibition on the intentional and incidental feeding of black bears in New York.

In recent years, black bear numbers have increased significantly, leading to a population increase and range expansion throughout New York. The feeding behavior of black bears contributes to conflicts between bears and people. Incidental and intentional feeding of bears has exacerbated problems for people, including increased risks to public health and safety.

Since most human-bear conflicts can be eliminated or greatly reduced by removing food attractants, the department's standard message is "Do not feed bears." Other states in the Northeast use a similar approach to managing human-bear conflict. However, the department's current regulations prohibit feeding based on proximity to certain locations and do not impose a comprehensive, state-wide prohibition.

6 NYCRR section 187.1, "Black bear feeding" currently states in part:

(b) Prohibitions. It is a violation for any person to: (1) feed bears within 500 feet of any occupied building (unless the building is owned or leased

and occupied by that person), school, playground, paved public road, designated or established campsite, landfill, dump or municipal waste transfer site or dumpster; (2) feed bears within 100 feet of any other building, any unpaved public road or trail, or body of water.

This limited prohibition creates a "mixed message" that needs to be corrected through rule making. Accordingly, the DEC proposes an amendment that will prohibit the feeding of bears to protect public health and safety, with exceptions allowed only in those limited instances where needed for research and management purposes. By adopting this regulation, the DEC hopes to reduce the number of problem bears, including situations requiring their destruction.

##### Training of dogs

The DEC also proposes to amend 6 NYCRR section 187.2, "Training of dogs on black bears." The proposed amendments will update the conditions under which trailing hounds can be trained and used to help manage bear problems pursuant to ECL 11-0521(1) and ECL 11-0928.

The DEC recognizes the benefit of maintaining a small community of people who use hounds to trail bears. Bear hound owners are currently licensed by the department and subject to the requirements of 6 NYCRR section 187.2. The use of bear hounds is one of the most effective tools for reducing bear damage to farm crops, especially corn.

A major component of bear hound training is using small food stations to locate bears. These food stations allow dog handlers to select safe, workable locations and guarantee that inexperienced hounds are being trained to follow the scent of bears rather than other wildlife. In most cases, the training activity itself works as a form of aversive conditioning for the bears, teaching the bears to avoid humans and dogs. The proposed amendments would accommodate limited feeding of bears by individuals who train bear hounds, and generally simplify the regulation language.

Bear hound training, along with black bear research, is one of the very few circumstances where attracting bears with food provides a legitimate public benefit. This proposal will define the conditions under which bear feeding as an attractant for hound training may occur, including the types of bait that may be used and authorized agents to assist with this activity.

As a result of expanding bear populations, and the associated damage to agricultural crops, the department is proposing to allow the training of bear hounds in any area of the state, instead of in a more narrowly defined northern or southern training area. The department also proposes to allow new breeds of bear trailing hounds.

The use of hounds is a powerful tool for protecting the public from the harmful effects of high bear populations, such as damage to farms. Adoption of the amendments described above will greatly enhance the management and enforcement efforts of the department, while concurrently protecting the public and the black bear resource from destructive and avoidable negative impacts.

##### 4. Costs:

Implementation of this regulation has no additional costs, other than normal administrative expenses.

##### 5. Local government mandates:

There are no local governmental mandates associated with this proposal.

##### 6. Paperwork:

The proposed amendments will not change any paperwork requirements associated with the use of trained dogs to control bear damage. There is no paperwork associated with controlling the incidental or intentional feeding of bears.

##### 7. Duplication:

There are no other local, State or Federal regulations associated with the incidental or intentional feeding of bears, or the use of trained dogs to control bear damage.

##### 8. Alternatives:

Leaving the regulation intact will mean that people will continue to have the ability to lawfully feed bears. This is unacceptable given the increasing number and severity of nuisance bear complaints. A complete prohibition on all bear feeding could be proposed, including persons who train hounds to trail nuisance black bears. However, trained bear hounds provide a useful, nonlethal alternative for chasing bears from agriculture areas. The use of baits to attract bears for the purpose of training hounds is an important component of this program. The department has attempted to teach homeowners that it is unwise to feed bears, including intensive efforts in Region 3 and 4. Despite these efforts, black bear problems continue to grow and a regulatory approach to strictly control the feeding of bears is now appropriate.

##### 9. Federal standards:

There are no Federal government standards associated with the management of black bears.

##### 10. Compliance schedule:

Persons regulated by the proposed regulation will be required to comply with its provisions upon adoption.

#### Regulatory Flexibility Analysis

The proposed regulation would amend the Department of Environmental Conservation's (DEC or department) black bear regulations to clarify

and expand restrictions on the feeding of black bears, and address necessary changes concerning the training of dogs on black bears.

Few, if any, small businesses directly participate in the legal feeding of black bears. Such business (e.g., wildlife photographers) will continue to have opportunity to accompany or act as agents for licensed black bear tracking dog handlers. Therefore, the department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments since it will not affect these entities.

All reporting, recordkeeping, and compliance requirements associated with black bear tracking dog licenses are administered by the department. Therefore, the department has determined that this rulemaking will not impose any reporting, record-keeping, or other compliance requirements on small businesses or local governments.

Therefore, the DEC has determined that a Regulatory Flexibility Analysis for Small Businesses and Local Governments is not needed.

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

1. Types and estimated numbers of rural areas:

Black bears live in most areas of New York, but their populations are particularly numerous in the Adirondacks, southeastern New York, eastern New York, and portions of central and western New York, especially along the Pennsylvania border. The incidental or intentional feeding of bears may occur in any of these locations. Bear damage complaints occur throughout their occupied range. Consequently, the proposed regulation impacts rural areas throughout New York State.

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

All reporting, recordkeeping and other compliance requirements; and professional services associated with black bears is the responsibility of the New York State Department of Environmental Conservation (DEC or department).

3. Costs:

All costs associated with the implementation and enforcement of the proposed regulation are the responsibility of the department.

4. Minimizing adverse impact:

The department is committed to provide educational outreach to increase the public's awareness of bears and inform the public on techniques to avoid conflicts with bears, principally through reduction in indirect and incidental feeding. The recently produced "Living with New York Black Bears" DVD, and information available on the department's website ([www.dec.ny.gov/animals/6960.html](http://www.dec.ny.gov/animals/6960.html)) are examples of this outreach. Additionally, since recreational bird feeders are the primary source of incidental bear feeding, the department intends to work with bird-related organizations to inform their members that bird feeding may lead to bear problems.

5. Rural area participation:

A key component of the New York State Black Bear Management Plan is the creation and use of Stakeholder Input Groups (SIGs) that are tasked to identify and prioritize bear impacts and to help department staff articulate black bear management objectives that would enhance positive impacts and lessen negative impacts. Since 2003, six SIGs have been convened and have consistently expressed interest in the state maintaining healthy bear populations and have encouraged education efforts to boost understanding and tolerance of bears. The DEC will continue to use the SIG process to incorporate public participation in bear management decision making.

#### **Job Impact Statement**

The proposed regulation will not have an impact on jobs in New York State. The proposal would simply amend the Department of Environmental Conservation's (department) black bear regulations to clarify and expand restrictions on the feeding of black bears, and address necessary changes concerning the training of dogs on black bears. Therefore, the department has determined that a Job Impact Statement is not needed.

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## Department of Health

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### NOTICE OF ADOPTION

#### **Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)**

**I.D. No.** HLT-02-10-00003-A

**Filing No.** 388

**Filing Date:** 2010-04-06

**Effective Date:** 2010-04-21

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

**Action taken:** Amendment of Subpart 6-2 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225

**Subject:** Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs).

**Purpose:** Mandate required ocean surf beaches to be supervised by a surf lifeguard trained in AED operation and provide and maintain onsite AED.

**Text or summary was published** in the January 13, 2010 issue of the Register, I.D. No. HLT-02-10-00003-P.

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

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

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

In response to the January 13, 2010 *State Register* notice of proposed rule making, no comments were received about the proposed amendments to Subpart 6-2 during the 45-day comment period.

We did receive notification from the Suffolk County Department of Health Services of an error in the Regulatory Impact Statement and the Regulatory Flexibility Analysis pertaining to the Suffolk County permit fee. The documents incorrectly identified the annual permit fee to operate a bathing beach in Suffolk County as being \$230 rather than \$200.

Permit fee information was included to estimate new expenses for two beaches operated by homeowner associations that were previously not regulated. The error resulted in the Department over estimating cost for the two homeowner associations to comply with the regulation by \$30.00 each. No change is proposed to the regulation as a result of this notification.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### **Standards for the Management of the New York State Retirement Systems**

**I.D. No.** INS-11-10-00002-E

**Filing No.** 381

**Filing Date:** 2010-04-05

**Effective Date:** 2010-04-05

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

**Action taken:** Amendment of Part 136 (Regulation 85) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 314, 7401(a) and 7402(n)

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

**Specific reasons underlying the finding of necessity:** The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards of behavior with regard to investment of the Common Retirement Fund's assets, conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, and January 5, 2010. Regulation No. 85 needs to remain effective for the general welfare.

**Subject:** Standards for the management of the New York State Retirement Systems.

**Purpose:** To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

**Text of emergency rule:** Section 136-2.2 is amended to read as follows:  
§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] Fund.

(d) OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

(c) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.

(d) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.

[f] (e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] Fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.

(g) OSC shall mean the Office of the State Comptroller.

[(g)] (h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h)] (i) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i)] Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

(i) Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

[(j)] (k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] Fund, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] Fund. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

[(k)] Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4 (d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] Fund, to [address] preclude potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] Fund, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] the Fund shall not [engages, hires, invests with, or commits] engage, hire, invest with or commit to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] Fund. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5 (g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] Retirement System's financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] Fund to investment managers, consultants or advisors, and third party administrators;

[(4)] disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] Fund's investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] Fund every three years by a qualified unaffiliated person.

**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. INS-11-10-00002-P, Issue of March 17, 2010. The emergency rule will expire June 3, 2010.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 314 vests the Superintendent with the authority to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with sections 310, 311 and 312 of the Insurance Law. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct

capacities. The first is as regulator of the insurance industry. The second is as a statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies. Section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Section 314 of the Insurance Law authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This amendment, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Section 314, which provides the Superintendent with the powers to promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

3. Needs and benefits: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. Investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

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

6. Paperwork: No additional paperwork should result from the prohibition imposed by the amendment.

7. Duplication: This amendment will not duplicate any existing state or federal rule.

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms.

But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. These entities agreed with the concerns expressed by the Department and intend to explore remedies most appropriate to the pension funds that they represent.

The standards set forth in the proposed amendment will be subject to comment and discussion at the public hearing required by Section 314 of the Insurance Law.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. The ban needs to remain in effect on an emergency basis until such time as the amended regulation can be made permanent.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This amendment strengthens standards for the management of the New York State and Local Employees' Retirement System and New York State and Local Police and Fire Retirement System (collectively, "the Retirement System"), and the New York State Common Retirement Fund ("the Fund").

The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the amendment. The State Comptroller is not a "small business" as defined in section 102(8) of the State Administrative Procedure Act.

This amendment will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The proposal will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the amendment is also directed to placement agents, who as a result of this proposal, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

The amendment bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who will lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, as a result of recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries and to safeguard the integrity of the Fund's investments.

This amendment will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this amendment is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

2. Compliance requirements: None.

3. Professional services: Investment managers, consultants and advisors who provide services to the fund, and are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may need to employ other professional services.

4. Compliance costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. However, investment managers, consultants and advisors who provide services to the fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Economic and technological feasibility: The rule does not impose any economic and technological requirements on affected parties, except for placement agents who will lose the opportunity to earn profits in connection with investments by the Fund.

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

7. Small business and local government participation: In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. The standards set forth in the amendment will be subject to additional comment and discussion at the public hearing required by Section 314 of the Insurance Law.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(13) will be affected by this proposal. The amendment bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The amendment does not adversely impact rural areas.

5. Rural area participation: Affected parties doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule at the public hearing required by Section 314 of the Insurance Law.

**Job Impact Statement**

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. The amendment bans investment managers from using placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"). The amendment may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries, and to safeguard the integrity of the Fund's investments.

**NOTICE OF ADOPTION**

**Workplace Safety and Loss Prevention Incentive Program**

**I.D. No.** INS-20-09-00011-A  
**Filing No.** 383  
**Filing Date:** 2010-04-07  
**Effective Date:** 2010-04-21

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

**Action taken:** Amendment of Subpart 151-3 (Regulation 119) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and 308; and L. 2007, ch. 6

**Subject:** Workplace Safety and Loss Prevention Incentive Program.

**Purpose:** To establish Workers' Compensation premium credits for certain employers that implement safety and loss prevention programs.

**Text or summary was published** in the May 20, 2009 issue of the Register, I.D. No. INS-20-09-00011-P.

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

**Revised rule making(s) were previously published in the State Register** on February 24, 2010.

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

**Assessment of Public Comment**

The agency received no public comment.

**Public Service Commission**

**NOTICE OF WITHDRAWAL**

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-40-08-00007-P	October 1, 2008
PSC-02-09-00006-P	January 14, 2009
PSC-02-09-00007-P	January 14, 2009
PSC-02-09-00008-P	January 14, 2009
PSC-04-09-00004-P	January 28, 2009
PSC-04-09-00006-P	January 28, 2009
PSC-18-09-00011-P	May 6, 2009
PSC-27-09-00012-P	July 8, 2009
PSC-34-09-00013-P	August 26, 2009
PSC-40-09-00011-P	October 7, 2009
PSC-40-09-00012-P	October 7, 2009
PSC-43-09-00011-P	October 28, 2009
PSC-43-09-00012-P	October 28, 2009
PSC-43-09-00013-P	October 28, 2009
PSC-43-09-00014-P	October 28, 2009
PSC-43-09-00016-P	October 28, 2009
PSC-45-09-00004-P	November 11, 2009
PSC-45-09-00006-P	November 11, 2009
PSC-49-09-00012-P	December 9, 2009
PSC-49-09-00013-P	December 9, 2009
PSC-49-09-00014-P	December 9, 2009
PSC-49-09-00015-P	December 9, 2009
PSC-04-10-00008-P	January 27, 2010
PSC-04-10-00010-P	January 27, 2010
PSC-06-10-00011-P	February 10, 2010
PSC-06-10-00013-P	February 10, 2010
PSC-06-10-00019-P	February 10, 2010
PSC-06-10-00020-P	February 10, 2010

**NOTICE OF ADOPTION**

**Transfer of Water Supply Assets**

**I.D. No.** PSC-41-09-00014-A  
**Filing Date:** 2010-04-02  
**Effective Date:** 2010-04-02

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

**Action taken:** On 3/25/10, the PSC adopted an order approving the petition of Rand Water Corporation to transfer its water supply assets serving Dogwood Knolls Subdivision to the Town of East Fishkill and the remaining assets to a new water corporation.

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

**Subject:** Transfer of water supply assets.

**Purpose:** To approve the transfer of water supply assets of Rand Water Corp. to the Town of East Fishkill.

**Substance of final rule:** The Commission, on March 25, 2010, adopted an order approving the petition of Rand Water Corporation to transfer its water supply assets serving Dogwood Knolls Subdivision to the Town of

East Fishkill for the amount of \$850,000, and to transfer its remaining assets to a new water corporation serving the Brandt Farms Subdivision. The Commission also authorized Rand Water Corporation, Inc.'s request to file a Certificate of Dissolution with the New York Department of State, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(09-W-0644SA1)

### NOTICE OF ADOPTION

#### Transfer of Water Supply Assets

**I.D. No.** PSC-01-10-00017-A

**Filing Date:** 2010-04-01

**Effective Date:** 2010-04-01

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

**Action taken:** On 3/25/10, the PSC adopted an order approving the joint petition of Pinebrook Water Co., Inc., to transfer its water supply assets to the Town of Hyde Park, and authorized its request to file a Certificate of Dissolution with the NY Department of State.

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

**Subject:** Transfer of water supply assets.

**Purpose:** To approve the transfer of water supply assets of Pinebrook Water Co., Inc. to the Town of Hyde Park.

**Substance of final rule:** The Commission, on March 25, 2010, adopted an order approving the joint petition of Pinebrook Water Co., Inc., to transfer its water supply assets to the Town of Hyde Park, and authorized Pinebrook Water Co., Inc.'s request to file a Certificate of Dissolution with the New York Department of State, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(09-W-0840SA1)

### NOTICE OF ADOPTION

#### RPS Main Tier and Customer-Sited Tier Programs

**I.D. No.** PSC-05-10-00011-A

**Filing Date:** 2010-04-02

**Effective Date:** 2010-04-02

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

**Action taken:** On 3/25/10, the PSC adopted orders resolving main tier issues, and authorizing Customer-Sited Tier Programs through 2015 pertaining to Renewable Portfolio Standard (RPS) Program.

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

**Subject:** RPS main tier and Customer-Sited Tier Programs.

**Purpose:** To resolve main tier issues and authorize Customer-Sited Tier Programs.

**Substance of final rule:** The Commission, on March 25, 2010, adopted

orders resolving Renewable Portfolio Standard (RPS) main tier issues and authorized Customer-Sited Tier Program through 2015 and resolved geographic balance and other issues pertaining to the RPS program, subject to the terms and conditions set forth in the orders.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(03-E-0188SA24)

### NOTICE OF ADOPTION

#### RPS Program Eligibility Rules

**I.D. No.** PSC-05-10-00014-A

**Filing Date:** 2010-04-02

**Effective Date:** 2010-04-02

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

**Action taken:** On 3/25/10, the PSC adopted an order approving the New York Solar Energy Industry Association's request to include solar thermal as an eligible technology of the Renewable Portfolio Standard (RPS) Program.

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

**Subject:** RPS program eligibility rules.

**Purpose:** To allow the inclusion of solar thermal hot water systems as an eligible technology.

**Substance of final rule:** The Commission, on March 25, 2010, adopted an order, approving the New York Solar Energy Industry Association's request to include solar thermal as an eligible technology in the Customer-Sited Tier of the Renewable Portfolio Standard (RPS). Specifically the Commission shall allow the inclusion of solar thermal hot water systems, as an alternative to electric hot water heating, as an eligible technology in the Customer-Sited Tier, while not a perfect fit, will be more administratively efficient than setting up a stand-alone program, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(03-E-0188SA23)

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Major Gas Rate Filing

**I.D. No.** PSC-16-10-00025-P

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

**Proposed Action:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service—P.S.C. No. 9.

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

**Subject:** Major gas rate filing.

**Purpose:** To consider a proposal to increase annual gas delivery revenues by approximately \$160.8 million or 22.14%.

**Public hearing(s) will be held at:** 11:00 a.m. (Evidentiary Hearing)\*, June 8, 2010 and continuing from weekday to weekday until completed at Department of Public Service, 90 Church St. - Gas Rates, 4th Fl. Board Rm., New York, NY.

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-G-0795.

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

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

**Substance of proposed rule:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) which would increase its annual gas delivery revenues by about \$160.8 million or 22.14%. The statutory suspension period for the proposed filing runs through October 4, 2010. However, Con Edison requests that new rates become effective October 1, 2010. Alternatively, Con Edison proposes three gas delivery revenue increases of \$115.5 million each, effective October 1, 2010, October 1, 2011, and October 1, 2012. These proposals have been updated and are expected to be further updated.

The Commission may adopt in whole or in part or reject the terms in Con Edison's single and multi-year rate proposals. The Commission may also adopt in whole or in part or reject the terms of any stipulations or joint proposals for single or multi-year rate plans resulting from negotiations among the interested active parties in this case.

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

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

**Public comment will be received until:** August 2, 2010.

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

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

(09-G-0795SP1)

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

**Major Steam Rate Filing**

**I.D. No.** PSC-16-10-00026-P

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

**Proposed Action:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Steam Service—P.S.C. No. 4.

**Statutory authority:** Public Service Law, section 80(10)

**Subject:** Major steam rate filing.

**Purpose:** To consider a proposal to increase annual steam revenues by approximately \$128.8 million or 18.2%.

**Public hearing(s) will be held at:** 11:00 a.m. (Evidentiary Hearing)\*, June 8, 2010 and continuing from weekday to weekday until completed at Department of Public Service, 90 Church St. - Steam Rates, 4th Fl. Board Rm., New York, NY.

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-S-0794.

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

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

**Substance of proposed rule:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) which would increase its annual steam revenues by about \$128.8 million or 18.2%. The statutory suspension period for the proposed filing runs through October 4, 2010. However, Con Edison requests that new rates become effective October 1, 2010. Alternatively, Con Edison proposes four steam revenue increases of \$66.1 million each, effective October 1, 2010, October 1, 2011, October 1, 2012, and October 1, 2013. These proposals have been updated and are expected to be further updated.

The Commission may adopt in whole or in part or reject the terms in Con Edison's single- and multi-year proposals. The Commission may also adopt in whole or in part or reject the terms of any stipulations or joint proposals for single- or multi-year rate plans resulting from negotiations among the interested active parties in this case.

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

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

**Public comment will be received until:** August 2, 2010.

**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-S-0794SP1)

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

**New York State Energy Research and Development Authority's Statewide EEPS Programs**

**I.D. No.** PSC-16-10-00001-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 Corning Natural Gas Corporation's petition dated March 19, 2010 seeking rehearing of four orders approving various New York State Energy Research and Development Authority Energy Efficiency Portfolio Standard (EEPS) programs.

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

**Subject:** New York State Energy Research and Development Authority's statewide EEPS programs.

**Purpose:** To encourage cost effective energy conservation in the State.

**Substance of proposed rule:** The Public Service Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action regarding the relief requested by Corning Natural Gas Corporation (Corning) in a Petition dated March 19, 2010 regarding statewide Energy Efficiency Portfolio Standard (EEPS) programs administered by the New York State Energy Research and Development Authority (NYSERDA). Corning seeks rehearing of various EEPS orders that require the utility to collect and transfer to NYSEDA certain System Benefit Charge funds for NYSEDA-administered EEPS programs. Specifically, Corning seeks to reduce its funding obligation to NYSEDA and to delay transfer of the funds until the utility has collected all of the funds from its customers. Alternatively, Corning requests complete relief from its obligation to fund NYSEDA-administered programs with a corresponding expansion of its own EEPS "Fast Track" Utility-Administered Gas Energy Efficiency Program. The orders from which Corning seeks rehearing are Case 08-E-1127, et al., Order Approving Multifamily Energy Efficiency Programs with Modifications, issued July 27, 2009; Case 08-E-1133, et al., Order Approving Certain Large Industrial Customer Energy Efficiency Programs with Modifications and Rejecting Others, issued August 24, 2009; Case 08-E-1127 et al., Order Approving Certain Commercial and Industrial Customer Energy Efficiency Programs with Modifications, issued October 23, 2009; and Case 08-E-1127, et al., Order Approving Certain Commercial and Industrial; Residential; and Low-Income Residential Customer Energy Efficiency Programs with Modifications, issued January 4, 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: secretary@dps.state.ny.us

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

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

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

(07-M-0548SP20)

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

**Interconnection Agreement to Interconnect Telephone Networks for Provisioning of Local Exchange Service**

**I.D. No.** PSC-16-10-00002-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 modification filed by Citizens Telecommunications Company of New York, Inc. ("Frontier") and PAETEC Communications, Inc. to revise the interconnection agreement effective on February 2, 2005.

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

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

**Purpose:** To amend the Frontier and PAETEC Communications, Inc. interconnection agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. ("Frontier") and PAETEC Communications, Inc. in May 2005. The companies subsequently have jointly filed amendments to clarify the interconnection trunking arrangements and specified points of interconnection. The Commission is considering these changes.

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

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

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

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

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

(01-01956SP6)

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

**Interconnection Agreement to Interconnect Telephone Networks for Provisioning of Local Exchange Service**

**I.D. No.** PSC-16-10-00003-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 modification filed by Verizon New York Inc. and Peerless Network of New York, LLC to revise the interconnection agreement effective on October 11, 2007.

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

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

**Purpose:** To amend the Verizon and Peerless Network of New York, LLC interconnection agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Peerless Network of New York, LLC in January 2008. The companies subsequently have jointly filed amendments to clarify the reciprocal compensation rates. The Commission is considering these changes.

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

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

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

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

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

(07-01241SP2)

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

**Major Gas Rate Filing Compliance Item**

**I.D. No.** PSC-16-10-00004-P

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

**Proposed Action:** Pursuant to the August 22, 2006 Order of the Public Service Commission in the above-captioned proceedings, Corning Natural Gas Corporation filed a revised Natural Gas Purchasing Plan requesting Commission approval.

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

**Subject:** Major Gas Rate Filing Compliance Item.

**Purpose:** To modify the existing Natural Gas Purchasing Plan.

**Substance of proposed rule:** By petition dated March 29, 2010, Corning Natural Gas Corporation seeks approval for revisions to its Natural Gas Supply and Acquisition Plan dated March 24, 2010 (Plan). Modifications to the existing Plan include but are not limited to initiation and implementation of a new gas storage contract, use of an asset manager for management of this storage field and changes to the physical hedge tools used to comprise the gas price volatility risk management program.

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

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

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

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

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

(08-G-1137SP2)

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

**To Consider Adopting and Expanding Mobile Stray Voltage Testing Requirements**

**I.D. No.** PSC-16-10-00005-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 require the continuation and expansion of mobile stray voltage testing as ordered previously in this case.

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

**Subject:** To consider adopting and expanding mobile stray voltage testing requirements.

**Purpose:** Adopt additional mobile stray voltage testing requirements.

**Substance of proposed rule:** In an order in Case 04-M-0159, issued and effective December 15, 2008, the Commission ordered all utilities, with the exception of Consolidated Edison Company of New York, Inc. to complete an initial mobile stray voltage detection survey of their underground electric distribution systems, in appropriate areas of cities with a population of at least 50,000 (based on the results of the 2000 census), during calendar year 2009 to positively identify those areas that can be effectively surveyed, and annually thereafter until further Commission action. After issuance of the order, an assessment by the companies indicated that the following cities were to be surveyed under the requirements detailed in the order: Buffalo, Syracuse, Utica, Albany, Schenectady, Niagara Falls (Niagara Mohawk Power Corporation d/b/a National Grid); Yonkers, White Plains, New Rochelle, Mount Vernon (Consolidated Edison Company of New York, Inc.); and Rochester (Rochester Gas & Electric Corporation). A contractor was retained and the work was completed as required by the end of 2009, and reports were submitted to Staff compiling the results of the testing.

Staff has reviewed and analyzed these results and is recommending that an additional round of testing be completed in calendar year 2010 for Yonkers, White Plains, Albany, Niagara Falls, Rochester, and New Rochelle, and that two system scans be completed in Buffalo. This determination was based on the detection rates in these areas relative to that of the historic rate encountered in New York City, which is tested 12 times per year per Commission order.

The Commission is considering whether to adopt, modify, or reject Staff's recommendation regarding mobile stray voltage testing.

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

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

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

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

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

(04-M-0159SP5)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Rehearing of Commission Order

**I.D. No.** PSC-16-10-00006-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 deeming the comments on compliance, filed by Home Depot, USA, Inc., and LNT, Inc., a petition for rehearing of the Commission's Order issued on February 2, 2010 in Case 05-W-0707.

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

**Subject:** Rehearing of Commission Order.

**Purpose:** To consider a petition for rehearing of the Commission's Order issued February 2, 2010 in Case 05-W-0707.

**Text of proposed rule:** On February 2, 2010, the Commission issued an Order in Case 05-W-0707 - Complaint by Home Depot, USA, Inc., and LNT, Inc. Requesting an 80% Reduction in Rates Charged by Independent Water Works, Inc. (IWW), which granted Home Depot, USA, Inc.'s, and LNT, Inc.'s (the Petitioners) complaint in part and denied it in part.

This Order directed IWW to file new monthly service charges, which represented about a 34% reduction in its initial monthly service charges which went into effect December 1, 2002. The new monthly service charges became effective February 5, 2010 on a temporary basis to allow time for the parties to comment. By letter dated February 25, 2010 the Petitioners filed comments stating among other things that they disagreed with how the reduced monthly service charges were calculated. The Petitioners disagreed with the interest rate (the Commission's prescribed interest rate on other customer capital) used in the calculation of the new service charges effective February 5, 2010. In addition, the Petitioners claimed that the Commission mistakenly represented that the Petitioners accepted the November 3, 2008 remittal date as appropriate for use in calculating the reduction to the new monthly service charges. The petitioners instead believe that the calculation of the new monthly service charges should be based on the Petitioners' original complaint filing date with the Commission, June 14, 2005. The company's current tariff is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Commission Documents - Tariffs). The Commission is considering whether to approve or reject, in whole or in part, or modify the Petitioner's request for a further reduction to the calculation of IWW's monthly service charges shown in Appendix A of the February 2, 2010 Order.

**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](mailto:leann_ayer@dps.state.ny.us)

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

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

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

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

(05-W-0707SP3)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Interconnection of the Networks between TDS Telecom and PAETEC Communications for Local Exchange Service and Exchange Access

**I.D. No.** PSC-16-10-00007-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 TDS Telecommunications Corp. ("TDS Telecom") for approval of a Mutual Traffic Exchange Agreement with PAETEC Communications, Inc., executed on November 18, 2009.

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

**Subject:** Interconnection of the networks between TDS Telecom and PAETEC Communications for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between TDS Telecom and PAETEC Communications.

**Substance of proposed rule:** TDS Telecommunications Corporation on behalf of Deposit Telephone Company, Inc. ("TDS Telecom") and PAETEC Communications, Inc. have reached a negotiated agreement whereby they will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-00550SP1)

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

**Interconnection of the Networks between TDS Telecom and Time Warner ResCom of NY for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-16-10-00008-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 TDS Telecommunications Corp. ("TDS Telecom") for approval of an Interconnection Agreement with Time Warner ResCom of New York, LLC, executed on September 1, 2009.

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

**Subject:** Interconnection of the networks between TDS Telecom and Time Warner ResCom of NY for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between TDS Telecom and Time Warner ResCom of NY.

**Substance of proposed rule:** TDS Telecommunications Corporation on behalf of its New York operating affiliates (collectively "TDS Telecom") and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby TDS Telecom 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](mailto:leann_ayer@dps.state.ny.us)

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-00551SP1)

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

**Whether to Permit the Use of the Mercury TCI for Use in Commercial and Industrial Accounts**

**I.D. No.** PSC-16-10-00009-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 approve, deny or modify, in whole or in part, a petition filed by National Grid for the approval to use the Mercury TCI—Temperature Compensating Index.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Whether to permit the use of the Mercury TCI for use in commercial and industrial accounts.

**Purpose:** To permit gas utilities in New York State to use the Mercury TCI.

**Substance of proposed rule:** The Public Service Commission is consider-

ing whether to grant, deny or modify, in whole or part, the petition filed by National Grid, to use the Mercury TCI Temperature Compensating Index used to correct for gas flow measurements created by differences in natural gas transmission line temperature and pressure.

**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, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-G-0090SP1)

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

**Amendment to 16 NYCRR Subpart 85-2**

**I.D. No.** PSC-16-10-00010-P

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

**Proposed Action:** This is a consensus rule making to repeal section 85-2.4 and add new section 85-2.4; and amend section 85-2.9 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 122(5)(b)

**Subject:** Amendment to 16 NYCRR Subpart 85-2.

**Purpose:** To add provisions on intervenor funding, delete an obsolete provision and correct a reference.

**Text of proposed rule:** Chapter I RULES OF PROCEDURE

SUBCHAPTER G Certificates of Environmental Compatibility and  
Public Need

PART 85 General Procedures

SUBPART 85-2 Procedures with Respect to All Electric Transmission  
Lines and Fuel Gas Transmission Lines 10 or More Miles Long

§ 85-2.9 Filing and content of applications for electric transmission  
facilities in national interest electric transmission corridors.

An application seeking approval of an electric transmission facility in a national interest electric transmission corridor as designated by the Secretary of the U.S. Department of Energy pursuant to Section 216 of the Federal Power Act (16 U.S.C. Section 824p) is considered filed on a date set forth in a letter to the applicant from the secretary, namely, the date of receipt of the application and any supplemental information necessary to bring it into compliance with all the following requirements, except any such requirements where the commission has granted permission to submit unavailable information at a future specified date pursuant to Section 85-2.3(c) of this Subpart or which the commission has waived pursuant to Section [85-2.4] 3.3 of this [Subpart] Title:

§ 85-2.4 Fund for municipal and other parties.

(a) Each application that proposes an electric transmission facility of 125kV or more shall, at the time it is provided to the Secretary, be accompanied by a fee in the amount specified herein:

(1) if the proposed route for the facility is greater than 100.0 miles in length, \$450,000;

(2) if the proposed route for the facility is greater than 50.0 and up to 100.0 miles in length, \$350,000;

(3) if the proposed route for the facility would require a new right-of-way for 10.0% or more of its length and is from 10.0 to 50.0 miles long, \$100,000; and

(4) if the proposed route for the facility would use an existing right-of-way for more than 90.0% of its length and is from 10.0 to 50.0 miles long, \$50,000.

(b) Any municipality or other party (except an applicant) may request funds to defray expenses for expert witness, consultant, administrative and legal fees (other than in connection with judicial review). Requests for funds shall be submitted to the presiding officer not later than 15 days after the issuance of a notice of the initial prehearing conference, unless otherwise specified by the presiding officer.

(c) Subject to the availability of funds, the presiding officer may fix additional dates for submission of fund requests.

(d) Each request for funds shall be submitted to the presiding officer, with copies to the other parties to the proceeding, and contain:

(1) a statement of the number of persons and the nature of the interests the requesting party represents;

(2) a statement of the availability of funds from the resources of the requesting party and from other sources and of the efforts that have been made to obtain such funds;

(3) if the requesting party represents owners or occupants of real property, the location of such real property in relation to the route proposed for the facility and any alternative route specified as reasonable in the application;

(4) the amount of funds being sought;

(5) to the extent possible, the name and qualifications of each expert to be employed;

(6) if known, the name of any other party who may, or is intending to, employ such expert;

(7) a detailed statement of the services to be provided by expert witnesses, consultants or others (and the basis for the fees requested), specifying how such services will contribute to a complete record leading to an informed decision as to the appropriateness of the facility and route;

(8) a statement as to the result of any effort made to encourage the applicant to perform any proposed studies or evaluations and the reason it is believed that an independent study is necessary; and

(9) a copy of any contract or agreement or proposed contract or agreement with each expert witness, consultant or other person.

(e) At any conference held to consider fund requests, the presiding officer shall discuss the award of funds and encourage the consolidation of requests.

(f) Not later than 15 days after the close of the initial prehearing conference, the presiding officer shall make an initial award of funds, and from time to time thereafter may make additional awards of funds, in relation to the potential for such awards to make a contribution to a complete record leading to an informed decision as to the appropriateness of the facility and route.

(g) If after its filing the application is amended in a manner that warrants substantial additional scrutiny, the Commission may require the applicant to pay an additional intervenor fee in an amount not to exceed \$125,000, and the presiding officer may make additional awards of funds, in relation to the potential for such awards to make a contribution to a complete record leading to an informed decision as to the appropriateness of the facility and route.

(h) The presiding officer shall ultimately award, on an equitable basis, at least 50% of the funds to municipalities and up to 50% to other parties whose requests comply with the provisions of subdivisions (b) and (d) of this section, so long as the funds will contribute to a complete record leading to an informed decision as to the appropriateness of the transmission facility and route and facilitate broad public participation in the proceeding.

(i) The fee submitted with each application, as well as any fee required to be submitted when an application is amended, shall be deposited in an intervenor account, established pursuant to Section 97-t of the State Finance Law.

(j) On a quarterly basis, unless otherwise required by the presiding officer, any municipality or other party receiving an award of funds shall:

(1) provide an accounting of the monies that have been spent; and

(2) submit a report to the presiding officer showing:

(i) the results of any studies conducted using such funds;

(ii) whether the purpose for which the funds were awarded has been achieved;

(iii) if the purpose for which the funds were awarded has not been achieved, whether reasonable progress toward the goal for which the funds were awarded is being achieved and why further expenditures are warranted.

(k) Where it appears warranted, the presiding officer may incorporate the reports referred to in subdivision (j) of this section into the hearing record as public statements.

(l) Disbursements from the intervenor account to municipal and other parties shall be made by the Department of Public Service upon audit and warrant of the Comptroller of the State on vouchers approved by the Chairman or a designee. Before any funds may be disbursed to a municipality or other party, such party must enter into a local assistance contract with the Department of Public Service. Vouchers prepared pursuant to such local assistance contract must be submitted for payment not later than six months after any withdrawal of an application or the Commission's final decision on an application (including a decision on rehearing, if applicable). Any funds that have not been disbursed shall be returned to the applicant after the Commission's final decision on an application (including any decision on rehearing or on remand following a court order, if applicable) has been made. If an application has been withdrawn, any funds remaining shall be returned within a reasonable time.

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

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

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

#### **Consensus Rule Making Determination**

The proposed rule is considered to be a consensus rule because the changes are technical in nature and they are believed to be non-controversial since they will implement a detailed mandate contained in § 122(5). Therefore, no objections to the proposed amendments are anticipated.

#### **Job Impact Statement**

It is believed this rule will not have any impact on jobs and employment opportunities because it simply involves a change in the Commission's rules and procedure regarding the environmental review of certain applications. The substance of the review remains unchanged.

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

#### **Interconnection of the Networks between Frontier and Choice One Communications for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-16-10-00015-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 Sylvan Lake, Inc. (Frontier) for approval of a Mutual Traffic Exchange Agreement with Choice One Communications of NY, Inc. executed on January 5, 2010.

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

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

**Purpose:** To review the terms and conditions of the negotiated agreement between Frontier and Choice One Communications.

**Substance of proposed rule:** Frontier Communications of Sylvan Lake, Inc. and Choice One Communications of New York, Inc. have reached a negotiated agreement whereby Frontier Communications of Sylvan Lake, Inc. and Choice One Communications of New York, Inc. will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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

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

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

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

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

(10-00596SP1)

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

**Interconnection of the Networks between Frontier, et al. and BullsEye Telecom for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-16-10-00016-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 Frontier Communications of NY, et al. (Frontier, et al.) for approval of an Interconnection Agreement with BullsEye Telecom, Inc. executed on January 22, 2010.

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

**Subject:** Interconnection of the networks between Frontier, et al. and BullsEye Telecom for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Frontier, et al. and BullsEye Telecom.

**Substance of proposed rule:** Frontier Communications of New York, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca-Gorham, Inc., Frontier Communications of Sylvan Lake, Inc. and Ogdén Telephone Company and BullsEye Telecom, Inc. have reached a negotiated agreement whereby Frontier Communications of New York, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca-Gorham, Inc., Frontier Communications of Sylvan Lake, Inc. and Ogdén Telephone Company and BullsEye Telecom, 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 until January 22, 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: Secretary@dps.state.ny.us

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

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

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

(10-00601SP1)

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

**Interconnection of the Networks between Frontier Telephone and BullsEye Telecom for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-16-10-00017-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. for approval of an Interconnection Agreement with BullsEye Telecom, Inc. executed on January 22, 2010.

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

**Subject:** Interconnection of the networks between Frontier Telephone and BullsEye Telecom for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Frontier Telephone and BullsEye Telecom.

**Substance of proposed rule:** Frontier Telephone of Rochester, Inc. and BullsEye Telecom, Inc. have reached a negotiated agreement whereby Frontier Telephone of Rochester, Inc. and BullsEye Telecom, 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 until January 22, 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: Secretary@dps.state.ny.us

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

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

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

(10-00602SP1)

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

**Interconnection of the Networks between Citizens Telecom and BullsEye Telecom for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-16-10-00018-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. approval of an Interconnection Agreement with BullsEye Telecom, Inc. executed on January 22, 2010.

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

**Subject:** Interconnection of the networks between Citizens Telecom and BullsEye Telecom for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Citizens Telecom and BullsEye Telecom.

**Substance of proposed rule:** Citizens Telecommunications Company of New York, Inc. and BullsEye Telecom, Inc. have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. and BullsEye Telecom, 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 until January 22, 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: Secretary@dps.state.ny.us

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

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

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

(10-00603SP1)

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

**Surcharge for Stimulus Projects**

**I.D. No.** PSC-16-10-00019-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 Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 220—Electricity.

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

*Subject:* Surcharge for Stimulus Projects.

*Purpose:* Establish a surcharge for the recovery of costs associated with New York Stimulus Projects.

*Substance of proposed rule:* The Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) to establish a surcharge for the recovery of costs associated with New York Stimulus Projects in compliance with Commission Order issued July 27, 2009 in Case 09-E-0310. The proposed filing has an effective date of August 1, 2010. The Commission may adopt in whole or in part, modify or reject Niagara Mohawk's proposal.

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

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

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

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

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

(09-E-0310SP4)

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

**New York State Energy Research and Development Authority's Statewide EEPs Programs**

**I.D. No.** PSC-16-10-00020-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 St. Lawrence Gas Company Inc.'s petition dated March 29, 2010 seeking rehearing of four orders approving various New York State Energy Research and Development Authority Energy Efficiency Portfolio Standard (EEPS) programs.

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

*Subject:* New York State Energy Research and Development Authority's statewide EEPs programs.

*Purpose:* To encourage cost effective energy conservation in the State.

*Substance of proposed rule:* The Public Service Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action regarding the relief requested by St. Lawrence Gas Company, Inc. (St. Lawrence) in a Petition dated March 29, 2010 regarding statewide Energy Efficiency Portfolio Standard (EEPS) programs administered by the New York State Energy Research and Development Authority (NYSERDA). St. Lawrence seeks reconsideration of various EEPs orders that require the utility to collect and transfer to NYSEDA certain System Benefit Charge funds for NYSEDA-administered EEPs programs. Specifically, St. Lawrence seeks to eliminate its funding obligation to NYSEDA and to expand or extend its own EEPs "Fast Track" Utility-Administered Gas Energy Efficiency Program. The orders from which St. Lawrence seeks rehearing are Case 08-E-1127, et al., Order Approving Multifamily Energy Efficiency Programs with Modifications, issued July 27, 2009; Case 08-E-1133, et al., Order Approving Certain Large Industrial Customer Energy Efficiency Programs with Modifications and Rejecting Others, issued August 24, 2009; Case 08-E-1127 et al., Order Approving Certain Commercial and Industrial Customer Energy Efficiency Programs with Modifications, issued October 23, 2009; and Case 08-E-1127, et al., Order Approving Certain Commercial and Industrial; Residential; and Low-Income Residential Customer Energy Efficiency Programs with Modifications, issued January 4, 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: secretary@dps.state.ny.us

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

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

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

(07-M-0548SP21)

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

**Surcharge for Stimulus Projects**

**I.D. No.** PSC-16-10-00021-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 Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

*Subject:* Surcharge for Stimulus Projects.

*Purpose:* Establish a surcharge for the recovery of costs associated with New York Stimulus Projects.

*Substance of proposed rule:* The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) to establish a surcharge for the recovery of costs associated with New York Stimulus Projects in compliance with Commission Order issued July 27, 2009 in Case 09-E-0310. The proposed filing has an effective date of August 1, 2010. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal.

*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,

tary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)  
**Public comment will be received until:** 45 days after publication of this notice.

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0310SP3)

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

**Surcharge for Stimulus Projects**

**I.D. No.** PSC-16-10-00022-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 Schedules for Electric Service, P.S.C. No. 9, PASNY No. 4 and EDDS No. 2.

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

**Subject:** Surcharge for Stimulus Projects.

**Purpose:** Establish a surcharge for the recovery of costs associated with New York Stimulus Projects.

**Substance of proposed rule:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) to establish a surcharge for the recovery of costs associated with New York Stimulus Projects in compliance with Commission Order issued July 27, 2009 in Case 09-E-0310. The proposed filing has an effective date of June 30, 2010. The Commission may adopt in whole or in part, modify or reject Con Edison's proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0310SP5)

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

**Surcharge for Stimulus Projects**

**I.D. No.** PSC-16-10-00023-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, P.S.C. No. 2—Electricity.

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

**Subject:** Surcharge for Stimulus Projects.

**Purpose:** Establish a surcharge for the recovery of costs associated with New York Stimulus Projects.

**Substance of proposed rule:** The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (Orange and Rockland) to establish a surcharge for the recovery of costs associated with New York Stimulus Projects in compliance with Commission Order issued July 27,

2009 in Case 09-E-0310. The proposed filing has an effective date of June 30, 2010. The Commission may adopt in whole or in part, modify or reject Orange and Rockland's proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0310SP6)

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

**Underground Residential Distribution in Subdivisions - Three Phase Service**

**I.D. No.** PSC-16-10-00024-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 Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

**Subject:** Underground Residential Distribution in Subdivisions - Three Phase Service.

**Purpose:** Revise contribution required where three-phase service is required to meet the electrical needs of residential subdivisions.

**Substance of proposed rule:** The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson or the Company) to revise the contribution required from an applicant in instances where the Company, during its supply configuration design process, determines that three-phase service is required to meet the anticipated electrical needs of an applicant's proposed residential subdivision in order to discharge the Company's obligation to provide, safe, adequate and reliable service. The proposed filing has an effective date of July 1, 2010. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (10-E-0129SP1)

## Racing and Wagering Board

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

#### Uncoupling of Entries with Common Thoroughbred Trainers

I.D. No. RWB-16-10-00034-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 4025.10 and 4035.2 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 231

**Subject:** Uncoupling of entries with common thoroughbred trainers.

**Purpose:** To allow multiple horses with a common trainer to compete in the same race as separate betting interests.

**Text of proposed rule:** 4025.10. Limitations on entries.

(a) A horse whose managing owner is a partnership cannot be entered or run in the name, whether real or stable, of an individual partner unless that individual's interest or property in the racing qualities of that horse is equal to at least 25 percent.

(b) All horses in common ownership as defined in section 4026.2(e) of this Title (i.e., having any common managing owner) or section 4026.3(c) (i.e., in which there is a 25 percent commonality among non-managing owners) must be coupled and run as an entry.

(c) Not more than two horses trained by the same person shall be drawn into any overnight race, or on the also-eligible list, to the exclusion of another horse.

(d) [All horses trained by the same trainer must be coupled and run as an entry.]

*A maximum of two horses trained by the same trainer may race uncoupled in any race provided the entries do not have common ownership as set forth in (b) above.*

(e) The board steward may require any horses entered in a race to be coupled for betting purposes prior to the commencement of wagering on-track and off-track, if he finds it necessary in the public interest.

(f) All horses trained or ridden by a spouse, parent, issue or member of a jockey's household shall be coupled in the betting with any horse ridden by such jockey.

(g) Notwithstanding the provisions of subdivisions (b) and (d) of this rule, no entry shall be couples by reason of common ownership or training in any race in which the gross purse is \$1,000,000 or more, provided however that the provisions of subdivision (e) of this section shall continue to be applicable in any such races. In any race subject to the provisions of this subdivision, the racing secretary shall have the authority to establish a mutuel field and coupled entries in any race with more than 14 starters.

4035.2

(e) *i.* If two or more horses are coupled in the betting as an entry, and one or more of them shall be disqualified for violation of the rules of racing, the balance of the entry shall also be disqualified if in the judgment of the stewards such violation prevented any other horse or horses from finishing ahead of the other part of the entry. If said violation is without such effect upon the finish of the race, penalty therefore may be applied against the offender and the balance of the entry may go unpunished.

*ii.* If any horses trained by the same trainer race uncoupled in any race, and one or more of them shall be disqualified for violation of the rules of racing, any other horses entered by that same trainer shall also be disqualified if in the judgment of the stewards such violation prevented any other horse or horses from finishing ahead of the other part of the entry. If said violation is without such effect upon the finish of the race, penalty therefore may be applied against the offender only.

**Text of proposed rule and any required statements and analyses may be obtained from:** John J. 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

1. Statutory Authority: Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 101, 218, 231, 235, 236, and 238. Section 101 vests the New York State Racing and Wagering Board ("Board")

with general jurisdiction over all horse racing activities and pari-mutuel betting activities in New York State. Section 218 requires stewards to supervise the conduct of racing in accordance with rules of the Board. Section 231 authorizes the lawful conduct of pari-mutuel betting on horse racing subject to supervision and for the purposes of raising revenue for the support of government and the promotion of agriculture generally. Section 235 provides that the Board shall make rules regulating the conduct of pari-mutuel betting. Sections 236 and 238 establish tax rates and provides for the distribution of wagers based on the type of wagering conducted.

2. Legislative Objectives: Pursuant to Article I, Section 9 of the New York State Constitution and Racing Law Section 231, pari-mutuel betting on horse racing was legalized for the purposes of deriving reasonable revenue for the support of government, to promote agriculture generally, and for the improvement of breeding of horses, particularly in New York State. The proposed rule amendments would provide additional wagering opportunities for bettors by removing certain existing limitations on entries in pari-mutuel races. The additional wagering opportunities would reduce the risk of canceling or not being able to offer certain pari-mutuel wagering pools (which require minimum numbers of wagering interests), and also generate larger pari-mutuel pools, which would in turn generate a proportionate corresponding increase in amounts payable as pari-mutuel tax, for purses, for breeding funds, and to be retained by the track operator. These amendments would thus provide further revenues for the support of government and additional monies for the payment of purses and payments to breeders for New York-bred horses, which participate in New York racing. The authorization to the stewards to disqualify horses trained by the same trainer in appropriate situations furthers these goals by providing assurance to the wagering public that the integrity of racing will be monitored and preserved when these rules are implemented.

3. Needs and Benefits: These rules will promote agriculture and horse breeding by increasing the field size of certain pari-mutuel races and thus result in more/betting interests and less cancellations of large wagering pools. A betting interest is an individual horse or more than one horse if coupled for wagering purposes. The bettor has more interests on which to wager when horses are not coupled because the identical number of horses results in more betting interests (i.e. wagering opportunities). Currently in situations where multiple horses are trained by the same trainer and compete in the same race (except in races with a greater than \$1 million purse), these horses are coupled (i.e. united) for betting purposes as one betting interest. This results in fewer wagering interests (opportunities) for the wagering public in each race with coupled horses. This rule would permit no more than two horses trained by the same trainer to race uncoupled for wagering purposes. This would be prohibited if the horses have common ownership as defined in subdivision (b) of Rule 4025.10. The common ownership restriction and the authorization to the stewards to disqualify horses trained by the same trainer in appropriate situations provides assurance to the wagering public that the integrity of racing will be monitored and preserved when these rules are implemented. These amendments will increase the amount of money wagered with resulting benefits to government and the racing participants, including the corporation conducting the race meeting, owners, trainers and breeders through larger purses, and the betting public through larger wagering pools to be distributed. It is estimated that these rule amendments would impact approximately 65% of races conducted at the three tracks operated by the New York Racing Association Inc. (Aqueduct Racetrack, Belmont Park, Saratoga Race Course), increasing field size from 7.91 to 8.64. Over 1,000 races/year would be impacted. For a three year period, it is estimated that total additional wagering handle would be \$556,000,000. Total additional purses over this same period are estimated to be \$18,751,000. Estimated total additional pari-mutuel tax is estimated to be \$1,095,000 with increased payments to breeders of \$479,000 and the Board as a regulatory fee of \$342,000. The integrity of racing is safeguarded by the stewards' authority to disqualify horses trained by the same trainer and running in the same race, when certain circumstances require in order to protect the interest of the betting public. Three stewards observe each race. The stewards have the benefit of the assistance of patrol judges, who also observe the conduct of the race, and replays of the race for review. These rules also promote inter-state uniformity since many major racing states do not have the current New York State coupling requirements for horses trained by the same trainer entered in a single race.

4. Costs: a) The adoption of these rule amendments would not impose any additional costs on the regulated parties-tracks, owners and trainers. These rules exist currently (4025.10[g]) for certain races, Belmont Stakes, Travers Stakes and Breeder's Cup races (if held in New York), i.e. those with a gross purse of one million dollars or more. These rules provide the opportunity to race horses as individual betting interests with advantages to the track, owners and trainers. The track simply applies the rule by not coupling horses in contrast to the present situation of coupling horses. This is a mere clerical entry for programming purposes and is provided in

the racing program and otherwise as information for the horse men and bettors. There are no additional costs to monitor races in which the horse will race as separate betting interests. There are no costs for continuing compliance.

b) There will be no additional costs for the agency or the state and local governments. The State (by on-site officials of the Board, Board-approved stewards of the racing association and The Jockey Club, and existing regulatory structure) has existing framework to oversee implementation of this rule, including the ongoing monitoring of thoroughbred races. There is no local government involvement in the conduct or regulation of thoroughbred racing.

5. Local Government Mandates: None; there is no local government involvement in the conduct or regulation of thoroughbred racing.

6. Paperwork: None; there are no new forms or reports required by this rule or any recordkeeping requirements. The track simply applies the rule by not coupling horses in contrast to the present situation of coupling horses. Owners and/or trainers will continue to enter horses verbally or by continuing the practice of completing forms for the entry of horses.

7. Duplication: None.

8. Alternatives: The Board solicited pre-proposal comment from the racing industry. These changes are supported by various interests, including both New York thoroughbred track operators, the representative horse men's organization at the New York Racing Association tracks, and New York off-track betting corporations. Limit comment was received opposing the changes on the basis that the opportunity for impropriety would exist if the existing restrictions were eliminated.

The Board considered continuing the existing coupling restrictions. However, in light of existing fiscal concerns and in the Board's judgment, the proposed rule changes provide a financial benefit to the State with sufficient protection for the wagering public. The three stewards will review each race for violations relating to the running of uncoupled horses, and the rule change limits uncoupling to two horses per trainer in the same race provided there is no common ownership. The Board considered eliminating the current restrictions without including a two horse per trainer limit. However, this was deemed to impose an unacceptable risk to the wagering public of the appearance of or actual impropriety in the running of races in which a single trainer might have an interest in more than two horses competing against each other (and others) for purse and pari-mutuel wagering purposes.

9. Federal Standards: None.

10. Compliance Schedule: Once adopted these rules can be implemented immediately upon publication in the *State Register*.

#### **Regulatory Flexibility Analysis**

1. Effect on Small Businesses and Local Governments: This rule making will have no negative impact on small businesses or local government. By increasing wagering opportunities with corresponding increase in wagering, there is the potential for monetary benefit to owners and trainers in the form of increased purses, and to local governments by increased off-track betting distributions.

2. Compliance Requirements: There are no reporting or record keeping requirements that will affect small businesses or local governments. In addition no additional licenses will be required by this rule making.

3. Professional Services: No services are required to comply.

4. Compliance Costs: This rule making will not require any additional costs to small businesses or local governments because it merely changes the coupling of thoroughbred horses for betting purposes.

5. Economic and Technological Feasibility: This rule does not impose any technological requirements on small businesses or local government.

6. Minimizing Adverse Impact: This rule will not have any adverse impact on small businesses or local governments because it merely removes the existing coupling requirement and thus expands opportunities for owners and trainers.

7. Small Business and Local Government Participation: Comments were solicited from industry groups, including representative horse men'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 of Rural Areas: These rules will not affect any rural areas.

2. Compliance Requirements: This rule will not require any additional reporting or recordkeeping and no additional licenses are required and there is no need for professional service to achieve compliance.

3. Costs: These rules do not impose any additional costs in rural areas. These rules merely remove existing limitations on entries in pari-mutuel horse racing and thus provide additional wagering opportunities.

4. Minimizing Adverse Impacts: This rule proposal will not adversely impact any rural areas.

5. Rural Area Participation: Comments were solicited from industry groups, including representative horse men'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 rules will not have an adverse impact on jobs because they only affect whether or not a horse must be coupled in a race for wagering purposes.

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## Department of State

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### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **Electrical Bonding of Gas Piping, and Protection of Gas Piping Against Physical Damage**

**I.D. No.** DOS-16-10-00012-EP

**Filing No.** 382

**Filing Date:** 2010-04-02

**Effective Date:** 2010-04-02

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

**Proposed Action:** Amendment of sections 1220.1 and 1224.1 of Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 377 and 378

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

**Specific reasons underlying the finding of necessity:** At its meeting held on April 1, 2010, the State Fire Prevention and Building Code Council determined that adopting this rule on an emergency basis is necessary to preserve public safety by clarifying requirements for electrical bonding of gas piping, clarifying requirements for protection of gas piping against physical damage, and adding new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST), which will increase protection against fires caused by lightning strikes in the vicinity of buildings equipped with CSST gas piping and fires caused by accidental punctures of CSST gas piping.

**Subject:** Electrical bonding of gas piping, and protection of gas piping against physical damage.

**Purpose:** To clarify requirements for electrical bonding of gas piping, to clarify requirements for protection of gas piping against physical damage, and to add new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST).

**Public hearing(s) will be held at:** 10:00 a.m., June 8, 2010 at Perry B. Duryea Jr. State Office Bldg., Classrooms 2 and 3, 250 Veterans Memorial Hwy., Hauppauge, 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:** [http://www.dos.state.ny.us/proposed\\_regs/1220text.html](http://www.dos.state.ny.us/proposed_regs/1220text.html)):

This rule amends several existing provisions in, and adds several new provisions to, the 2007 edition of the Residential Code of New York State (the "2007 RCNYS"), the publication which is incorporated by reference in 19 NYCRR Part 1220, and the 2007 edition of the Fuel Gas Code of New York State (the "2007 FGCNYS"), the publication which is incorporated by reference in 19 NYCRR Part 1224. The new and amended provisions in the 2007 RCNYS and 2007 FGCNYS:

(1) Clarify the situations in which a gas piping system that contains no corrugated stainless steel tubing ("CSST") will be considered to be "likely to become energized" and, therefore, required to be bonded to an effective ground-fault current path;

(2) Specify that a gas piping system that contains no CSST may be

bonded in any manner described in Section E3509.7 of the 2007 RCNYS, in cases where the 2007 RCNYS applies, or in any manner described in Section 250.104(B) of NFPA 70-2005, in cases where the 2007 FGCNYS applies;

(3) Require gas piping systems that contain any CSST to be electrically continuous and bonded to the electrical service grounding electrode system at the point where the gas service enters the building or structure;

(4) Specify standards for the installation and bonding of CSST, including standards for the size of the bonding jumper, standards for bonding clamp, standards for the place and manner of attachment of the bonding clamp, and standards for separation of the CSST from other electrically conductive systems;

(5) Specify standards for protection of piping other than black or galvanized steel from physical damage, including standards for the types of shield plates to be used, standards for determining the location where shield plates are required, and additional standards for protection of piping made of CSST; and

(6) Clarify the situations in which section E3509.7 in the RCNYS (entitled "Bonding other metal piping") will apply.

This rule also provides that the 2005 edition of standard NFPA 70, entitled "National Electrical Code" shall be deemed to be one of the standards incorporated by reference into 19 NYCRR Part 1224.

**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 June 30, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, email: Joseph.Ball@dos.state.ny.us

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

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

##### 1. STATUTORY AUTHORITY.

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code").

Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions.

##### 2. LEGISLATIVE OBJECTIVES.

Executive Law section 371(2) provides that it is the public policy of the State of New York to provide for the promulgation of a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction.

The Legislative objectives sought to be achieved by this rule are to provide uniform requirements for the installation of gas piping made of corrugated stainless steel tubing (CSST); to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require extra protective measures in all cases where CSST is used; to prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping; to require the use of shield plates whenever gas piping made of any material other than black or galvanized steel is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member; and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by punctures of gas piping made of material other than black or galvanized steel.

##### 3. NEEDS AND BENEFITS.

CSST piping can be punctured by nails and other fasteners driven into walls containing concealed CSST piping. It can also be punctured when arcing of electrical currents from a nearby lightning strike burns a hole in the wall of the piping.

CSST manufacturers have provided installation instructions that require (1) the use of shield plates and other means of protecting CSST from the puncturing caused by nails and other fasteners driven into walls containing concealed CSST piping and (2) electrical bonding of CSST piping to protect against the puncturing caused by the lightning-induced current and arcing phenomena. However, the manufacturers' installation instructions are not uniformly consistent with each other.

The Uniform Code currently requires that materials such as CSST piping be installed in accordance with manufacturer's instructions. The purposes of this rule are to provide uniform requirements for the installation of CSST piping and, by doing so, to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require certain extra protective measures which are called for by some, but not all, of such installation instructions; to prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping and which are prohibited by some, but not all, of such installation instructions;

and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by the puncturing of CSST gas piping.

Gas piping made of other materials other than black or galvanized steel (such as copper, brass or aluminum-alloy pipe or copper, brass or aluminum tubing) can also be punctured by nails and other fasteners driven into walls containing concealed gas piping. The Uniform Code currently requires the use of shield plates to protect non-steel gas piping when it is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1 inch from the nearest edge of such member. This rule will require the use of shield plates whenever non-steel gas piping is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member, which will decrease the instances where a nail or other fastener driven into an unprotected member, and penetrating that member by more than 1 inch, will puncture concealed non-steel gas piping.

The report or study that served as a basis for this rule is Corrugated Stainless Steel Tubing for Gas Distribution in Buildings and Concerns Over Lightning Strikes, dated August 2007, published by The NAHB Research Center, Inc., which is summarized as follows: "In the case of proximity lightning, a high voltage can be induced in metallic piping that may cause arcing; and for CSST there is concern that arcing may cause perforation of the CSST wall and therefore cause gas leakage. The fuel gas code, electric code, plumbing code, product standards, and manufacturer installation instructions have different methods of providing dissipation of electrical energy through techniques called bonding and grounding. Since the codes, product standards, and installation requirements are not harmonized, builders and contractors may find differing and possibly conflicting requirements. Generally, the local jurisdiction having authority and code official will rely upon the manufacturer's installation recommendations in lieu of other requirements."

This report was used to determine the necessity for and benefits derived from this rule in the following manner: CSST manufacturers have always required that CSST systems be bonded to the electrical system in accordance with the local codes. Based on this report, the bonding methods prescribed within such local codes are minimum requirements and are designed to protect the consumer against ground-faults from the premise wiring system only. The intent of this rule is to harmonize the requirements for bonding of metallic piping while providing protection from proximity lightning strikes.

##### 4. COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

The Department of State ("DOS") estimates the cost of the bonding jumper required in a typical installation to be between \$200 and \$300; the cost of the clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section) to be \$31; the cost of purchasing and installing the shield plates required in a typical installation to be between \$15.50 and \$77.50; and the cost of the protective metal pipe required in a typical installation to be \$135.50. Based on the foregoing, DOS estimates that the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe in a typical installation will be between \$382 and \$544. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) Attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is "unlisted," and this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping, which would reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is negligible.

(3) The failure to use shield plates and/or protective metal pipe in all situations specified in this rule could increase the chances that non-steel gas piping will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

(4) CSST piping, even if not physically constrained, can be punctured by a nail driven by a power nail gun. In light of the almost universal use of power nail guns and other similar devices on construction sites, it is the opinion of DOS that failure to require the use of shield plates and/or protective metal pipe to protect CSST gas piping running parallel to, and within 1.75 inches of, a stud, joist, rafter or other member will increase the chances that such CSST gas piping will be punctured. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

There are no costs to DOS for the implementation of this rule. DOS is

not required to develop any additional regulations or develop any programs to implement this rule.

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs a building equipped with non-steel gas piping, or installs any such piping in an existing building, the State or such local government, as the case may be, will be required to bond the piping (in the case of CSST piping) and protect the piping from physical damage in the manner required by this rule.

Second, the authorities responsible for administering and enforcing the Uniform Code will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

#### 5. PAPERWORK.

This rule will not impose any new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

#### 6. LOCAL GOVERNMENT MANDATES.

This rule will not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows:

First, any county, city, town, village, school district, fire district or other special district that constructs a building equipped with n-n-steel gas piping, or installs any such piping in an existing building, will be required to comply with the electrical bonding and physical protection provisions amended and/or added by this rule.

Second, most cities, towns and villages, and some counties, are responsible for administering and enforcing the Uniform Code; since this rule amends provisions in the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

#### 7. DUPLICATION.

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

#### 8. ALTERNATIVES.

The alternative of making no change to the Uniform Code provisions relating to electrical bonding and physical protection of gas piping was considered. However, it was determined that the existing provisions of the Uniform Code could be construed as permitting inadequate electrical bonding and inadequate physical shielding of gas piping, particularly in the case of gas piping made of CSST. Therefore, this alternative was rejected.

The alternative of banning the use of CSST was considered. However, the weight of expert opinion appears to be that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that the principal concerns about the use of CSST piping (viz., puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

#### 9. FEDERAL STANDARDS.

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

#### 10. COMPLIANCE SCHEDULE.

Regulated persons will be able to achieve compliance with this rule in the normal course of operations, either as part of the installation or construction of a new building or the renovation of an existing building.

### Summary of Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE:

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of any material other than black or galvanized steel against physical damage. Specifically, in a case where gas piping made of CSST is installed, this rule will (1) require the electrical bonding of CSST gas piping to the building's grounding electrode system; (2) prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping, such as using the brass hexagonal nut on the CSST fitting as the attachment point for the bonding jumper; and (3) require certain protective measures, such as using strike plates or other protective coverings, in

certain situations where CSST gas piping runs parallel to, a stud, joist, rafter or similar member. Additionally, in a case where gas piping made of CSST or any other material other than black or galvanized steel is installed, this rule will require the use of strike plates in situations where the gas piping passes through a stud, joist, rafter or similar member and is within 1.75 inches of the edge of such member (the Uniform Code currently requires the use of strike plates only where the non-steel gas piping is located within 1 inch of the edge of the member). Any small business or local government that constructs a building equipped with gas piping made of CSST (or any other material other than black or galvanized steel), or that installs any such gas piping in an existing building, will be affected by this rule. Small businesses that manufacture, sell or install gas piping, bonding jumpers, bonding clamps, shield plates, and other related equipment may also be affected by this rule.

Since this rule amends provisions in the Uniform Code, each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department of State (DOS) estimates that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

#### 2. COMPLIANCE REQUIREMENTS:

No reporting or recordkeeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments subject to the rule will be required to install gas piping in accordance with the rule's provisions. In most cases, the local government responsible for administering and enforcing the Uniform Code will be required to consider the requirements of this rule when reviewing plans and inspecting work.

#### 3. PROFESSIONAL SERVICES:

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

#### 4. COMPLIANCE COSTS:

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe. DOS estimates the costs in a typical installation to be:

(1) approximately 30 to 50 feet of bonding jumper, at \$6.00 per foot: \$200 to \$300.

(2) clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section): \$31.

(3) 1 to 5 shield plates, at a cost (including the cost of installation) of \$15.50 per shield plate: \$15.50 and \$77.50.

(4) approximately 10 linear feet or protective metal pipe (schedule 40 steel or iron pipe), at a cost (including the cost of installation) of \$13.55 per linear foot: \$135.50.

Based on the foregoing, DOS estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) The installation instructions provided by two of the four major CSST manufacturers permit attaching the bonding jumper to the brass hexagonal nut on the CSST fitting, and do not require the clamp and 4-inch section of schedule 40 pipe required by this rule. In the case of installation of CSST piping made by either of the two manufacturers whose installation instructions permit attaching the bonding jumper to the brass hexagonal nut, this rule may be viewed as adding a new requirement (use of the clamp and 4-inch section of schedule 40 pipe) and as adding an additional cost (estimated to be \$31). However, attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is not "listed" and, in the opinion of DOS, this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping which, in turn, could reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is viewed as negligible.

(3) The installation instructions provided by each of the four major CSST manufacturers already require the use of shield plates and/or protective metal pipe in places where CSST piping passes through holes or notches in wood studs, joists or rafters. However, the installation instructions provided by three of the four major manufacturers do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule. In the case of installation of CSST piping made by any of the three manufacturers whose installation instructions do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule, this rule may be viewed as adding a new requirement (the use of shield plates or protective metal pipe in situations where neither method of protection would have been required by the manufacturer's installation instructions) and as adding an additional cost (the cost of installing the additional shield plates or protective metal pipe). Additionally, where gas piping made of CSST or copper, brass or aluminum tubing is installed, this rule will require the use of shield plates where such piping is within

1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member. However, in the opinion of DOS, the failure to use shield plates and/or protective metal pipe in all situations specified in this rule will increase the chances that gas piping made of CSST, or copper, brass or aluminum tubing will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

Any variation in costs of complying with this rule for different types or sizes of small businesses and local governments will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type or sizes of such small businesses and local governments. To the extent that larger businesses and larger local governments may tend to own larger buildings, or more than one building, the total costs of compliance would be higher for larger businesses and larger local governments.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. This rule imposes no substantial capital expenditures. No new technology need be developed for compliance with this rule.

#### 6. MINIMIZING ADVERSE IMPACT:

The economic impact of this rule on small businesses and local governments will be no greater than the economic impact of this rule on other regulated parties, and the ability of small businesses and local governments to comply with the requirements of this rule should be no less than the ability of other regulated parties to comply. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

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

DOS notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

In addition, DOS held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. DOS also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above include:

(1) A comment suggesting that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements. This alternative has not been incorporated into the proposed rule, because the data available at this time do not support the need for more robust bonding of gas piping made of material other than CSST.

(2) A comment suggesting that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance. This alternative is reflected in the proposed rule. This rule continues the existing rule regarding the circumstances under which non-CSST gas piping is considered to be "bonded."

(3) A comment suggesting changes to the wording of the proposed rule, to clarify its intent. These alternatives have been incorporated, in whole or in substantial part, into the proposed rule.

(4) A comment suggesting that earlier versions of the proposed rule may have confused the concept of bonding with grounding. DOS believes that the current version of the proposed rule eliminates any such confusion.

(5) A comment suggesting that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors. DOS believes that the weight of expert opinion is that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that it be bonded. The alternative of banning the use of CSST was considered. However, it was determined that the principal concerns about the use of CSST piping (viz.,

puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

DOS has posted the full text of this rule on its website.

#### Rural Area Flexibility Analysis

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

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of CSST, or any material other than black or galvanized steel, against physical damage. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements.

The rule will add new requirements relating to the installation and electrical bonding of gas piping made of CSST, and new requirements relating to protection of gas piping made of CSST (or any other material other than black or galvanized steel) against physical damage. No professional services are likely to be needed in a rural area in order to comply with such requirements.

##### 3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe.

The Department of State estimates the cost of the bonding jumper required by this rule in most situations (6 AWG copper wire) to be \$ 6.00 per foot. In a typical installation, approximately 30 to 50 feet of bonding jumper may be required. Therefore, the Department of State estimates that the cost of bonding jumper required in a typical installation to be between \$200 and \$300.

The Department of State estimates the cost of the clamp and 4" section of schedule 40 pipe, when required by this rule, (including the cost of installing the clamp and pipe section) to be \$31.

The Department of State estimates the cost of the shield plates required by this rule (including the cost of installing the shield plates) to be \$15.50 per shield plate. In a typical installation, approximately 1 to 5 shield plates may be required. Therefore, the Department of State estimates that the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

The Department of State estimates the cost of the protective metal pipe (schedule 40 steel or iron pipe) required in certain instances by this rule (including the cost of installation) to be \$13.55 per linear foot. In a typical installation, approximately 10 linear feet of protective metal pipe may be required. Therefore, the Department of State estimates that the cost of protective metal pipe required in a typical installation to be \$130.55.

Based on the foregoing, the Department of State estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530.

It should be noted, however, that in most cases, the bonding jumper, clamp, and shield plates required by this rule are also required by the CSST manufacturer's installation instructions. Accordingly, these materials would be required even in the absence of this rule, and this rule has little actual impact on the cost of installing CSST piping.

Additionally, in the case of installation of gas piping made of copper, brass or aluminum tubing, this rule may be viewed as adding a new requirement (using shield plates where such tubing is within 1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member) and as adding an additional cost (the cost of installing shield plates in areas where the tubing is more than 1 inch, but less than 1.75 inches, from the edge of a stud, rafter, joist or other member). As noted above, the Department of State estimates the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

Compliance with this rule will occur when gas piping or is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule. Any variation in costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

##### 4. MINIMIZING ADVERSE IMPACT.

The economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

#### 5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry in all areas of the State, including rural areas.

In addition, the Department of State held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. The Department of State also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above included:

(1) a suggestion that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements, since all metal piping could be susceptible to damage from nearby lightning strikes (this suggestion has been incorporated into the proposed rule);

(2) a suggestion that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance (this suggestion was not incorporated into the proposed rule);

(3) suggested changes to the wording of the proposed rule, to clarify its intent (these suggestions have been incorporated, in whole or in substantial part, into the proposed rule);

(4) a suggestion that earlier versions of the proposed rule may have confused the concept of bonding with grounding (the Department of State believes that the current version of the proposed rule eliminates any such confusion); and

(5) a suggestion that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors (the Department of State believes that the weight of expert opinion is that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that it be bonded).

The Department of State has posted the full text of this rule on the Department's website.

#### Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds new paragraphs (9), (10), (11), and (12) to subdivision (d) of section 1220.1, amends subdivision (b) of section 1224.1, and adds new paragraphs (2), (3), and (4) to subdivision (c) to section 1224.1 of Title 19 NYCRR. New paragraphs (9), (10), (11), and (12) of subdivision (d) of section 1220.1 and new paragraphs (2), (3), and (4) of subdivision (c) of section 1224.1 will clarify requirements in the Uniform Fire Prevention and Building Code ("Uniform Code") relating to electrical bonding of gas piping and protection of gas piping against physical damage, and will add new requirements relating to installation of gas piping made of corrugated stainless steel tubing (CSST).

It is anticipated that builders will be able to comply with the electrical bonding and physical protection requirements, as clarified and added by this rule, by using equipment that is currently available and techniques that are currently known. It is also anticipated that any increase costs of compliance resulting from this rule will be negligible. Therefore, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in businesses that manufacture or install gas piping, other metal piping, or CSST piping.

## Office of Temporary and Disability Assistance

### NOTICE OF ADOPTION

#### Temporary Housing Assistance for Certain Sex Offenders

**I.D. No.** TDA-28-09-00006-A

**Filing No.** 389

**Filing Date:** 2010-04-06

**Effective Date:** 2010-04-21

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

**Action taken:** Addition of section 352.36 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), (8), 34(3)(f) and 131(1); and L. 2008, ch. 568

**Subject:** Temporary housing assistance for certain sex offenders.

**Purpose:** To implement chapter 568 of the Laws of 2008 concerning factors that social services districts must consider when making determinations about the location of temporary housing for level two and three sex offenders, when advance notice has been received.

**Text or summary was published** in the July 15, 2009 issue of the Register, I.D. No. TDA-28-09-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16 C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

#### Assessment of Public Comment

The Office of Temporary and Disability Assistance (OTDA) has received public comments regarding its proposed regulations to implement Chapter 568 of the Laws of 2008.

**Comment:** OTDA received a comment asserting that it is the individual's responsibility, and not the local social services district's responsibility, to locate permanent housing. The comment also maintained that a local social services district is not responsible for possible concentrations of sex offenders permanently residing in residential neighborhoods.

**Response:** The proposed regulation supports the intent of the Legislature to address challenges faced by local social services districts when locating appropriate temporary housing for certain sex offenders in accordance with Chapter 568 of the Laws of 2008. The proposed regulation supports this intent by establishing factors a local social services agency must consider before making a temporary housing placement, but does not seek to establish such factors for placing certain sex offenders into permanent housing.

**Comment:** OTDA received a comment claiming that the proposed regulation assumes that counties have options in placing homeless sex offenders in temporary housing and therefore appears to place the burden of placement solely on the local social services district rather than sharing responsibility across the involved State agencies.

**Response:** The proposed regulation reinforces the responsibility of all social services districts to arrange temporary housing assistance for homeless individuals, including sex offenders, while providing factors for consideration for those sex offenders for whom social services districts receive a written referral pursuant to section 259-c(17) of the Executive Law. A forthcoming Administrative Directive will discuss these factors and the role each plays in the placement decision as well as a discussion of a locator tool now available to social services districts in cooperation with New York State Division of Criminal Justice Services. Additionally, the Administrative Directive will advise local social services districts of an agreement with the New York State Division of Parole (DOP) and the New York State Department of Correctional Services (DOCS) providing advance notice of the release of certain sex offenders.

**Comment:** OTDA received a comment objecting to the use of the phrase "ill-advised concentration of sex offenders in certain neighborhoods and localities" as vague, negative, not offering any true direction, and lending support to the development of local rules regarding the temporary housing of certain sex offenders.

**Response:** This proposed regulation is supportive of Chapter 568 of the Laws of 2008 by requiring local social services officials to consider the concentration of sex offenders as one factor in determining placement

choices for temporary housing. It also supports the Governor's statement in his Approval Memorandum (No. 33 Chapter 568 of the Laws of 2008) in which there is a recognition that a coordinated and comprehensive approach takes into account competing factors and concerns. Careful deliberation and reasonable efforts that take into account such factors as transitional services, law enforcement monitoring, housing availability, and the need to provide emergency shelter are all aspects that are intended to further the State's goal of both protecting its citizens and ensuring that an individual's immediate needs are met.

Comment: OTDA received a comment expressing a concern that a local social services district would knowingly not react to information in its possession pertinent to the placement of certain sex offenders into temporary housing.

Response: The proposed regulation reflects the language set forth in Chapter 568 of the Laws of 2008. To address concerns that local social services agencies consider known information when making a temporary housing placement, OTDA intends to issue its Administrative Directive to the local social services districts. The forthcoming Administrative Directive will include language advising local social services districts to act based on all known information when making temporary housing placements for certain sex offenders, including those factors outlined in law and any other relevant factors known to the agency. Local social services districts are instructed to consider the totality of circumstances when making a temporary housing placement of certain sex offenders and coordinate their efforts with DOP and DOCS. These coordinated efforts include the provision of information by using common forms developed in cooperation with DOP and DOCS for release with the Administrative Directive.

Comment: OTDA received a comment objecting to the inclusion of a statement in the proposed regulation advising local social services districts when to place individuals in the most appropriate available shelter in the absence of the apparent relevancy or practicability of factors enumerated by Chapter 568 of the Laws of 2008.

Response: OTDA included this statement in its proposed regulation to underscore that the State statute requires local social services districts to consider the factors outlined in Chapter 568 of the Laws of 2008. However, not all factors apply equally to each homeless sex offender. The local social services districts must factor in all the relevant circumstances in placing homeless individuals seeking assistance into temporary housing who cannot adequately provide for themselves in accordance with Social Services Law § 131. For example, the term "vulnerable populations" may include, but is not limited to, nurseries, pre-schools, day care centers, and elementary, middle and high schools. However, the application of the term is dependent on the individual seeking temporary housing. Crimes against the elderly may include a different grouping of "vulnerable populations" including senior citizen centers or nursing homes.

Comment: OTDA received a comment expressing concerns over the potential length of a temporary housing assignment subsequent to DOP's post-placement investigation and disapproval of the current temporary housing placement.

Response: The forthcoming Administrative Directive will outline the local social services district's response to DOP's reactions to pre- and post-placement inspections, directing local social services districts to take the appropriate action and consider if a different, available placement is more appropriate.