

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Formation, Training, Appointment and Activation of State and County Animal Response Teams

I.D. No. AAM-11-10-00014-A

Filing No. 574

Filing Date: 2010-05-28

Effective Date: 2010-06-16

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

Action taken: Addition of Part 69 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, section 410

Subject: Formation, training, appointment and activation of State and county animal response teams.

Purpose: To implement legislative directive by adopting a rule relating to the creation of State and county animal response teams.

Text or summary was published in the March 17, 2010 issue of the Register, I.D. No. AAM-11-10-00014-P.

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

Text of rule and any required statements and analyses may be obtained from: David Smith, DVM, Acting Director, Div. of Animal Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standards of Identity for Olive Oil, Olive Pomace Oil, and Virgin Olive Oil

I.D. No. AAM-24-10-00001-P

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

Proposed Action: This is a consensus rule making to add Part 269 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 204-a

Subject: Standards of identity for olive oil, olive pomace oil, and virgin olive oil.

Purpose: To ensure that olive oil, and varieties thereof, meet appropriate compositional requirements to promote fair dealing.

Text of proposed rule: The heading to subchapter D of Chapter VI of 1 NYCRR is amended to read as follows:

Standards of Identity [and Enrichment] for Cereal Flours and Related Products, Milled Rice, Macaroni and Noodle Products [and], Bakery Products *and Olive Oil*

1 NYCRR is amended by adding thereto a new Part 269, to read as follows:

Part 269

Olive Oil and Related Products

§ 269.1 Olive Oil and related products: identities; label statements.

(a) Standards of Identity

(1) Olive oil means the olive oil obtained solely from the fruit of the olive tree (*Olea Europaea L.*) without the use of solvents or re-esterification processes. Olive oil may consist wholly, or as a blend, of virgin olive oil and refined olive oil, as defined in paragraphs (3) and (4) of this subdivision. Olive oil has a free acidity, expressed as oleic acid, of not more than 1 gram per 100 grams and is light yellow to green in color.

(2) Olive-pomace oil means oil obtained by treating olive pomace (the pulpy material remaining from the fruit of the olive tree after olive oil has been extracted therefrom) with solvents or other physical treatments and is dark green, brown, or black in color.

(3) Virgin olive oil means olive oil obtained from the fruit of the olive tree solely by mechanical or other physical means under conditions that do not lead to alterations in the oil, and which has not undergone treatment other than washing, decanting, centrifuging and filtration. Virgin olive oil may not contain preservatives, artificial colors, or food additives. Virgin olive oils include and are not limited to:

(i) Extra virgin olive oil, which means virgin olive oil that has a free acidity, expressed as oleic acid, of not more than 0.8 grams per 100 grams and is yellow to green in color.

(ii) Virgin olive oil, which means virgin olive oil that has a free acidity, expressed as oleic acid, of not more than 2 grams per 100 grams and is yellow to green in color.

(iii) Ordinary virgin olive oil, which means virgin olive oil that has a free acidity, expressed as oleic acid, of not more than 3.3 grams per 100 grams.

(4) Refined olive oil means the olive oil obtained from virgin olive oil by a refining method which does not lead to alterations in the initial glyceridic structure, has a free acidity, expressed as oleic acid, of not more than 0.3 grams per 100 grams and is light yellow in color.

(5) Refined olive-pomace oil means the oil obtained from olive-pomace oil, as defined in paragraph (2) of this subdivision, by a refining

method which does not lead to alterations in the initial glyceridic structure, has a free acidity, expressed as oleic acid, of no more than 0.3 grams per 100 grams, is odorless and flavorless and is light yellow to brownish yellow in color.

(b) Alpha-tocopherol may be added to refined olive oil, olive oil, refined olive-pomace oil and olive-pomace oil to restore natural tocopherol lost in the refining process. The concentration of alpha-tocopherol in the final product shall not exceed 220 mg/kg.

(c) Nomenclature: label statement. The name of the foods defined in paragraphs (1) and (2) of subdivision (a) of this section are, respectively, "olive oil" and "olive-pomace oil." The name of the foods defined in subparagraphs (i) - (iii) of paragraph (3) of subdivision (a) of this section are respectively, "extra virgin olive oil," "virgin olive oil," and "ordinary virgin olive oil." The names of the foods defined in paragraphs (4) and (5) of subdivision (a) of this section are, respectively, "refined olive oil" and "refined olive-pomace oil."

Text of proposed rule and any required statements and analyses may be obtained from: Steve Stich, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-4492, email: stephen.stich@agmkt.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.

Consensus Rule Making Determination

The proposed rule will amend 1 NYCRR by adding a new Part 269, which will set forth standards of identity for various types of olive oil.

The proposed rule is non-controversial. The standards of identity for olive oil, as set forth in the proposed rule ("the proposed standards of identity"), are consistent with the standards set forth in Agriculture and Markets Law section 204-a, the statute that provides, in part, the statutory authority for 1 NYCRR Part 269. Furthermore, such standards of identity are consistent with the standards set forth in a document entitled *Trade Standard Applying to Olive Oils and Olive-Pomace Oils*, published by the International Olive Council, an organization comprised of and representing the major foreign and domestic manufacturers and sellers of olive oil. Furthermore, the proposed standards of identity were sent to and have been endorsed by the North American Olive Oil Association, an organization comprising the major domestic manufacturers and sellers of olive oil. Finally, the proposed standards of identity are consistent with the standards of identity for olive oil adopted by California and Connecticut. As such, the proposed standards of identity will facilitate trade in such commodities among and between the states.

The proposed rule will not, therefore, have any adverse impact upon regulated parties and is, therefore, non-controversial.

Job Impact Statement

The proposed rule will not have an adverse impact upon employment opportunities.

The proposed rule will adopt standards of identity for various types of olive oil. Currently, there are many foods, offered for sale, that are labeled as being "olive oil," or varieties thereof, which contain, either or whole in part, other ingredients such as soybean oil and peanut oil. The proposed rule, by discouraging the improper labeling of olive oil blends as solely olive oil and varieties thereof, may very well increase demand for "real" olive oil, and varieties thereof, because consumers will be better assured that they are buying "real" olive oil. As such, the proposed rule will have no adverse impact upon jobs and may very well increase employment opportunities.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-24-10-00003-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To classify positions in the exempt class.

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 "Division of Criminal Justice Services," by adding thereto the positions of Crime Analysis Center Director (4).

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-24-10-00004-P

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

Proposed Action: Amendment of Appendix 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, by adding thereto the position of Agency Emergency Management Supervisor (1).

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-24-10-00005-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Family Assistance under the subheading “Office of Children and Family Services,” by decreasing the number of positions of Secretary from 5 to 4; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading “Office of Children and Family Services,” by adding thereto the position of Agency Emergency Management Coordinator (OCFS) (1).

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-24-10-00006-P

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

Proposed Action: Amendment of Appendix 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 Education Department, by adding thereto the position of Associate Counsel (1).

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**

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

Deer Management Assistance Permits, and the Use of “Pelt Seals” for Beaver

I.D. No. ENV-24-10-00002-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 1.30 and 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0903 and 11-1103

Subject: Deer management assistance permits, and the use of “pelt seals” for beaver.

Purpose: To reduce costs associated with Deer Management Assistance Permits and measuring beaver harvest.

Text of proposed rule: Title 6 of NYCRR, section 1.30, entitled “Deer management assistance permits,” is amended as follows:

Repeal existing paragraph 1.30(i)(1) and adopt new paragraph 1.30(i)(1) to read as follows:

(1) Immediately upon taking a deer under the authority of a deer management assistance permit (DMAP), the taker must use a pen to sign the carcass tag and fill in all information on the carcass tag. The carcass tag must be attached to the deer, except the carcass tag does not need to be attached while the deer is actually being dragged to a camp, dwelling, or point where transportation is available. The carcass tag must not be removed until the deer is prepared for consumption. The taker must report each harvested deer to the permit holder.

Repeal existing paragraphs 1.30(i)(3) and (4).

Adopt new paragraph 1.30(i)(3) to read as follows:

(3) The permit holder is responsible for submitting to the department

a report of all harvested deer taken under the authority of their DMAP within five business days of the close of the deer hunting season in the area where the DMAP has been issued.

Title 6 of NYCRR, section 6.3, entitled "General regulations for trapping beaver, otter, mink, muskrat, raccoon, opossum, weasel, red fox, gray fox, skunk, coyote, fisher, bobcat and pine marten," is amended as follows:

Amend existing subdivision 6.3(c) to read as follows:

(c) "Tagging and sealing requirements for [beaver,] otter, bobcat, fisher and pine marten taken in New York State."

Amend existing paragraph 6.3(c)(3) to read as follows:

(3) Except as provided in paragraph (2) of this subdivision, no one except the taker may possess an unsealed, unprocessed pelt or unskinned carcass of a [beaver,] otter, bobcat, fisher or pine marten taken in New York State unless it is accompanied by a completed furbearer possession tag in accordance with paragraph (2) of this subdivision.

Repeat existing paragraph 6.3(c)(5).

Amend existing paragraph 6.3(c)(7) to read as follows:

(7) No one may buy and no one except the taker may possess an unprocessed pelt or unskinned carcass of an [beaver,] otter, bobcat, fisher or pine marten taken in New York unless it has an appropriate, intact and closed New York State pelt seal attached to it in accordance with paragraph (4) of this subdivision, except that a person, acting as an agent for the taker, may temporarily possess the taker's pelts or unskinned carcasses for the purpose of skinning or taking them for sealing, provided that the taker's license under which the furbearer was taken, or a copy (front and back) of the taker's license under which a furbearer was taken, accompanies the pelts or unskinned carcasses and the pelts or unskinned carcasses also are accompanied by their furbearer possession tags as provided in paragraph (2) of this subdivision.

Renumber existing paragraphs 6.3(c)(6) through (13) as 6.3(c)(5) through (12), respectively.

Amend existing subdivision 6.3(d) to read as follows:

(d) To legally possess or transport an unskinned carcass or unprocessed pelt of an [beaver,] otter, bobcat, fisher or pine marten taken outside New York State, a person must comply with the following:

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, (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.

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

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) section 11-0903 provides the Department of Environmental Conservation (DEC or department) with regulatory authority to issue deer management assistance permits (DMAP). ECL section 11-1103 establishes the department's regulatory authority to establish beaver trapping regulations, including the regulation of the possession and disposition of beaver.

2. Legislative objectives:

In establishing the DMAP program, the Legislature provided an additional deer management tool for "site specific management goals" including, but not limited to, the control of deer damage on farms. In providing for the regulation of trapping seasons and the possession and disposition of beaver, the Legislature granted the department authority to make adjustments in trapping regulations to reflect the current status of beaver, and to provide an efficient means of monitoring their harvest.

3. Needs and benefits:

The primary justification for this rule making is to save money. The change to the DMAP regulation (6 NYCRR section 1.30) will save about \$3,000/year. The change to the beaver pelt seal regulation (6 NYCRR section 6.3) will save about \$6,000/year.

An explanation of each change follows:

DMAP

The DMAP program provides an important deer management tool for "site-specific" control of high deer numbers. Typical permit holders include farmers, forestry companies, and nature preserves. In 2009, we issued just over 2,600 permits resulting in a take of about 9,700 deer.

In prior years, DEC printed a "tag set" that included a carcass tag and a deer harvest report tag. A supply of tags is given to the permit holder for subsequent distribution to hunters who have permission to hunt on a DMAP area. Under the current regulation, a successful hunter is respon-

sible for reporting a harvested deer. The permit holder also is required to return a summary report card with the total number of deer taken by all hunters using their property.

The department proposes to change the regulations to accommodate a streamlined and more efficient system. A permit holder will receive a set of inexpensive carcass tags for distribution to cooperating hunters. These tags will serve as a law enforcement tool but the hunter will not be responsible for reporting a harvested deer to the department. Instead, each hunter will have to report their take to the permit holder, and he or she will be responsible for providing the department with the deer kill for their property. A simple paper form will serve as both the permit and the form for tabulating all deer taken on that permit. In essence, this change will mean that the property owner or property manager will be responsible for determining total take on each DMAP property.

Beaver seals

The department has already determined that the beaver seal requirement should be dropped by the 2011-2012 trapping season and intended to initiate rule-making early next year. However, a recent determination that the production of the plastic pelt seals is not eligible for Federal Aid funding compels DEC to advance this change immediately. The department does not have sufficient Conservation Fund monies to pay for the additional \$6,000 required to buy plastic pelt seals.

The department has evaluated the use of trapper mail surveys to estimate beaver harvest, and the estimates of harvest derived from these surveys are sufficient for management purposes. The department already conducts these mail surveys for other purposes (e.g., determining harvest of other furbearers) so the addition of beaver adds no additional cost to the survey. (These surveys are eligible for Federal Aid funding.)

4. Costs:

The change in DMAP regulations will save about \$3,000 in printing costs. The new, inexpensive carcass tags will cost about \$500. The ending of the requirement for beaver pelt seals will save about \$6,000.

5. Local government mandates:

There are no local government mandates associated with the proposed changes.

6. Paperwork:

There is no additional paperwork associated with this proposal. While DEC has proposed requiring DMAP permit holders to submit a report on harvested deer, they already are required to do so. The proposal simply changes the format of the report, and ends the requirement for hunters to report a DMAP deer to DEC. Hunters will be required to report harvested deer to DMAP permit holders.

7. Duplication:

There are no other regulations that duplicate the proposed changes.

8. Alternatives:

To continue the DMAP program at even lower costs, DEC considered using a simple paper carcass tag that could be printed on a computer. However, a paper carcass tag would not be durable under field conditions and they could be readily duplicated on a copy machine. (Permit holders or hunters could produce unauthorized tags.) For these reasons, DEC rejected this option. The department also considered printing carcass tags using old sporting license materials but this would be too labor intensive.

The department considered buying a supply of plastic pelt seals for one more season, but there is no reason to delay the ending of the pelt sealing requirement for beaver, and DEC would have to further reduce Conservation Fund allocations to regional and central offices. Since there is an acceptable alternative for determining beaver harvest, DEC also rejected this alternative.

9. Federal standards:

There are no federal standards associated with this proposal.

10. Compliance schedule:

These changes will be implemented prior to the start of big game hunting and beaver trapping in New York.

Regulatory Flexibility Analysis

The proposed changes have no impact on small businesses or local governments. The implementation of the deer management assistance permits and beaver management programs are solely within the purview of the Department of Environmental Conservation. All administrative costs associated with these programs, including all aspects of implementation and enforcement, are the responsibility of the department. For this reason, the department has determined that a Regulatory Flexibility Analysis for Small Businesses and Local Governments is not needed.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend regulations governing the possession and reporting of deer harvested under the jurisdiction of the deer management assistance permits program, and to eliminate the requirement that trapped beaver are marked with a plastic seal. Hunters and trappers will not have to comply with any new or additional reporting or record-keeping requirements, and no professional services will be needed

for people living in rural areas (or elsewhere) to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse economic impacts on any public or private entities in rural areas of New York State. For these reasons, the department has concluded that this rulemaking does not require a formal Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend regulations governing the possession and reporting of deer harvested under the jurisdiction of the deer management assistance permits (DMAP) program, and to eliminate the requirement that beaver must be marked with a plastic seal for continued legal possession or sale. Based on the Department of Environmental Conservation's (DEC or department) past experience in promulgating regulations of this nature, and based on the professional judgment of DEC staff, the department has determined that this rule making will have no significant impact on the number of participants or the frequency of participation in deer hunting under the DMAP program, or beaver trapping. Trapping does not often involve professional guide services or other employment opportunities, and relatively few jobs exist as a direct result of trapping. The department expects that the net impact on jobs or employment opportunities to be negligible.

For all of the above reasons, the department anticipates that this rule making will have no impact on jobs and employment opportunities. Therefore, the department has concluded that a Job Impact Statement is not required.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Nitrogen Oxide (NO_x) Emission Reduction Practices and Potential Controls for Hot Mix Asphalt Production Plants

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

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

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

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

Subject: Nitrogen oxide (NO_x) emission reduction practices and potential controls for hot mix asphalt production plants.

Purpose: To reduce NO_x emissions from hot mix asphalt production plants to decrease ambient ozone and particulate matter concentrations.

Text of revised rule: Existing section 212.1 is repealed. A new section 212.1 is added as follows:

Section 212.1 Definitions

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

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

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

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

(3) **Low NO_x Burner.** A burner designed to reduce flame turbulence by the mixing of fuel and air and by establishing fuel-rich zones for initial combustion, thereby reducing the formation of nitrogen oxides.

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

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

(6) **Tune-up.** Adjustments made to a burner in accordance with procedures supplied by the manufacturer (or an approved specialist) to optimize the combustion efficiency.

Existing section 212.2 through section 212.11 remain unchanged.

A new section 212.12 is added as follows:

Section 212.12 Hot mix asphalt production plants

(a) The owner or operator of a hot mix asphalt production plant must comply with the following requirements:

(1) Beginning in calendar year 2011, a tune-up must be performed on the dryer burner on an annual basis at any hot mix asphalt production plant that is in operation during that calendar year.

(2) A plan must be submitted to the Department by March 1, 2011 which details the introduction or continuation of methods by which to reduce the moisture content of the aggregate stockpile(s). Such methods must be implemented that year, or the first subsequent year the plant is in operation.

(b)(1) Beginning January 1, 2012, the owner or operator of a hot mix asphalt production plant must analyze the economic feasibility of installing a low NO_x burner when it comes time for their current burner to be replaced. This economic analysis must follow an approach acceptable to the Department.

(2) By January 1, 2020, all owners or operators of active plants must have submitted the economic feasibility analysis for the installation of a low NO_x burner. A low NO_x burner must be installed for that operating year in all instances in which it proves feasible.

(3) Hot mix asphalt production plants which are in a state of inactivity on January 1, 2020 and have not otherwise complied with the requirements of this subdivision by that date must do so prior to continued operation.

(4) A similar analysis must be submitted for subsequent burner replacements.

(5) A low NO_x burner will be required at any new hot mix asphalt production plant.

(c) For major stationary sources, approved RACT determinations will be submitted by the Department to the United States Environmental Protection Agency for approval as separate State Implementation Plan revisions.

Revised rule compared with proposed rule: Substantial revisions were made in sections 212.1, 212.10(g) and 212.12.

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

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

Public comment will be received until: July 16, 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 Revised Regulatory Impact Statement

STATUTORY AUTHORITY

The statutory authority for this amendment is the Environmental Conservation Law (ECL) Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources," to include control requirements for hot mix asphalt production plants throughout the state. These control requirements, to be included in the new section 212.12, will be specifically aimed at reducing emissions of oxides of nitrogen (NO_x) that result from combustion during the aggregate drying and heating process. These requirements apply to any entity that owns or operates a subject plant.

At the June 7, 2006 Ozone Transport Commission (OTC) Annual Meeting, OTC member states adopted Resolution 06-02, which set forth guidelines for emission reduction strategies for six source sectors, including hot mix asphalt production plants. OTC member states agreed to pursue state rulemakings or other implementation methods to achieve emission reductions consistent with the guidelines. The Department is proposing to revise Part 212 to add NO_x reduction requirements through best practices and the potential application of low NO_x burner technology in line with the recommendations of OTC.

LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above statutes are directed toward protection of the environment and public health. NO_x emissions contribute to the formation of both ozone and particulate matter in ambient air. New York State contains nonattainment areas for the primary and secondary ozone and PM_{2.5} (both annual and 24-hour) NAAQS. As such, the air quality in these areas is not, allowing for an adequate margin of safety, sufficient to protect public health, nor is it sufficient to protect the public welfare from any known or anticipated adverse effects associated with the presence of the relevant air pollutants.

The proposed revision will yield initial NO_x reductions in 2011 via burner tune-ups and stockpile maintenance. Emission reductions will continue as facilities consider low NO_x burner replacements beginning in 2012. This rule will therefore benefit any nonattainment area relying on NO_x reductions in 2011. This includes the 1997 eight-hour ozone nonat-

ainment area of New York-N. New Jersey-Long Island, NY-NJ-CT. While the current official date to reach attainment for this area is June 15, 2010, the Department has submitted a "bump-up" request to the United States Environmental Protection Agency (EPA) to re-classify the area from moderate to serious. While EPA has yet to act on this request, the transition to a serious classification will move the date to demonstrate attainment to June 15, 2013.

On March 12, 2008, EPA took action to strengthen the NAAQS for ground-level ozone, revising the level of the 8-hour primary and secondary standards to 75 parts per billion (ppb).¹ This standard is currently in effect, though EPA has extended its deadline for making nonattainment designations. EPA later decided to reconsider these 2008 standards and on January 6, 2010, proposed a new, more stringent ozone NAAQS in the range of 60 to 70 ppb.² A final decision on the exact level of the standard is expected in August, 2010. The Department will require significant reductions of ozone precursors to meet this upcoming NAAQS. Emission reductions from these asphalt plant requirements will benefit each of the nonattainment areas in the state.

On October 8, 2009, EPA designated the New York-N. New Jersey-Long Island, NY-NJ-CT area as nonattainment for the 2006 24-hour PM_{2.5} NAAQS.³ Because NO_x acts as a precursor to particulate matter, the reduction in NO_x resulting from this rule revision will assist in this area meeting its attainment deadline of 2014.

NEEDS AND BENEFITS

Because most asphalt paving operations are performed during the summer months, NO_x emissions from these sources are more likely to react with volatile organic compounds (VOCs) in the summer heat to form ground-level ozone. NO_x emissions result from the combustion of fuel during the drying and heating of aggregate prior to its mixing with asphalt cement. Approximately 200 hot mix asphalt plants exist in New York State. Annual NO_x emissions have been approximated in the range of 550 to 600 tons in recent years. While this represents a small portion of the overall annual NO_x emissions in the state, production is concentrated during those times when NO_x emissions are most inclined to react with other precursors to form ozone.

Reducing the NO_x formed during the aggregate drying process at asphalt plants will aid in New York's attainment of the ozone NAAQS. The revised Part 212 is being included among the control measures needed for attainment of the 1997 eight-hour ozone NAAQS in the State Implementation Plan (SIP) for the New York-N. New Jersey-Long Island, NY-NJ-CT nonattainment area. The updated Part 212 will also prove important in helping to attain the revised eight-hour ozone standard, which is expected to be finalized by EPA in August, 2010. During paving operations in cooler months, NO_x emissions are more likely to contribute to increased ambient particulate levels. The revised Part 212 will be included as a measure needed to help reach attainment of the 2006 24-hour PM_{2.5} standard in the SIP for the downstate nonattainment area.

Ozone

EPA recently proposed a new set of standards for the ozone NAAQS which are scheduled to be finalized on August 31, 2010. The primary standard will likely be set in the range of 60 to 70 ppb. EPA will finalize designations for the new standards by August, 2011. Accordingly, the Department estimates that 41 to 47 New York counties will be designated as nonattainment, depending upon the level ultimately selected by EPA.

New York State is currently obligated to meet the requirements related to the 1997 eight-hour ozone NAAQS.⁴ Federal regulations require New York State to develop and implement enforceable strategies to bring nonattainment areas into attainment with the 1997 eight-hour standard by certain deadlines. This includes meeting the June 15, 2013 deadline for the serious nonattainment area of New York-N. New Jersey-Long Island, NY-NJ-CT (once EPA has approved the Department's "bump-up" request). Timely promulgation of this rule revision is required for EPA approval of the 1997 eight-hour ozone SIP.

Short-term exposure to ozone can irritate the respiratory system, reduce lung function and make it more difficult to breathe deeply. Increased hospital admissions and emergency room visits for respiratory problems have been associated with ambient ozone exposures. Longer-term exposure can inflame and damage the lining of the lungs. Studies have shown a definitive link between short-term ozone exposure and human mortality.⁵ Ozone also affects vegetation and ecosystems, leading to reductions in agricultural crop and commercial forest yields, reduced growth and survivability of tree seedlings, and increased plant susceptibility to disease, pests, and other environmental stresses such as harsh weather. Ozone damage to foliage can also decrease the aesthetic value of ornamental species and the natural beauty of our national parks and recreation areas.

The Department is working to establish or revise additional SIP programs to bring all areas into attainment for ozone. The Department is currently pursuing efforts to develop or modify a number of additional regulations to further limit NO_x and VOC emissions in order to reduce ozone levels.

Particulate Matter

By action dated July 18, 1997, EPA revised the NAAQS for particulate matter to add new standards for PM_{2.5}.⁶ EPA established health and welfare-based annual and 24-hour PM_{2.5} standards. Effective December 18, 2006, EPA revised the 24-hour standard to 35 micrograms per cubic meter.⁷ On October 8, 2009, EPA designated the New York-N. New Jersey-Long Island, NY-NJ-CT area as nonattainment for this standard.⁸ New York has the obligation to reach attainment in this area in 2014.

Fine particles are associated with a number of serious health effects including premature mortality, aggravation of respiratory and cardiovascular disease, lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems such as heart attacks and cardiac arrhythmia. Individuals particularly sensitive to fine particle exposure include older adults, people with heart and lung disease, and children.

Other Air Quality Implications

Reduced levels of NO_x will lead to visibility improvements in many parts of the eastern United States. Reductions of NO_x emissions will also reduce acidification and eutrophication of water bodies in the region. Acid deposition has resulted in damage to plant species as well, and attacks buildings, statues and sculptures by contributing to, and accelerating the decay of the materials used in the construction of these structures.

COSTS

Costs to Regulated Parties and Consumers

The Department will be requiring plants to conduct an annual burner tune-up to ensure efficient combustion for the drying and heating process. Periodic tune-ups are already a common practice because of the fuel savings that can be obtained. This requirement, yielding up to 10 percent reductions in NO_x at an approximate cost of \$1,000 per ton reduced, may have a direct payback to owners from decreased fuel use.

The Department is also requiring facilities to investigate methods to reduce moisture in aggregate stockpiles. Each plant will be required to submit its intended practice(s) plan by March 1, 2011. The plant will have to implement the stated practice(s) that year, if it is an active site, or the first subsequent year that the plant will be in operation otherwise. The primary ways by which aggregate moisture content could be reduced are by covering the stockpile, or by paving under and sloping the pile to allow water to drain away. By reducing the moisture content of the aggregate before it reaches the dryer, the amount of fuel required to dry and heat the aggregate can be considerably reduced. This could result in significant fuel savings for the plant. A technical paper released by Astec, Inc. enumerates other benefits of paving under a stockpile, and proposes an example in which a plant could offset the cost of paving under and sloping its stockpile in five to six months due to savings in materials, fuel, and loader operation. Any money saved after this payback period would be a direct benefit.⁹

Beginning January 1, 2012 (but no later than January 1, 2020) the Department will also require the owner or operator of an asphalt plant to investigate the feasibility of installing a low NO_x burner when it comes time for replacement of the burner currently in use. Additionally, a low NO_x burner must be installed at any new asphalt plant. Costs for low NO_x burners vary depending on the burner model and plant characteristics, but the amount for equipment and installation ranges from approximately \$100,000 up to \$250,000. In order to determine economic feasibility, the cost effectiveness calculation contained in Air Guide 20 will be utilized, using a threshold that represents the dollar-per-ton value of RACT at the time the analysis is done.

Costs to State and Local Governments

The department has identified the New York City Department of Transportation (NYC DOT) and City of Syracuse Department of Public Works (DPW) as owners of hot mix plants and therefore subject to the Part 212 revisions. The requirements placed on these municipally-owned plants under the proposed revisions will not differ in any way from the requirements placed on other subject plants. Aside from these plants, there are no direct costs to state or local governments associated with this proposed regulatory revision, and no additional recordkeeping, reporting, or other requirements will be imposed on local governments.

The Department believes that this regulation will reduce NO_x emissions from this sector in a manner that will not lead to large increases in the cost of hot mix asphalt. State, county and local governments represent a large portion of the customer base for hot mix asphalt plants. For some plants, the majority of sales are to such entities. These entities should not be expected to incur excessive additional costs under these new requirements.

Costs to the Regulating Agency

The Department will face some initial labor costs associated with reviewing the stockpile maintenance plan and permit modification application provided by each hot mix asphalt source by March 1, 2011. Permits will also need to be modified to include the low NO_x burner requirement for those plants that find the technology feasible. Additional costs may be minimal, as these permits are already modified and reviewed periodically. Staff has up to 45 days to review these applications. The

actual number of days required for review will vary depending upon the configuration of the source and the completeness of the application.

There will be labor costs associated with incorporating the requirements into the facility's permit, and for reviewing and processing the permit. Associated with this is a cost to publish a public notice for the permit modification, which varies depending on the scope and location of the publication(s) that carries the notice.

LOCAL GOVERNMENT MANDATES

The plants owned by the City of Syracuse DPW and NYC DOT will need to comply with the requirements of Part 212. No additional record-keeping, reporting, or other requirements will be imposed on local governments under this rulemaking.

PAPERWORK

Each facility is required to submit a plan to the Department by March 1, 2011 which puts forth its plan to reduce moisture in aggregate stockpiles. The owner or operator at each plant will be required to submit an application to modify their registration or permit to include the new section 212.12 requirements. Each facility is required to analyze the feasibility of installing a low NO_x burner when it comes time for the existing burner to be replaced (though no later than January 1, 2020) and submit its findings to the Department for approval.

DUPLICATION

Because NO_x emissions from minor hot mix asphalt production plants are being controlled for the first time, the Department does not believe that duplication of regulatory requirements will be an issue for subject plants.

ALTERNATIVES

One alternative to the proposed revisions of Part 212 is to take no action. The Department has an obligation under the ECL and the CAA to develop programs that protect the air quality in New York State. Controls on minor hot mix asphalt plants have been identified as technologically feasible and cost effective for reducing NO_x emissions, and will have a positive impact on lowering ambient ozone and PM_{2.5} concentrations.

A second alternative is to implement the OTC NO_x emission guidelines only at major facilities. The partial implementation alternative was rejected because of the insufficient reductions in NO_x emissions that would have been obtained. If the Department were to not regulate minor asphalt plants, NO_x emissions from this source category would continue to go uncontrolled.

FEDERAL STANDARDS

The addition of control requirements for hot mix asphalt production plants to Part 212 is necessary to help realize attainment in New York State's ozone and PM_{2.5} nonattainment areas by the dates mandated in the CAA.

COMPLIANCE SCHEDULE

Annual burner tune-ups will be required beginning in 2011 for any plant in operation. Each plant must also submit a plan to the Department by March 1, 2011 which details the introduction or continuation of methods by which to reduce the moisture content of their aggregate stockpile(s). Such methods must be implemented that year, or the first subsequent year the plant is in operation. Beginning January 1, 2012, the owner or operator of a plant must submit an analysis of the economic feasibility of installing a low NO_x burner when it comes time for their current burner to be replaced. A low NO_x burner must be installed in the event that the analysis proves it to be feasible. Remaining plants must submit the economic feasibility analysis to the Department by January 1, 2020, and install a low NO_x burner that year if it proves feasible. A similar analysis will be required for subsequent burner replacements. Additionally, a low NO_x burner will be required at any new hot mix asphalt production plant.

¹ 73 FR 16436, published March 27, 2008

² 75 FR 2938, published January 19, 2010

³ 74 FR 58688, published November 13, 2009

⁴ 62 FR 38856, published July 18, 1997

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

⁶ 62 FR 38652, published July 18, 1997

⁷ 71 FR 61144, published October 17, 2006

⁸ 74 FR 58688, published November 13, 2009

⁹ Technical Paper T-129, "Stockpiles" by George H. Simmons, Jr. Available on www.astecinc.com.

Revised Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process

Emission Sources," to include control requirements for hot mix asphalt production plants. These control requirements will be specifically aimed at reducing emissions of oxides of nitrogen (NO_x) resulting from combustion during the aggregate drying and heating process. The Department finds that reducing NO_x emissions from hot mix asphalt plants is a necessary step in attaining ambient concentrations of ozone and fine particulate matter that are in compliance with the national ambient air quality standards.

The current NO_x requirements under Part 212 affect only major facilities. Most, if not all, hot mix asphalt plants in New York State are minor sources. These new requirements will therefore be targeted primarily at minor sources. Approximately 200 hot mix asphalt production plants exist throughout the state, though not all are currently in service. While some asphalt production plants have consolidated under common ownership, many of these could be considered small businesses.

The Department has identified two local government entities that will be affected by the proposed requirements of Part 212. The New York City Department of Transportation (NYC DOT) has been operating a hot mix plant in Brooklyn, and just recently took over a plant in Queens. The City of Syracuse Department of Public Works (DPW) also owns a hot mix plant. The requirements placed on these municipally-owned plants under the proposed revisions will not differ in any way from the requirements placed on other subject plants.

COMPLIANCE REQUIREMENTS

The new compliance requirements under Part 212 apply uniformly statewide. Under the proposed requirements, owners and operators of hot mix asphalt production plants must comply with NO_x reduction practices and the possible application of low NO_x burner control technology. Annual burner tune-ups will be required in order to increase the efficiency of the dryer burner. Plants will also be required to implement methods of reducing the moisture content in their aggregate stockpiles, which will have the effect of requiring less drying time and therefore requiring less fuel to be burned.

The owners or operators of plants will also be required to analyze the economic feasibility of installing a low NO_x burner when their current burner is due to be replaced (though no later than 2020). In instances where it proves feasible, the installation of a low NO_x burner will be required. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

PROFESSIONAL SERVICES

Burner technicians will be utilized to comply with the annual tune-up requirements. Plant owners or operators will need to obtain low NO_x burner specifications from manufacturers to complete the economic analysis. In the event that a low NO_x burner is found to be economically feasible, the installation will be performed by burner manufacturer staff.

COMPLIANCE COSTS

The Department will be requiring plants to conduct annual burner tune-ups to ensure efficient combustion for the drying and heating process. Such tune-ups increase the efficiency of the burner, resulting in decreased fuel use and an associated decrease in emissions of NO_x and other pollutants. Periodic tune-ups are already a common practice because of the fuel savings that can be obtained. Requiring such tune-ups annually can yield 10 percent reductions in NO_x at an approximate cost of \$1,000 per ton reduced, and can have a direct payback to plant owners from decreased fuel consumption.

The Department is also requiring facilities to investigate the best method by which to reduce moisture in aggregate stockpiles. This may simply be a continuation of current practice if such measures are already being taken. By reducing the moisture content of the aggregate before it reaches the dryer, the amount of fuel required to dry and heat the aggregate can be considerably reduced. This could result in significant fuel savings for the plant. Costs will vary depending upon the method selected and the plant's site characteristics, and whether such methods are already employed. A technical paper released by Astec, Inc. (a manufacturer of asphalt plant equipment) proposes an example in which a plant with production volume of 150,000 tons per year could offset the cost of paving under its stockpile in just five to six months due to savings in materials, fuel, and loader operation.¹ Any money saved after this payback period would be a direct benefit.

Beginning January 1, 2012, the Department will also require the owner or operator of an asphalt plant to investigate the feasibility of installing a low NO_x burner when it comes time for replacement of the burner currently in use. By January 1, 2020, all plants must have submitted such an analysis to the Department. Low NO_x burners have the potential to reduce NO_x emissions by 25 to 40 percent. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

MINIMIZING ADVERSE IMPACT

Because these proposed requirements are targeted toward minor facilities, a number of small businesses will be affected, as well as the Syracuse DPW, which owns one plant, and the NYC DOT, which owns two. The Department is requiring a combination of operating practices and the analysis of control equipment to reduce NO_x emissions. In this manner, it hopes to achieve sufficient NO_x reductions while minimizing the effects on businesses. The annual burner tune-ups and reduction in aggregate moisture content will reduce NO_x at moderate cost while making the plant operate more efficiently and reduce fuel use. The Department is requiring plants to utilize the cost effectiveness threshold value for RACT in conducting the low NO_x burner analysis. In instances where the installation of a low NO_x burner would be too costly, it would not be required.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The proposed addition of NO_x control requirements to Part 212 results from a candidate control measure developed by member states of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department held a public comment period for the initially proposed revisions to Part 212, as well as public hearings on February 8, 9, and 10, 2009, as required by the State Administrative Procedures Act. On February 8, 2010, Department staff met with representatives of the New York Construction Materials Association, Inc. (NYMaterials) to discuss the requirements of the proposed revision. The Department is taking into consideration the comments received during the comment period and the views of NYMaterials in re-proposing these requirements. The Department will be holding an additional public comment period on these latest revisions, and will again take any comments received into consideration.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The various proposed requirements are all expected to be technically feasible methods of reducing NO_x at hot mix asphalt production plants, and apply equally to all plants. The annual burner tune-up requirement comes at a cost of approximately \$1,000 per ton of NO_x reduced, and the resulting increase in efficiency can lead to savings in fuel use. Similarly, the costs expended in performing stockpile maintenance can be recouped through reduced fuel use, as less energy would be required to dry the aggregate.

The Department is utilizing a cost threshold to determine the feasibility of installing low NO_x burners when the currently installed burners have reached the end of their useful life. The low NO_x emissions from some plants may preclude them from finding low NO_x burners to be cost effective, though larger plants are likely to see enough of a reduction in NO_x to make the application of such technology economically feasible.

¹ Technical Paper T-129, "Stockpiles" by George H. Simmons, Jr. Available on www.astecinc.com.

Revised Rural Area Flexibility Analysis**TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED**

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources." The proposed revision will include the addition of nitrogen oxide (NO_x) control requirements for hot mix asphalt production plants under new section 212.12. Approximately 200 hot mix asphalt production plants exist throughout the state, though not all of these are in service. All such plants throughout the state will be affected, regardless of location. Rural areas are not disproportionately affected by these new control requirements under Part 212.

COMPLIANCE REQUIREMENTS

The new compliance requirements under Part 212 apply uniformly statewide. Under the proposed requirements, owners and operators of hot mix asphalt production plants must comply with NO_x reduction practices and the possible application of low NO_x burner control technology. Annual burner tune-ups will be required to increase the efficiency of the dryer burner. Plants will also be required to implement methods of reducing the moisture content in their aggregate stockpiles, which will have the effect of requiring less drying time and therefore requiring less fuel to be burned.

Owners and operators of plants will also be required to analyze the economic feasibility of installing a low NO_x burner when their current burner is due to be replaced (though no later than 2020). In instances where it proves feasible, the installation of a low NO_x burner will be required. This analysis will utilize the cost effectiveness calculation contained in the

Department's Air Guide 20 guidance document. Additionally, a low NO_x burner will be required at any new hot mix asphalt production plant.

COSTS

The Department will be requiring plants to conduct an annual burner tune-up to ensure efficient combustion for the drying and heating process. Such tune-ups increase the efficiency of the burner, resulting in decreased fuel use and an associated decrease in emissions of NO_x and other pollutants. Periodic tune-ups are already a common practice because of the fuel savings that can be obtained. Requiring such tune-ups annually can yield 10 percent reductions in NO_x at an approximate cost of \$1,000 per ton reduced, and can have a direct payback to plant owners from decreased fuel consumption.

The Department is also requiring facilities to investigate the best method by which to reduce moisture in aggregate stockpiles. This may simply be a continuation of current practice if such measures are already being taken. By reducing the moisture content of the aggregate before it reaches the dryer, the amount of fuel required to dry and heat the aggregate can be considerably reduced. This could result in significant fuel savings for the plant. Costs will vary depending upon the method selected and the plant's site characteristics, and whether such methods are already employed. A technical paper released by Astec, Inc. (a manufacturer of asphalt plant equipment) proposes an example in which a plant with production volume of 150,000 tons per year could offset the cost of paving under its stockpile in just five to six months due to savings in materials, fuel, and loader operation.¹ Any money saved after this payback period would be a direct benefit.

Beginning January 1, 2012, the Department will also require the owner or operator of an asphalt plant to investigate the feasibility of installing a low NO_x burner when it comes time for replacement of the burner currently in use. By January 1, 2020, all plants must have submitted such an analysis to the Department. Low NO_x burners have the potential to reduce NO_x emissions by 25 to 40 percent. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

MINIMIZING ADVERSE IMPACT

The Department does not expect any adverse impacts on rural areas. Because the proposed asphalt plant requirements are applicable to sources statewide, no rural area will be affected disproportionately.

The Department is requiring a combination of operating practices and the analysis of control equipment to reduce NO_x emissions. In this manner, it hopes to achieve sufficient NO_x reductions while minimizing the effects on businesses. The annual burner tune-ups and reduction in aggregate moisture content will reduce NO_x emissions at moderate cost while making the plant operate more efficiently and reducing fuel use. The Department is requiring plants to utilize the cost effectiveness threshold value for RACT in conducting the low NO_x burner analysis. In instances where the cost of installation of a low NO_x burner would exceed the RACT threshold, the installation of such equipment would not be required.

There will be positive environmental impacts from the regulation in rural areas. Rural areas containing applicable sources, as well as rural areas downwind of such sources, should be subject to a decrease in ground-level ozone, airborne particulate matter, and acid deposition due to the reduction in NO_x emissions.

RURAL AREA PARTICIPATION

The proposed addition of NO_x control requirements to Part 212 results from a candidate control measure developed by member states of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department held a public comment period for the initially proposed revisions to Part 212, as well as public hearings on February 8, 9, and 10, 2009, as required by the State Administrative Procedures Act. On February 8, 2010, Department staff met with representatives of the New York Construction Materials Association, Inc. (NYMaterials) to discuss the requirements of the proposed revision. The Department is taking into consideration the comments received during the comment period and the views of NYMaterials in re-proposing these requirements. The Department will be holding an additional public comment period on these latest revisions, and will again take any comments received into consideration.

¹ Technical Paper T-129, "Stockpiles" by George H. Simmons, Jr. Available on www.astecinc.com.

Revised Job Impact Statement**NATURE OF IMPACT**

The New York State Department of Environmental Conservation

(Department) proposes the addition of nitrogen oxide (NO_x) control requirements for hot mix asphalt production plants under 6 NYCRR Part 212, "General Process Emission Sources." The proposed requirements under new section 212.12 seek NO_x reductions through operational practices and equipment upgrades. Plants throughout the state will be required to perform annual burner tune-ups, which can yield 10 percent reductions in NO_x at an approximate cost of \$1,000 per ton reduced. Plants will also be required to submit to the Department a plan for reducing moisture content in aggregate piles, resulting in less energy being used in the dryer and an associated reduction in NO_x. These requirements can lead to a beneficial fuel savings for the plant. The Department will also require that, when their current burner has reached the end of its useful life (starting in 2012, but no later than 2020), plant owners must analyze the economic feasibility of installing a low NO_x burner. Low NO_x burners have the potential to reduce NO_x emissions by 25 to 40 percent, and come at approximately double the cost of non-low NO_x models. The Department will utilize a cost effectiveness calculation similar to that contained in Air Guide 20, with a threshold that represents the value of RACT at the time the analysis is done, in order to determine economic feasibility. Additionally, a low NO_x burner will be required at any new hot mix asphalt production plant.

The Department believes that the proposed NO_x control requirements at hot mix asphalt production plants are necessary components of the ozone and PM_{2.5} state implementation plans. This control strategy is an outgrowth of ongoing efforts by the Ozone Transport Commission (OTC) to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six source sectors, including asphalt production plants. OTC member states felt that controlling these sources was an effective strategy for the reduction of NO_x, and could be done without negatively impacting the success of the industry. The Department's proposed revisions, combining best practices which may have a payback to owners and a technical control analysis which utilizes a cost effectiveness threshold, are not expected to have excessive costs resulting in a substantial adverse impact on jobs or employment opportunities in New York State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The revisions to Part 212 are not anticipated to have any long-term effects on the number of current jobs or future employment opportunities. In order to comply with the control requirements, subject facilities may be required to purchase and install a low NO_x burner. To prevent a source from adopting excessively expensive controls, an economic feasibility analysis will be used to determine if a low NO_x burner is appropriate. Increased demand for burner technicians may result from the requirement for annual tune-ups contained in the proposed revisions.

REGIONS OF ADVERSE IMPACT

The addition of control requirements for hot mix asphalt production plants under section 212.12 applies statewide. Because these sources are not concentrated heavily in any particular part of the state, these new requirements do not impact any region or area of New York State disproportionately in terms of jobs or employment opportunities.

MINIMIZING ADVERSE IMPACT

The owner or operator of a hot mix asphalt production plant will be required to analyze the economic feasibility of installing a low NO_x burner when it comes time for replacement of the burner currently in use. By utilizing a specific cost threshold for this analysis, the Department is ensuring that the applicable facility does not undergo any excessive costs which may adversely impact its ability to operate. Allowing plants until 2020 to investigate the feasibility of a low NO_x burner will ensure that no company will be forced to immediately replace a burner that has just recently been installed. By reviewing these assessments on a case-by-case basis, the Department avoids placing uniform standards on all asphalt plants, which could potentially lead to extraneous costs in many instances.

Owners or operators will be required to perform an annual burner tune-up beginning in 2011. This control method is expected to come at reasonable cost, and a portion of this cost would potentially be offset with a resulting increase in fuel efficiency. Owners or operators must also develop a plan by which to reduce moisture content in aggregate piles, the result of which would be decreased dryer operation. This NO_x reduction method could likewise have a direct payback to the plant due to potential fuel savings of approximately 10 to 15 percent.

SELF-EMPLOYMENT OPPORTUNITIES

The revisions to Section 212.10 are not expected to affect self-employment opportunities. The case-by-case nature of the low NO_x burner cost analysis seeks to prevent any excessive expenditure on NO_x control equipment which would affect such opportunities.

Assessment of Public Comment

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Part 212, General Process

Emission Sources, to add new section 212.12, Hot mix asphalt production plants. This regulatory revision is for the purpose of reducing emissions of oxides of nitrogen (NO_x) from these asphalt plants in order to comply with the increasingly stringent ozone National Ambient Air Quality Standards (NAAQS).

The Department proposed the revisions to Part 212 on December 23, 2009. Hearings were held in Avon on February 8, 2010, in Albany on February 9, 2010, and in Long Island City on February 10, 2010. The comment period closed at 5:00 p.m. on February 17, 2010. The Department received written and oral comments from 11 commenters on the proposed revisions. All of the comments have been reviewed, summarized, and responded to by the Department.

A number of commenters felt that NO_x emissions from the hot mix asphalt (HMA) industry were too insignificant to regulate. They cited that only approximately 0.10 percent of annual statewide NO_x emissions are from this source category. Furthermore, the economic downturn has naturally curbed production, and therefore NO_x emissions, over the last couple years. The Department is taking action to control emissions from these plants because of the widespread ozone issues throughout New York and the northeast region. The United States Environmental Protection Agency (EPA) is scheduled to declare its new ozone NAAQS in August, 2010. The Department currently expects that the majority of New York State will be designated as nonattainment for this standard. New York State is a member of the Ozone Transport Commission (OTC) which, after a lengthy review process, identified the HMA industry as a source of adequate potential NO_x reductions. Because of the current and impending nonattainment areas in New York State which require emission reductions to meet safe ozone levels prescribed by the NAAQS, the Department is taking action to regulate emissions from these HMA plants, along with the other source categories identified by the OTC.

While NO_x emissions from this source category may represent a small portion of the overall annual NO_x emissions in New York State, the vast majority of hot mix operations occur during the summer, and particularly on hot, sunny days. This differs from industries or sources that have emissions year-round (e.g., motor vehicles, power generating plants, other industry). Although HMA emissions may be lower than those other source categories on an annual basis, production is concentrated during those times when NO_x emissions are most inclined to react with other precursors to form ozone. It is due to these disproportionate ozone season emissions that the Department has followed OTC's proposal to impose NO_x reduction requirements. In addition, as the economy rebounds from its recession and federal, state, county and local governments are able to make greater expenditures for roadway and infrastructure improvements, HMA production (and associated NO_x emissions) will again increase.

Many commenters noted the high costs and short timeframe for the new control requirements, which would primarily include an analysis of the technical and economic feasibility of low NO_x burners and flue gas recirculation (FGR). The FGR assessment has been removed as a requirement in the re-proposal. The Department has also extended the compliance time for a low NO_x burner assessment through 2020. As with the initial proposal, in order to manage costs incurred by plants, the Department is utilizing a cost-per-ton threshold equal to that used for Reasonably Available Control Technology (RACT). The use of this RACT threshold, currently valued at \$5,500 per ton of NO_x reduced, will prevent HMA plants (especially smaller and more efficient plants) from making large capital expenditures when emissions would be low enough so as to prevent such controls from being cost-effective. The Department is also instituting best practice methods of reducing NO_x, as suggested in the comments by the National Asphalt Pavement Association (NAPA) to OTC and by the New York Construction Materials Association (NYMaterials). These requirements will include annual tune-ups to ensure efficient operation of the burner, and stockpile maintenance to reduce the moisture content of the aggregate being sent to the dryer. These approaches will reduce fuel use and associated NO_x emissions at reasonable cost, potentially with a net savings.

Commenters noted that there were additional costs of compliance which were not discussed in the Regulatory Impact Statement (RIS). These included costs associated with plant closures, dryer burners that have already been replaced in recent years, reduced fuel efficiency attributable to low NO_x burners, additional equipment which will require more maintenance, related costs with FGR installation, and the potential de-rating of plants due to low NO_x burners. The Department has addressed these concerns in the re-proposal and has revised its position on low NO_x burners, has removed the FGR analysis requirement, and has added a discussion regarding the other concerns in the revised RIS.

Because a large portion of HMA sales are to state, county, or local governments, some commenters were concerned that the costs of compliance would necessarily be passed to these entities and eventually to taxpayers. The Department has included compliance methods in the re-proposal that will reduce NO_x emissions from the sector in a manner that

will not lead to large increases in the cost of HMA. State, county and local governments should not be expected to incur excessive additional costs under these new requirements.

Some commenters expressed the difficulty the industry would have in meeting the compliance date of the original proposal, particularly due to the uniqueness of plants and the configuration of new technologies that would have to be assessed at each site. The Department has included a prolonged compliance period in the re-proposal.

Commenters were concerned about the consistency with which the control technology assessment would be reviewed and interpreted by the Department's regional offices. They cited a lack of reconciliation procedures if the owner and Department disagree on the outcome of the control technology analysis. The Department has also not provided a definition of "low NO_x burner" or stated specific emission rate targets, which could add to inconsistency. In the re-proposal, the control technology assessment has been simplified to an economic feasibility analysis for a low NO_x burner. For consistency in the economic feasibility test, the Department will utilize the approach contained in its Air Guide 20 guidance document and the value of Reasonable Available Control Technology (RACT) at the time the analysis is done. Burner manufacturers contacted by the Department have dedicated models which they refer to as "low NO_x," which should remove ambiguity. Department staff will also be encouraged to share information on which burners get approved as being "low NO_x." If the plant owner and Department staff differ in their interpretation of the results of the assessment, the parties will work together in an effort to reach a common conclusion as is the case with most of the Department air pollution control requirements.

A comment was received that the Department should not require plants to operate with natural gas to reduce NO_x emissions, as not all sites are serviced by natural gas and the cost of new infrastructure at these plants would be exorbitant. The Department had never intended to use this as a requirement, and clarifying language has been added to the RIS to that effect.

It was noted by commenters that some HMA plants maintain active permits yet are non-operational for long periods of time. They noted that the proposed regulations do not offer stipulations for such plants, and suggested that inactive plants be exempted from the control technology assessment until they are scheduled for reactivation. The Department has included conditions in the revised express terms to account for inactive plants.

Numerous commenters discussed how, in the last five years, the industry has made concerted efforts to develop and promote the use of warm mix asphalt (WMA), which heats the aggregate to temperatures approximately 35 percent lower than traditional HMA and reduces fuel consumption by approximately 25 percent and NO_x emissions by 34 percent. The industry expects to see increased use of WMA over the next few years as it becomes more commonly accepted for large paving projects. Commenters noted that the use of WMA will reduce emissions without a large capital investment, will reduce fuel consumption and will not greatly affect blacktop costs.

The Department finds the potential growing use of WMA to be encouraging, and recognizes that the industry will naturally devote more and more of its production to WMA as its use becomes accepted for a greater number of projects. The New York State Department of Transportation (NYSDOT) is still conducting testing on the use of WMA to ensure that it can be used as a suitable replacement for HMA on large jobs, and handle the most severe weather and traffic conditions. Because NYSDOT has yet to finalize its specifications for WMA and define where it can be acceptably applied, the Department is unable to explicitly require its production and use; WMA will likely have varying levels of demand in different parts of the state as well, further complicating any attempts to regulate its use. The Department encourages its expanded production when possible. However, the Department is retaining the requirement for a low NO_x burner analysis in the re-proposal because NO_x emissions from the largest plants will likely remain high enough to justify the installation of a low NO_x burner.

In light of the low levels of NO_x emissions from this source category, commenters stated that the Department should focus on regulating NO_x emissions from larger sources to achieve compliance with the ozone NAAQS. The Department is currently undertaking a number of additional rulemakings to seek NO_x and volatile organic compound (VOC) reductions from other sources for the purpose of attaining the NAAQS. This includes the other source categories identified in the OTC's Resolution 06-02. The Department has determined that it is necessary to regulate smaller and smaller sources to obtain adequate reductions of ozone precursors so that air quality in all areas of New York State can reach healthy levels within the NAAQS.

Citing reasons such as excessive cost and minimal reductions in NO_x emissions, a couple of commenters recommended that the regulation be withdrawn. Others called for a review of more practical options of NO_x

control from HMA. In the latter case, it was suggested that the Department work with NYMaterials, which represents many HMA plants throughout the state, to identify alternative compliance methods which achieve more cost-effective NO_x reductions. The Department explains in the "Alternatives" section of the RIS why the "no action" option is not practical—namely, that these emission reductions are necessary to aid in reaching attainment of the ozone NAAQS. In considering alternative compliance options for the re-proposal, the Department has been having discussions with NYMaterials, beginning with a meeting at the Department's central office on February 8, 2010. These conversations have been very productive and helpful for the purposes of this re-proposal.

One commenter claimed the proposed language did not go far enough in separating cases where application of RACT requirements would serve the important purpose of NO_x reduction from cases where application of RACT would be wasteful. For cases where low emission rates have been achieved without the use of a low NO_x burner, the commenter felt an economical and technical analysis along with the permit modification would be onerous, and that provisions for annual tune-ups and stockpile management should be sufficient. The Department is taking steps in its re-proposal to manage the costs to small, well-managed plants. Investigation of controls beyond low NO_x burners is no longer a requirement. For example, the economic analysis required for the installation of a low NO_x burner will prevent such small and efficient plants from installing equipment which will lead to minimal emission reductions, because the cost-per-ton figure for these plants would exceed the threshold established as RACT. Annual burner tune-up and stockpile management requirements have been included in the re-proposal.

A commenter noted that the HMA provisions should be expanded to apply to all plants throughout the state, as the applicability was currently limited by subdivision 212.10(a). The re-proposal applies to all HMA plants throughout the state.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Limiting Emissions of Volatile Organic Compounds (VOCs) from Commercial and Industrial Adhesives, Sealants and Primers

I.D. No. ENV-51-09-00010-RP

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

Proposed Action: Amendment of Parts 200 and 228 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

Subject: Limiting emissions of Volatile Organic Compounds (VOCs) from commercial and industrial adhesives, sealants and primers.

Purpose: To continue making progress towards reducing the eight hour ozone levels for New York's designated nonattainment areas.

Substance of revised rule: 6 NYCRR Part 228 is being renumbered as Subpart 228-1. Internal references in the existing Part are being revised to reflect this renumbering. 6 NYCRR Part 200.9 is being amended to include documents incorporated by reference in new Subpart 228-2 and to reflect the renumbering of existing Part 228.

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

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

sive application methods, and work practices for adhesive-related handling activities and cleaning materials. The proposed revisions have the following requirements:

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

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

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

D. Establishes a VOC limit for surface preparation solvents;

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

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

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

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

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

J. The reproposal adds provisions allowing for process-specific RACT determinations.

Several adhesive and sealant applications and products are exempt from this model rule: tire repair, testing and evaluation associated with research and development, solvent welding operations for medical devices, plaque laminating operations, products or processes subject to other New York State rules, low-VOC products (less than 20 g/l), and adhesives subject to the New York State rules based on the OTC 2001 consumer products model rule. Additionally, the model rule provides an exemption for adhesive application operations at emissions sources that use less than 55 gallons per year (12-month rolling average) of non-complying adhesives and for emissions sources that emit not more than 200 pounds of VOCs per year from adhesives operations.

Until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes and permissible time periods for the manufacture, sale and distribution of the existing adhesives, sealants, and primers. On and after the effective date of this rule, a 15 month sell-through period will allow the sale and use of non-compliant industrial and commercial adhesives, sealants and primers.

Revised rule compared with proposed rule: Substantial revisions were made in sections 228-2.1(a), (b), 228-2.2(b), 228-2.3(a), (b), (d), (g), 228-2.4(a)(6), (c)(1), (2), (g) and 228-2.7(a).

Text of revised proposed rule and any required statements and analyses may be obtained from Robert Waterfall, P. E., NYS DEC - Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8403, email: 228ract@gw.dec.state.ny.us

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

Public comment will be received until: July 16, 2010.

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

Summary of Revised Regulatory Impact Statement

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Con-

servation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground-level ozone pollution: nitrogen oxides (NOx) and volatile organic compounds (VOCs). The Department has listed this proposed regulatory revision for commercial and industrial adhesives, sealants and primers as a measure that would help progress toward attainment. The adoption of the proposed Subpart 228-2 amendment, Commercial and Industrial Adhesives and Sealants, and attendant revisions to Part 200, General Provisions, marks the latest action in a sustained series of actions undertaken by New York State, in concert with EPA and other States, in an effort to control emissions of ozone precursors, NOx and VOCs, so that the New York State may attain the ozone NAAQS.

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

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

There are no direct costs to state and local governments associated with this proposed regulation. However, state and local governments, like other consumers, will need to pay the increased prices for consumer products that are manufactured using commercial and industrial adhesives, sealants and primers resulting from compliance with the new, more restrictive VOC content limits. No additional record keeping, reporting, or other requirements will be imposed on local governments under the rulemaking. The authority and responsibility for implementing and administering the proposed Subpart 228-2 resides solely with the Department. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale industrial and commercial adhesives, sealants and primers. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

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

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

Alternatives 2, 3 and 4 are proposed in this rulemaking because these alternatives will allow industrial and commercial users of the regulated adhesives and sealants greater flexibility in reducing VOC emissions. Facilities presently operating control equipment in their

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

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

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

Revised Regulatory Flexibility Analysis

1. Effects on Small Businesses and Local Governments. No small businesses or local governments will be directly affected by the proposed amendment to 6 NYCRR Part 228, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to 6 NYCRR Part 200, General Provisions. Small businesses that manufacture affected products must comply with the VOC content limits, labeling and reporting requirements of Subpart 228-2. Since this can represent a small portion of their total business and the burden of reformulation falls on the major manufacturers, the impact on small businesses will be minimal, if any. For any cases where changes are made to products through reformulation, there is the possibility that these same small businesses would be able to provide the required alternative products. Three months after the effective date of this rule, small businesses may not sell, supply, offer for sale, or manufacture for sale in New York State, any commercial or industrial adhesive, sealant, adhesive primer or sealant primer manufactured on or after that date, unless it complies with the applicable VOC content limits specified in the rule. Small businesses and local governments that purchase affected products will be affected by the increased prices of affected commercial and industrial adhesives, sealants and primers resulting from the Subpart 228-2 amendment.

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

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

Small businesses that manufacture commercial or industrial adhesives, sealants and primers products must also comply with the labeling requirements of Subpart 228-2. This entails displaying the maximum VOC content (as supplied and as applied when used in ac-

cordance to the manufacturer's recommendations) on the label, lid or bottom of the container.

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

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

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

There is a limited possibility that some facilities may need to install add-on controls, which is a more costly alternative. Add-on devices include, for example, oxidizers, adsorbers, and concentrators. For some industrial manufacturing applications, low-VOC adhesives do not meet performance requirements, and add-on controls must be employed. Facilities may elect to comply with the proposed rule's requirements by using add-on control equipment. It is expected that most users will not select this option due to the availability of compliant adhesives, especially those that will meet the rule's standards, and due to the high cost of installing and operating the control equipment. At a cost-effectiveness of \$9,000 to \$110,000 per ton of VOC reduced, the use of add-on control equipment to comply with the requirements of the proposed rule may be a cost-effective option for only a few facilities. In the event a facility cannot economically achieve compliance with this rule by the use of low VOC adhesive products or by the installation of add-on controls, an available hardship exemption may be granted to the facility in accordance with a process-specific RACT demonstration provision included in the reproposal.

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

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

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

To further mitigate adverse impacts, Ozone Transport Commission (OTC) implementation options were included in Subpart 228-2 to minimize the impact of this regulation on the regulated parties, including manufacturers that are small businesses. In addition, the proposed

implementation date allows additional time for manufacturers to reformulate their products to comply with the new VOC content limits. This will be especially helpful to small manufacturers who have limited research and development budgets.

6. Small Business and Local Government Participation. The OTC workgroup that developed the OTC model rule, which the Subpart 228-2 amendment is based, held informal regulatory development meetings with stakeholders and other interested parties, such as the National Adhesive and Sealant Council, the National Paint and Coatings Association, and the EPDM Roofing Association. These associations and its member companies provided the OTC workgroup comments during the development of both the OTC model rules and the individual regulations of participating OTC states. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comment on the draft model rules. Since this regulation does not particularly affect small businesses and local governments, no special outreach efforts were made. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

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

Revised Rural Area Flexibility Analysis

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Conservation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground-level ozone pollution: nitrogen oxides (NOx) and volatile organic compounds (VOCs). The Department has listed this regulatory amendment, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to Part 200, General Provisions, as a measure that would help progress toward attainment in SIPs already submitted to EPA for the New York-New Jersey-Long Island, NY-NJ-CT and Poughkeepsie nonattainment areas. This rule revision will also be included in the SIPs for the Jamestown and Buffalo-Niagara Falls nonattainment areas. Additionally, these more stringent requirements for production and use of commercial and industrial adhesives, sealants and primers will provide a necessary component of realizing the recently announced 2008 NAAQS for ozone, which will require that ambient concentrations throughout the state meet a 0.075 ppm standard.

This VOC control strategy is an outgrowth of the Ozone Transport Commission's (OTC) ongoing efforts to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six source sectors, including industrial adhesives, sealants and primers. OTC member states agreed to pursue state rulemakings or other implementation methods to achieve emis-

sion reductions consistent with the guidelines. The Department is proposing to develop regulations to require VOC emission reductions consistent with the OTC guidelines for commercial and industrial adhesives, sealants and primers. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. Facilities using less than 55 gallons of noncompliant commercial or industrial adhesives, sealants, primers and cleanup solvents in a 12-month period are exempt from the product VOC content requirements of the proposed rule.

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

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

2. Reporting, recordkeeping and other compliance requirements: The criteria and procedures in Subpart 228-2 apply statewide. Reporting requirements are applicable to the company, firm or establishment which is listed on the product's label. If the label lists two or more companies, firms, or establishments, the "Responsible Party" is the party which the product was "manufactured for" or "distributed by," as noted on the label. For record keeping, as well as labeling, the responsibility will reside with the manufacturers of commercial and industrial adhesives, sealants and primers. Other compliance requirements exist as well that are applicable to any person who sells, supplies, offers for sale, or manufactures these products. One such applicable requirement will be for compliance with the VOC content limits for each of the commercial and industrial adhesives, sealants and primers specified in the proposed Subpart 228-2. Although these products are used in rural areas, rural areas are not particularly affected. Professional services are not anticipated to be necessary to comply with this rule.

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

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

The Department undertook no special cost analysis for rural areas as the costs associated with the proposed Subpart 228-2 are not expected to vary for rural areas. However, small businesses and local governments will need to pay the increased prices for consumer

products resulting from compliance with the new, more restrictive VOC content limits. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

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

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

Revised Job Impact Statement

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

CARB determined that most manufacturers and users of commercial and industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. CARB developed cost estimates, with the assumption that all facilities will choose the low-VOC adhesive materials alternate. With the belief that low-VOC adhesives that can meet the recommended control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content, the cost effectiveness is estimated to be in a range of \$265 to \$2,320 per ton of VOC emission reduction.

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

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

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

4. Minimizing adverse impact: Although the Department does not expect this regulation to have any effect on employment, flexibility provisions have been included in the regulation to facilitate compliance. These flexibility provisions, including: VOC content limits by product category; allowing the use of add-on air pollution

control equipment for those facilities needing the operational flexibility to use high-efficiency add-on controls instead of low-VOC content adhesives (especially when the use of high VOC adhesives is necessary or desirable for product efficacy); and work practices to reduce VOC emissions, are expected to lower compliance costs and, therefore, mitigate any adverse impacts on employment. In the event a facility cannot economically achieve compliance with this rule by the use of low VOC adhesive products or by the installation of add-on controls, an available hardship exemption may be granted to the facility in accordance with a process-specific RACT demonstration provision included in the reproposal.

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

5. Self-employment opportunities: Not Applicable.

Assessment of Public Comment

The Department received four comments to the proposed revisions to Part 228.

The comments were grouped as follows:

1. Comment: With regard to the sell-through period identified in "Section 228-2.3 (b) Requirements", Oatley and the America Coatings Association (ACA) are requesting that the sell-through period language be modified to allow for an indefinite sell-through period. NRLA is requesting a nine month sell-through period. The request is being made to allow for wholesalers, retailers and plumbing contractors throughout New York State to continue to receive value from products that were manufactured prior to the implementation date for the regulation. ACA claims that the states that have adopted a regulation for industrial adhesives and sealants, including Delaware, Maryland, New Jersey, Rhode Island, and Maine, allow for an unlimited sell-through, use and application, so long as the product is date-coded in compliance with certain requirements. Commenters: 1, 2, 3

Response: The Department wishes to clarify its timing of both the effective date of proposed Subpart 228-2 and the subsequent sell-through period, and also to express its position on the allowance for indefinite product sell-through periods.

In order to meet federal NAAQS standards for reduction of ground level ozone levels in non attainment areas in New York State, reductions of VOC emissions from several identified area sources must be achieved, one of which is adhesives and sealants. In 2006 the Ozone Transport Commission issued several model rules for member states to use in developing their individual State Implementation Plans (SIP). Hence, each state has its own requirements and is not obligated to follow the model rules exactly.

It is imperative that non-compliant products be taken off the retail market as soon as possible so that New York State may take credit for the quantities of VOC reductions it has committed to in its SIP. Therefore, New York State cannot agree to an indefinite sell-through period. In fact, the OTC Adhesives and Sealants Model Rule are not configured for the incorporation of an indefinite sell-through period. Section VII, "Container Labeling", of the model rule (OTC Model Rule for Adhesives and Sealants, Ozone Transport Commission, 2006) has no provisions for product container dating or date-coding. In other words, non-compliant products could continue to be produced and sold after the rule's effective date, with no way of determining if any given individual adhesive or sealant container was manufactured before or after the effective date of the rule. As for the individual OTC state adhesive and sealant rules currently in effect, only New Jersey has specified dating/date-code requirements in its adhesives and sealants product labeling requirements.

For the above reasons, a permanent sell-through of existing non-compliant products has not been included in the reproposal of the rule. However, a one year sell-through period starting three months after the rule's effective date, is included to give retailers and distributors time to reorganize their adhesive and sealant stocks and sell remaining stocks of non-compliant products.

2. Comment: The methyl ethyl ketone (MEK) used in plastic solvent welding operations should be excluded from the definition of “adhesive”. In the applicable rule, a plastic cement welding adhesive is defined as “any adhesive labeled for use to dissolve the surface of plastic to form a bond between mating surfaces. The MEK used in this operation is not “labeled” as an adhesive. Commenter: 4

Response: The language used to identify our intent to prevent the use of non-compliant products, inadvertently failed to address other materials used to perform the same function as the listed adhesives (e.g., general-use industrial solvents, as alternative plastic solvent welding adhesives). Modifications of certain rule definitions and other changes to the terms of the adhesives and sealants rule to restrict the use of adhesives, sealants, primers and other materials with VOC content higher than those of the applicable limits of Table 1 are included in the reproposal.

3. Comment: If the MEK used at the Sonoco facility is considered by NYS DEC to be applicable under the Part 228 rule as a plastic cement welding adhesive, there is absolutely no way for a compliant material to be substituted because the compound contains 100% VOC. New York could add an exemption for all solvent welding operations where the only viable adhesive consists of 100 percent solvent. Commenter: 4

Response: Incorporation of an exemption to allow the use of alternative plastic welding solvents with very high VOC content would likely defeat the purpose of the rule, which is to effect an overall reduction of VOC emissions from this particular industrial product group in order to reduce the formation of ground level ozone. However, OTC states have the opportunity to incorporate other options, including variances and alternative control plans to grant partial relief to facilities with certain hardship cases, such as those adhesive applications where alternative products are not available and where incorporation of add-on controls would not enable the achievement of the control efficiency required by the rule. New York is incorporating provisions allowing process-specific RACT demonstrations in the reproposal of the Part 228 rule.

4. Comment: Other RACT provisions have a variance element that allow for a demonstration of economic infeasibility (see, e.g., (Part 223.3(e)). If an otherwise regulated facility were able to make a demonstration to the state’s satisfaction that there is no other way to come into compliance, we suggest that the new Subpart 228-2 should make similar allowances. If this were allowed, Sonoco would be able to conduct a site-specific RACT analysis (with vendor quotations) to determine economic feasibility. Commenter: 4

Response: As stated in the response to comment 3, provisions allowing process-specific RACT demonstrations are incorporated in the reproposal of the Part 228 rule.

5. Comment: The state could place a lower threshold for very small facilities. For instances, facilities with actual emissions of less than 10 tons of VOC per year could be exempted entirely from the regulation. Commenter: 4

Response: The proposed Subpart already contains a low-usage exemption for sources using less than 55 gallons of noncompliant products per year. In addition, the provisions in the reproposal allowing process-specific RACT demonstrations require the applicant to address the technical and economic feasibility of alternatives. This will result in requiring facilities that can comply to do so, while allowing facilities that truly cannot comply to have some level of relief from the requirements.

APPENDIX
LIST OF COMMENTERS

Commenter number	Name and Affiliation
1.	Sara Morgan, Oatley Company
2.	Thomas Lindberg, Northeast Retail Lumber Association (NRLA)
3.	Heidi K. McAuliffe, Esq., American Coatings Association, Inc.

4. Scott T. Lundy, Sonoco Crellin Corporation

Department of Health

NOTICE OF ADOPTION

Environmental Testing for Critical Agents Using Autonomous Detection Systems (ADS)

I.D. No. HLT-49-09-00006-A

Filing No. 573

Filing Date: 2010-05-28

Effective Date: 2010-06-16

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

Action taken: Amendment of Subpart 55-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

Subject: Environmental Testing for Critical Agents Using Autonomous Detection Systems (ADS).

Purpose: Establishes standards for certification of environmental labs using new technologies to analyze samples for critical agents.

Substance of final rule: This amendment to Subpart 55-2, which revises Sections 55-2.10 and 55-2.13, as well as adds a new Section 55-2.14, establishes standards for the certification and operation of environmental laboratories that seek approval to engage in critical agent testing by means of new technologies, including polymerase chain reaction (PCR)-based methods and immune-based bioassays employed at a fixed-base facility, or by use of an autonomous detection system (ADS) deployed in the field. An ADS is, generally speaking, an automated, real-time, self-contained sampling and analytical system for detection of critical agents situated outside a fixed-base laboratory.

Section 55-2.10(d) is amended by replacing “section” with “Subpart” to clarify that the requirement to designate a temporary director in the extended absence of the technical director, with notice to the Department whenever the absence exceeds sixty-five days, applies to environmental laboratories whose technical directors qualify under Section 55-2.13 or 55-2.14.

Section 55-2.13(a) is amended by adding “component of an organism” to the definition of critical agent, and clarifying that select agents as designated by the federal Centers for Disease Control and Prevention are also included within that definition. The amendment also clarifies that the terms “chemical element” and “chemical compound” include radioactive substances.

Subdivisions (b) through (d) of Section 55-2.13 are amended to incorporate several references to ADSs in written policies and procedures already prescribed in Subpart 55-2, and to authorize the Department to consider, as part of the certification process, a laboratory’s capacity to assume an appropriate role in the public health and safety emergency response to detection of critical agents. Air is added to the list of example sample matrices, as all ADSs now commercially available sample air. Time of specimen collection is added to requisite report content. The timeframe for reporting results is changed to “as soon as practicable, but no later than 24 hours,” and a maximum of one hour is specified for the laboratory’s notification following an ADS signal. Definitions are included for “supplemental testing” and “confirmatory testing,” and laboratories conducting such testing in response to an ADS signal are required to make available their findings to the approved laboratory operating the ADS.

Personnel requirements in existing Section 55-2.13(f) have been modified to include, as director-qualifying experience, work performed using technologies other than conventional microbiologic techniques, i.e., experience in analysis using the specific technology of the device, instrument or system for which the laboratory is seeking approval (e.g., nucleic acid detection by the PCR technique). “Conventional microbiologic techniques” are defined as culture, use of differential media, stains and/or biochemical reactions, and morphologic

examination of colonies and/or organisms. Additional flexibility has been afforded to substitute coursework in the specific technology for one year's such experience.

A new Section 55-2.14 is added to establish certification and operational requirements for laboratories engaged in testing for critical agents in environmental samples using an ADS. An "autonomous detection system" is defined as a fixed or portable self-contained analytical system that: automatically, continuously or periodically samples the environment; analyzes sample(s); and triggers an alert that a critical agent, as defined in Section 55-2.13, has been detected. "Deploy" is defined as engaging an ADS in real time collection and analysis of environmental samples for purposes of detecting incidental release of a critical agent. The section includes an express exception for six commonly used devices, and makes clear the authority of the Commissioner of Health to make determinations whether Department oversight is required for any environmental sampling and/or testing device that is or has been deployed for a purpose other than detecting incidental release of a critical agent.

Pursuant to subdivision (b) of new Section 55-2.14, a laboratory engaged in the analysis of environmental samples using an ADS must: ensure that the system is operated in a secure and safe manner to prevent accidental or deliberate tampering that could compromise the integrity of its operation; establish and validate the minimum concentration(s) of specified critical agent(s) that will trigger a signal; develop a laboratory response plan acceptable to the Department, to be immediately implemented whenever a signal is triggered; retain documentation that the response plan has been developed in collaboration with the client(s) on whose property an ADS is situated and with State and local public health and emergency preparedness authorities; and maintain a standard operating procedure manual (SOPM) containing specific protocols for ADS operation as detailed in subdivision (b). The requisite response plan must include procedures for: notification of a signal to the client(s) on whose property an ADS is situated; notification of a signal to State and local public health and emergency preparedness authorities; emergency shutdown of any ADS suspected to be malfunctioning; communication between the laboratory's technical director and authorities responding to a signal; timely verification that any signal triggered was neither a false positive nor false negative signal, including review of results of any supplemental tests; and remediation for any false signal. The new provisions require the SOPM to include, at a minimum: (i) the laboratory's process for selecting locations where each ADS would be situated, or, if a system is portable, a description of the types of locations where a system may be deployed; (ii) procedures to ensure adequate oversight by the technical director of each ADS deployed by the laboratory, including, but not limited to, review of quality assurance and quality control data, and, as available, the results of any post-signal confirmatory testing; (iii) protocols for monitoring multiple systems or monitoring from a remote location; (iv) protocols for timely communication between the system's operator and the technical director, and between the client and the laboratory; and (v) the laboratory's response plan. Subdivision (b) also stipulates that the laboratory must retain documentation of local government approval of the response plan, where appropriate, which may be a copy of the permit allowing deployment in the local authority's jurisdiction.

New subdivision (b) of Section 55-2.14 also stipulates that the laboratory's immediate response to an ADS signal must include: adherence to the Department-approved response plan; timely notification to the Department; and review of records of any supplemental testing conducted in response to the triggered signal. Should results of such supplemental testing be inconsistent with the expected reason for the signal, this amendment requires the laboratory to render inoperable the ADS that triggered the signal until the cause of the discrepancy is determined and remediated.

New subdivision (c) of Section 55-2.14 requires the laboratory to maintain a fixed-base location at which all records are retained for periods stipulated in the Subpart. Records include, but are not limited to, calibration, testing, quality assurance, quality control, operator training, client notification protocols, supplemental testing, and required registration of critical agent inventory.

New subdivision (d) of Section 55-2.14 allows a laboratory to oper-

ate more than one ADS under the direction of one technical director, provided procedures for direct oversight by the technical director of the systems and their operators shall be acceptable to the department.

New subdivision (e) of Section 55-2.14 requires the laboratory to engage the services of one or more persons as ADS operators to monitor the systems continuously, and allows the director to act as an operator. The subdivision also requires that the operator: receive adequate training specific to the operation of each specific make and model of ADS in use by the laboratory; provide written attestation to reading and understanding the general policies and procedures of the laboratory, and those specific to the autonomous detection system(s) in use, including the laboratory's response plan and the operator's responsibilities under that plan; and undergo a successful demonstration of capability.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 55-2.14(a) and (e).

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

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

Assessment of Public Comment

A Notice of Proposed Rulemaking for an amendment to 10 NYCRR Subpart 55-2 that sets standards for critical agent testing, including an express terms summary for the proposed rule, was published in the State Register on December 9, 2009, for a 45-day public comment period. For purposes of the rule, a critical agent is defined as an organism, chemical element or chemical compound, which is recognized as posing a risk to national security and/or requiring special action to protect the public health because the agent: can be disseminated or transmitted person-to-person with ease; causes moderate to high mortality and/or morbidity; and can have a significant public health impact. Prior to publication, copies of the proposed amendment were distributed to: environmental laboratories holding New York State (NYS) certificates of approval in areas relevant to critical agent testing; clinical laboratories holding an NYS permit in clinical disciplines pertinent to critical agent testing (i.e., microbiology and toxicology); and other affected parties, including agencies and units of local government whose personnel act as "first responders" in case of an incident or suspect incident involving critical agents. Three formal comments were received in response to publication of the proposed amendment. No revisions to the published regulations are needed as a result of the comments.

One commenter requested clarification whether the requisite response plan of a firm that deploys autonomous detection systems (ADSS) is intended to inform the laboratory director about the laboratory's appropriate role in the response. The Department does expect the laboratory's role to be defined in the requisite response plan. In fact, the proposed amendment stipulates that the Department, in its determination to approve a laboratory for critical agent testing, shall consider the laboratory's capability to assume an appropriate role in the public health and safety response(s) to critical agents. This provision authorizes the Department to deny an approval application from a laboratory whose principals have a history of noncompliance or have otherwise shown inability or unwillingness to comply with State or local laws and/or to assume a "detect and notify" role in the public health protection process for responding to a potential incident.

Certainly, activities in common are expected to be included in all response plans, such as immediate communication with public health and public safety authorities. However, the role of any particular laboratory in the coordinated response to a signal (i.e., an indication that a critical agent has been detected) would depend on several factors, including the laboratory's relationship to other affected parties (e.g., building owners) and the location and detection capabilities of the deployed ADSS. The requirement that response plans be approved by State and local public health and emergency preparedness authorities is prescribed to ensure that such authorities make known their expectations for a laboratory's role and responsibilities in response to an

incident. The Department expects to draw from its considerable experience with local health departments' response protocols to develop recommendations for the content of response plans applicable to all-hazards response efforts. The Department will consider issuing specific guidance on the content of acceptable response plans to augment the minimum ADS response plan components specified in the proposed regulation.

A second commenter, a manufacturer of critical agent detection devices, expressed the opinion that the burden imposed by the proposed regulation would discourage government authorities, transit system owners and building owners from installing anti-terrorism devices. The Department disagrees, and notes that the requirements for analysis of environmental samples were established by the Legislature, with the intent of protecting public health. All entities identified by the commenter as potential ADS deployers, as well as the public, have a vested interest in ensuring that each system is reliable and generates accurate results. While the manufacturer/commenter may have demonstrated his model systems to be effective and accurate, a potential exists for unscrupulous firms to market substandard devices and thus endanger the public. Standards development and compliance monitoring by a third party, backed by the authority to sanction violators, are proven approaches to protecting the public health and safety. The Department notes that the commenter supports "some oversight" and monitoring to "ensure the detection systems are operating and maintained as designed." The requirement for ongoing scientific administration of the entity deploying the ADS seems to be at issue. The Department believes that certification, as well as the safeguards inherent in laboratory practices carried out by an entity knowledgeable in the underlying science of the detection method, will bolster the public's trust in early warning systems, a factor that is paramount to the system's continued effectiveness in saving lives and protecting property.

The second commenter also suggests that the regulation inappropriately focuses on testing for biological critical agents at fixed-location facilities and thus fails to take into account existing technologies that do not require sample collection and referral to a laboratory. The Department notes that Section 55-2.13 formerly dealt only with general requirements for biological critical agent testing in conventional laboratories. However, requirements specific to the operation of an ADS for biological, chemical and radiochemical critical agent detection have been incorporated into this section, as well as a new Section 55-2.14, to address the unique nature of an ADS, which, as the commenter notes, is capable of accurate detection without traditional sample collection. Accordingly, the proposed rule applies to chemical and radiochemical agents as well as biological agents. The Department assures the commenter that any requirement initially established for biological agent testing that proves inappropriate for another class of critical agents (radioisotopes, for example) because of the different nature of the analyte or the test method, that requirement would be applicable. The Department anticipates that imposition of additional standards, some of which would be model specific, would follow reviews of ADS technical validation data.

The commenter interprets the proposed amendment as requiring "a company (or the installing entity) to have a lab and personnel to perform functions" not required by the ADS technology. It is correct that whatever entity is responsible for ongoing operation of the ADS -- more likely a building or site management or installing entity than the manufacturer -- would need to be certified as an environmental laboratory, and such certification minimally entails: maintaining records on personnel training and device monitoring that are accessible to the Department with 24 hours of request; hiring a technical director, minimally a person with a bachelor's degree and one year's experience, to oversee quality assurance activities for one or more devices and coordinate with public safety authorities; and training of operators in daily maintenance and operation of the ADS.

The Department agrees with this commenter's suggestion that remote monitoring of ADSs should be a choice, not a requirement, and points out that Section 55-2.14 does not prescribe, but merely allows for, remote monitoring. The Department also agrees that monitoring by in-house security personnel would be adequate in some cases, provided the security staff are employees, agents or otherwise

fiduciaries of the certified laboratory, and have been properly trained as operators and in carrying out the response plan. The regulation does not preclude ADS monitoring by the same persons who provide in-house security services.

The commenter states that there is no need for requirements for chain-of-custody or any supplemental testing of critical agent samples. The Department disagrees, and notes that there may be circumstances under which an alleged terrorist could not be indicted, charged or found guilty unless evidence had been maintained under chain of custody. The Department also notes that supplemental testing calls for, in addition to confirmatory testing, DNA analysis of samples from several locations to verify a common origin (i.e., DNA fingerprinting) and other procedures determined to be necessary by prosecutors to ensure proper identification of the critical agent and, as needed, its source.

The commenter states his belief that the response plan is not the responsibility of the manufacturer, but of the property owner who has an ADS installed in a building or specific location. The Department shares the commenter's belief that the response plan is not the responsibility of the manufacturer, unless the manufacturer also acts as the ADS operator. The commenter is reminded that the proposed rule requires that the property owner have a role in the development of a response plan, but that primary responsibility for development and implementation of a response plan rests with the certified laboratory. The Department believes the entity that seeks certification as a laboratory will be a firm that will oversee ongoing operation of ADS installations in one or several buildings. A service provider/installer affiliated with an ADS manufacturer could, but need not, take on that role; similarly the building owner could contract for the laboratory's monitoring services or the laboratory could contract with the building's security staff, at a lower cost than that incurred if each building owner sought separate certification as a laboratory. In short, any number of structures could occur, provided the operator met the requirements to be permitted as a laboratory.

The commenting manufacturer also believes the regulation should be modified to recognize his devices' "Full Designation" under the U.S. Department of Homeland Security's SAFETY Act of 2002 as sufficient to qualify for automatic certification of the devices by the Department. The Department declines to make such a modification. Based on its experience with laboratory oversight, the Department finds ongoing monitoring of each deployed ADS to be essential for minimizing the risk of malfunction and ensuring the continuous readiness necessary for real-time air testing. The commenter is reminded that SAFETY Act coverage is available to qualified vendors of anti-terrorism technologies strictly for the purpose of providing risk management tools and liability coverage, so that the vendor's liability stemming from a terrorist act or event would be significantly limited. The Department acknowledges that the SAFETY Act application solicits certain technical information and device validation information, including the device's limits of detection, false-positive/negative rates and documentation of successful testing. In fact, a service provider/installer may be able to use the same data listed on the device manufacturer's SAFETY Act application in seeking the Department's certification as an environmental laboratory.

A third commenter, the service/installation provider for the above commenting manufacturer, interpreted the proposed regulation as defining his firm as a laboratory. The commenter expressed the opinion that it is unrealistic and onerous to place the burden of creating a response plan on the laboratory (provider), since many parties are potentially involved, including the building owner. This commenter is reminded that the laboratory is the only affected entity over which the Department has authority; it has no authority to require owners and lessees of buildings and property to develop a response plan to terrorist acts in coordination with local authorities. It is noteworthy that the proposed rule specifies that the owner of the building or property at which an ADS is deployed must be an active participant in development of a response plan. Onsite security staff would be involved in carrying out the plan as it pertains to evacuation of the public and air system controls. The plan also must meet the expectations of public health and safety authorities. The Department finds that a laboratory is best positioned to coordinate plan development.

This commenter also calls for response plan guidelines. As previously stated, the Department is considering issuing specific guidance on the content of an acceptable response plan to augment the minimum ADS response plan components specified in the proposed regulation.

The commenter suggests that the definition of a laboratory needs to be redefined to accommodate ADS users. The Department finds that ADS installations meet the existing definition for an environmental laboratory, which is sufficiently general and functions-based to include testing facility models other than a four-walled enclosure. An ADS analyzes an environmental sample (air) for the purpose of detecting an analyte (a critical agent) in order to protect public health. The manner of operation of an ADS -- conducting analyses in the field -- is common to other devices (e.g., continuous radon measurement devices). The Department takes very seriously its mandate to protect the public health. The Department would not meet this mandate while failing to provide effective oversight of entities that monitor for critical agents, given the potential of critical agents to cause significant mortality and widespread morbidity among citizens of this state.

Insurance Department

EMERGENCY RULE MAKING

Standards for the Management of the New York State Retirement Systems

I.D. No. INS-11-10-00002-E

Filing No. 575

Filing Date: 2010-06-01

Effective Date: 2010-06-01

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, January 5, 2010, and April 2, 2010. A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department is assessing these comments.

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) 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 July 30, 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.

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.

Initially, 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. The proposed rule was published in the State Register on March 17, 2010. A Public Hearing was held on April 28, 2010. The following comments were received:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund ("The Fund"). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women- and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Insurance Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement

agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider 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. At the time, 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.

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 the 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.

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department is assessing these comments.

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: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department is assessing these comments.

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.

Assessment of Public Comment

Comments that were received as a result of the Public Hearing held on April 28, 2010:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund (“The Fund”). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women- and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority (“FINRA”);
- A requirement that any placement agent seeking to do business in New York register with the Insurance Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association (“SIFMA”), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are

registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider 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. At the time, 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.

The Department intends to conduct further research on the comments received.

Office of Mental Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Prior Approval Review for Quality and Appropriateness

I.D. No. OMH-24-10-00011-P

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

Proposed Action: This is a consensus rule making to amend Part 551 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 31.05 and 31.23

Subject: Prior Approval Review for Quality and Appropriateness.

Purpose: To make minor technical corrections and clarify the intent of the regulation.

Text of proposed rule: Subdivisions (c) and (d) of Section 551.6 of Title 14 NYCRR are amended to read as follows:

(c) Projects classified as E-Z PAR review projects pursuant to this Part include:

(1) outpatient program projects submitted by an applicant who currently operates [an outpatient program(s)] *one or more programs* that [is] *are* currently licensed by the Office of Mental Health, including:

- (i) establishment of a new outpatient program;
- (ii) establishment of a new satellite;
- (iii) relocation of a licensed outpatient program or satellite to a location outside of the county in which such program or satellite is currently located;

(iv) expansion or reduction of caseload or annual volume of services in a clinic treatment program over any contiguous 12-month period by more than 25 percent;

(v) expansion or reduction of the approved caseload or capacity of an outpatient program, excluding clinic treatment programs, over any contiguous 12-month period by more than 10 percent;

(vi) closing an outpatient program;

(vii) *closing of an outpatient satellite with greater than 5.5 full-time equivalent staff;*

(viii) substantial change in population served, services provided, or program type; and

[(viii)](ix) other projects that may have a substantial impact on outpatient mental health services;

(2) licensed housing projects submitted by an applicant who currently operates a program which has been licensed by the Office of Mental Health, including:

- (i) expansion or reduction of licensed capacity;
- (ii) relocation of licensed housing, including community residences, crisis residences, single room occupancy residences;

(iii) establishment of licensed housing operated by a business corporation or limited liability company;

(iv) establishment of licensed housing not selected through the Office of Mental Health's request for proposal (RFP) process; [and]

(v) closure of licensed housing programs; *and*

(vi) *development of a community residence capital project costing above \$250,000;*

(3) inpatient projects that involve:

(i) expansion or reduction of licensed psychiatric inpatient beds by greater than 5 percent and not more than 15 percent, or by a maximum of 10 beds, whichever is less; and

(ii) request for waiver requiring the admission of individuals in emergencies pursuant to section 9.39 of the Mental Hygiene Law as provided in section 31.04 of the Mental Hygiene Law and section 551.12(b) of this Part;

(4) change of sponsor of a program currently licensed by the Office of Mental Health where the new sponsor currently operates a program which has been licensed by OMH for at least six months and is in substantial compliance with Office of Mental Health standards, as determined by the Office;

(5) significant change in the terms and conditions of an operating certificate such as program type, population served, special populations served, services or hours of operation by the licensed program or by a discrete component of the licensed program;

(6) capital project costing under \$600,000 and above \$250,000, or a dollar amount determined by the Commissioner based on average construction cost increases subsequent to 2010, for an existing or proposed program;

(7) a project proposing change in ownership of 10 percent or more of the stock of a business corporation pursuant to Part 573 of this Title; and

(8) a project otherwise eligible for an administrative action that is reclassified as an E-Z PAR review project pursuant to section 551.9(c) of this Part

(d) Projects classified as Administrative Action do not require the submission of a Prior Approval Review application under Part 551 of this Title. However, the following projects require the submission of information, in a form and format designated by the Office, prior to the implementation of a proposed action. Administrative Action includes:

(1) capital projects costing under \$250,000 for an existing or proposed program which have demonstrated a source of funding for the project;

(2) changes in the operation of a licensed program that do not require E-Z PAR review or comprehensive review under this Part, including but not limited to:

(i) expansion or reduction of inpatient capacity of less than 5 percent or less than 10 beds, whichever is less;

(ii) expansion or reduction of a clinic treatment program's caseload or volume of services between 10 percent and 25 percent over a recent contiguous 12-month period;

(iii) expansion or reduction of an outpatient program's annual capacity, excluding clinic treatment, up to 10 percent over any contiguous 12-month period;

(iv) minor change in terms and conditions of an operating certificate such as authorized services, population served or days and hours of operation that do not change the overall terms and conditions of the license;

(v) program consolidation with no major program expansion or reduction;

(vi) utilization of a management contract;

(vii) utilization of a clinical services contract; and

(viii) change of satellite location to a full program;

(3) changes in the location of a licensed program that involve:

(i) relocation of an existing outpatient program or satellite within the area currently served by the program or within a service area defined by the local governmental unit;

(ii) relocation of a part of an existing program to establish a satellite location within the area currently served by the program that does not expand the capacity, caseload or volume of services; and

(iii) consolidation of programs or satellite locations without substantial reduction in the overall capacity, caseload, volume of services, or area served by the program;

(iv) *closure of an outpatient satellite with 5.5 full-time equivalent staff or less;*

(4) transfer of less than 10 percent of the stock of a business corporation or company that does not substantially change the ownership and control of the corporation pursuant to Part 573 of this Title;

(5) approval of a certificate of incorporation or amendment pursuant to subdivision (e) of this section; and

(6) actions pertaining to licensed programs or proposed programs in response to emergency situations.

Text of proposed rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

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

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

Consensus Rule Making Determination

This rulemaking is filed as a Consensus rule on the grounds that its purpose is to make technical corrections and is non-controversial. No person is likely to object to this rulemaking since it merely clarifies the intent of the regulation regarding the prior approval review process and provides regulatory relief to regulated parties.

On September 2, 2009, the Office of Mental Health (OMH) adopted a rule making which amended Part 551 of Title 14 NYCRR. The amended regulation provided a more streamlined process for agencies seeking OMH project approval. All programs requiring licensure (e.g., inpatient, community residences, outpatient) by OMH are required to obtain prior approval from OMH before a program can be developed or modified. The amendments resulted in a re-categorizing of projects requiring review into three distinct categories: Comprehensive PAR, E-Z PAR and Administrative Action.

Projects in the category of Comprehensive PAR review include those that establish a new program which is not currently licensed by OMH or which has been licensed for less than six months; establishment of licensed psychiatric inpatient beds or expansion or reduction of licensed psychiatric inpatient beds by at least 15 percent of the licensed capacity of that site or by more than 10 beds, whichever is less; a change in sponsor of a program licensed by OMH where the new sponsor does not currently operate a program licensed by OMH or has been licensed for less than six months; closure of a licensed psychiatric inpatient program; capital projects that exceed \$600,000 (or a dollar amount determined by the Commissioner based upon average construction cost increases subsequent to 2010), and projects otherwise eligible for E-Z PAR review that are reclassified to Comprehensive PAR review pursuant to the regulation.

Projects classified as E-Z PAR review consist of outpatient program projects submitted by an applicant who operates an outpatient program that is currently licensed by OMH including: establishment of a new outpatient program; establishment of a new satellite, relocation of a licensed outpatient program or satellite to a location outside of the program's current county; expansion or reduction of caseload or annual volume of services in a clinic treatment program over any contiguous 12-month period by more than 25 percent; expansion or reduction of the approved caseload or capacity of an outpatient program, excluding clinic treatment programs, over any contiguous 12-month period by more than 10 percent; closing an outpatient program; a substantial change in population served, services provided, or program type; and other projects that may have a substantial impact on outpatient mental health services. Other E-Z PAR projects include licensed housing projects submitted by an applicant which currently operates a program which has been licensed by OMH including: expansion or reduction of licensed capacity; relocation of licensed housing, including community residences, crisis residences, single room occupancy residences; establishment of licensed housing operated by a business entity; establishment of licensed housing not selected through OMH's request for proposal process; and closure of licensed housing programs. E-Z PAR projects also include inpatient projects that involve expansion or reduction of licensed inpatient beds by more than 5 percent up to 15 percent, or by a maximum of 10 beds, whichever is less; and requests for a waiver of the requirement that the program admit individuals in emergencies. A change of sponsor of a program currently licensed by OMH, when the new sponsor currently operates a program which has been licensed by OMH for at least six months and is in good standing warrants an E-Z PAR process, as do a significant change in the terms and conditions of an operating certificate and capital projects falling within a prescribed dollar range.

Projects categorized as Administrative Action are not subject to the prior approval review specified in Part 551 of Title 14 NYCRR; however, certain projects require the submission of OMH-prescribed forms prior to the implementation of a proposed action.

Since the adoption of the amended Part 551, OMH has achieved a significant reduction in the amount of time it takes to render a decision, as well as a reduction in the amount of paperwork necessary to be completed by providers. As a result of this improved process over the course of the last several months, the agency has also determined areas where the regulations should be clarified to further serve to ease the regulatory burden on providers. OMH is amending the regulation to add the following to the E-Z PAR process, instead of the more lengthy Comprehensive PAR process:

- (1) allowing providers who currently operate any type of OMH-licensed program to submit an E-Z PAR application when establishing an outpatient program;
- (2) closing of an outpatient satellite with greater than 5.5 full-time equivalent (FTE) staff;
- (3) developing community residence capital projects costing above \$250,000.

In addition, OMH is amending the regulation to allow for the closure of an outpatient satellite with 5.5 full-time equivalent staff or less to be processed through an Administrative Action instead of an E-Z PAR application. Since most of OMH licensed outpatient satellites operate with less than 5.5 FTE's, this change would allow lower staffed and smaller sized outpatient satellites to close without going through the PAR process.

Statutory Authority: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction.

Section 31.04 of the Mental Hygiene Law provides that the Commissioner has the power to adopt regulations and to establish procedures for the issuance and amendment of operating certificates.

Section 31.05 of the Mental Hygiene Law establishes the criteria for the issuance of an operating certificate.

Section 31.23 of the Mental Hygiene Law establishes criteria for the approval of facility programs, services and sites.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because this consensus rule merely clarifies the intent of the existing regulation regarding the prior approval process and provides regulatory relief to regulated parties. There will be no impact on jobs and employment opportunities as a result of this rulemaking.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Company's Petition to Recover Deferred Site Investigation and Remediation (SIR) Costs

I.D. No. PSC-24-10-00007-P

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

Proposed Action: The Commission is considering the Petition to Reopen Proceedings to Consider Recovery of Deferred Balances filed by KeySpan Gas East Corporation d/b/a National Grid (Company).

Statutory authority: Public Service Law, sections 65 and 66

Subject: The Company's petition to recover deferred site investigation and remediation (SIR) costs.

Purpose: To determine whether to grant, in whole or in part, modify or reject the Company's petition.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition, submitted on January 29, 2010 by KeySpan Gas East Corporation d/b/a National Grid (Company) to recover site investigation and remediation (SIR) costs over rolling five-year periods through its existing Delivery Rate Adjustment mechanism. The Company proposes that it be given authority to recover deferred SIR costs incurred through December 31, 2009, offset by existing deferred credits, beginning on January 1, 2011. Additionally, regarding SIR costs incurred in 2010 and subsequent years, the Company proposes that it make an annual filing identifying and justifying these costs on April 15 of the following year and that it be authorized to recover such costs, over rolling five-year periods, beginning on the June 1 immediately following its filing. The Commission may grant, in whole or in part, modify or deny the Company's petition, and may also consider related matters.

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.

(06-G-1186SP8)

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

The Company's Petition to Recover Deferred Site Investigation and Remediation (SIR) Costs

I.D. No. PSC-24-10-00008-P

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

Proposed Action: The Commission is considering the Petition to Reopen Proceedings to Consider Recovery of Deferred Balances filed by The Brooklyn Union Gas Company d/b/a National Grid NY (Company).

Statutory authority: Public Service Law, sections 65 and 66

Subject: The Company's petition to recover deferred site investigation and remediation (SIR) costs.

Purpose: To determine whether to grant, in whole or in part, modify or reject the Company's petition.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition, submitted on January 29, 2010 by The Brooklyn Union Gas Company d/b/a National Grid NY (Company) to recover site investigation and remediation (SIR) costs over rolling five-year periods through its existing Delivery Rate Adjustment mechanism. The Company proposes that it be given authority to recover deferred SIR costs incurred through December 31, 2009, offset by existing deferred credits, beginning on January 1, 2011. Additionally, regarding SIR costs incurred in 2010 and subsequent years, the Company proposes that it make an annual filing identifying and justifying these costs on April 15 of the following year and that it be authorized to recover such costs, over rolling five-year periods, beginning on the June 1 immediately following its filing. The Commission may grant, in whole or in part, modify or deny the Company's petition, and may also consider related matters.

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. Brilling, 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.

(06-G-1185SP10)

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

Verizon New York Inc. Tariff Regulations Relating to Voice Messaging Service

I.D. No. PSC-24-10-00009-P

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

Proposed Action: The Commission is considering a request by Verizon New York Inc. to de-tariff its retail voice messaging service.

Statutory authority: Public Service Law, sections 94(2), 92(1) and 2(18)

Subject: Verizon New York Inc. tariff regulations relating to voice messaging service.

Purpose: To remove tariff regulations relating to retail voice messaging service from Verizon New York Inc.'s tariff.

Substance of proposed rule: Verizon New York, Inc. (Verizon or company) is seeking approval to de-tariff its retail voice messaging service (VMS) because the company believes that VMS is not required to be tariffed under state law. VMS constitutes an "information service" as defined by federal law, and de-tariffing VMS would advance Commission

policies favoring competitive parity. The Commission is considering whether to grant or deny, in whole or in part, approval of Verizon's request to de-tariff VMS.

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. Brilling, 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-C-0211SP1)

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

Open Access Transmission Tariff (OATT) and Power for Jobs

I.D. No. PSC-24-10-00010-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Central Hudson Gas & Electric Corporation to make various changes in rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 15 — Electricity.

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

Subject: Open Access Transmission Tariff (OATT) and Power for Jobs.

Purpose: To replace references to the OATT and to update the Power for Jobs rates.

Substance of proposed rule: The Commission is considering a filing by Central Hudson Gas & Electric Corporation (Central Hudson or the company) to replace references to the company's Open Access Transmission Tariff (OATT) on file with the Federal Energy Regulatory Commission (FERC) with references to the New York Independent System Operator's OATT on file with FERC. These changes are required to reflect the cancellation of Central Hudson's OATT. In addition, the company proposes to update the Power for Jobs rates for Service Classification Nos. 2, 3 and 13 to the Commission's approved demand rate for non-Power for Job customers. The proposed filing has an effective date of September 1, 2010. The Commission may adopt, reject, or modify, in whole or in part, 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. Brilling, 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-E-0255SP1)