

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

EMERGENCY RULE MAKING

Firewood (All Hardwood Species), Nursery Stock, Logs, Green Lumber, Stumps, Roots, Branches and Debris

I.D. No. AAM-03-10-00003-E

Filing No. 167

Filing Date: 2010-02-23

Effective Date: 2010-02-23

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

Action taken: Amendment of Part 139 of Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, was first detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities detected infestations of this pest in other areas of Brooklyn as well as in and about Amityville, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend the existing quarantine area on Staten Island. This rule contains the needed

modification. This rule also amends 1 NYCRR section 139.3(b)(1) to add *katsura* (*Cercidiphyllum japonicum*) to the list of regulated host materials subject to regulation under the quarantine, since *katsura* has been found by the United States Department of Agriculture (USDA) to be subject to infestation by the Asian Long Horned Beetle.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: *Acer* (Maple); *Aesculus* (Horse Chestnut), *Albizia* (Silk Tree or Mimosa); *Betula* (Birch); *Populus* (Poplar); *Salix* (Willow); *Ulmus* (Elm); *Celtis* (Hackberry), *Fraxinus* (Ash), *Cercidiphyllum japonicum* (*Katsura*); *Platanus* (Plane tree, Sycamore); and *Sorbus* (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

Based on the facts and circumstances set forth above the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately modify the quarantine area and restrict the movement of trees and materials from the areas of the State infested with Asian Long Horned Beetle could result in the spread of the pest beyond those areas and damage to the natural resources of the State and could result in a federal quarantine and quarantines by other states and foreign

countries affecting the entire State. This would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Asian Long Horned Beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule modifying the quarantine area should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Firewood (all hardwood species), nursery stock, logs, green lumber, stumps, roots, branches and debris.

Purpose: To modify the Asian Long Horned Beetle quarantine to prevent the spread of the beetle to other areas.

Text of emergency rule: Subdivision (d) of section 139.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new subdivision (d) is added to read as follows:

(d) *That area in the Borough of Richmond in the City of New York bound by a line beginning at a point along the State of New York and the State of New Jersey border due north of the intersection of Richmond Terrace and Morningstar Road; then south to the intersection of Morningstar Road and Richmond Terrace; then southwest along Morningstar Road to its intersection with Forest Avenue; then east along Forest Avenue to its intersection with Willow Road East; then south and then southeast along Willow Road East to its intersection with Victory Boulevard; then west along Victory Boulevard to its intersection with Arlene Street; then south along Arlene Street until it becomes Park Drive North; then south on Park Drive North to its intersection with Rivington Avenue; then east along Rivington Avenue to its intersection with Mulberry Avenue; then south on Mulberry Avenue to its intersection with Travis Avenue; then northwest on Travis Avenue until it crosses Main Creek; then along the west shoreline of Main Creek to Fresh Kills Creek; then along the north shoreline of Fresh Kills Creek to Little Fresh Kills Creek; then along the north shoreline of Little Fresh Kills Creek to the Arthur Kill; then west to the border of the State of New York and the State of New Jersey in the Arthur Kill; then north along the borderline of the State of New York and the State of New Jersey; then east along the borderline of the State of New York and New Jersey excluding Shooters Island to the point of beginning.*

Paragraph 1 of subdivision (b) of section 139.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(1) Firewood (all hardwood species) and all host material living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of a half inch or more in diameter of the following genera: Acer (Maple); Aesculus (Horse Chestnut); Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry); Fraxinus (Ash); *Cercidiphyllum japonicum* (Katsura); Platanus (Plane Tree, Sycamore) and Sorbus (Mountain Ash) are regulated articles.

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. AAM-03-10-00003-P, Issue of January 20, 2010. The emergency rule will expire April 23, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

The quarantine accords with the public policy objectives the Legislature

sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States was detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, Queens, Manhattan and Staten Island.

As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend by approximately two square miles, the existing quarantine area on Staten Island. The proposed rule contains the needed modifications. This rule also amends 1 NYCRR section 139.3(b)(1) to add katsura (*Cercidiphyllum japonicum*) to the list of regulated host materials subject to regulation under the quarantine. Katsura has been found by the United States Department of Agriculture (USDA) to be subject to infestation by the Asian Long Horned Beetle.

The Asian Long Horned Beetle is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut); Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry); Fraxinus (Ash); *Cercidiphyllum japonicum* (Katsura); Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the extension of the quarantine on Staten Island imposed by this rule has been determined to be the most effective means of preventing the further spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

4. Costs:

(a) Costs to the State government: none.

(b) Costs to local government: A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City.

(c) Costs to private regulated parties:

Nurseries exporting host material from the quarantine area established by this rule, other than pursuant to compliance agreement, will require an

inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area established by this rule may not move outside that area due to the fact that it is not practical at this time to determine for certification purposes that the material is free from infestations.

The extension of the existing quarantine area on Staten Island would affect eight nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area.

(d) Costs to the regulatory agency:

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

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

5. Local government mandate:

Yard waste, storm clean-up and normal tree maintenance activities involving twigs and/or branches of 1/2" or more in diameter of host species will require proper handling and disposal, i.e., chipping and/or incineration if such materials are to leave the quarantine area established by this rule. A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City. An effort is underway to identify centralized disposal sites that would accept such waste from cities, villages and other municipalities at no additional cost.

6. Paperwork:

Regulated articles inspected and certified to be free of Asian Long Horned Beetle moving from the quarantine area established by this rule will have to be accompanied by a state or federal phytosanitary certificate and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to extend the existing quarantine on Staten Island where the Asian Long Horned Beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Asian Long Horned Beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine proposed in this rulemaking.

9. Federal standards:

The amendment does not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

The small businesses affected by extending the existing quarantine area on Staten Island are the nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area. There are eight such businesses within that area. Since there is already a quarantine area on Staten Island, the City of New York and the borough of Staten Island will remain involved in the proposed extension of this quarantine.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same quarantine requirements as other regulated parties.

2. Compliance requirements:

All regulated parties in the new quarantine area on Staten Island established by this amendment will be required to obtain certificates and limited permits in order to ship regulated articles from those areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services:

In order to comply with the rule, small businesses and local governments shipping regulated articles from the new quarantine area on Staten Island will require professional inspection services, which would be

provided by the Department and the United States Department of Agriculture (USDA).

4. Compliance costs:

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

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

Nurseries exporting host material from the new quarantine area on Staten Island, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most such inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments would be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the new quarantine areas may not move outside those areas due to the fact that it is not practical at this time to determine for certifications purposes that the material is free from infestation.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same costs as other regulated parties. A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City.

5. Minimizing adverse impact:

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

6. Small business and local government participation:

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of Asian long horned beetle quarantines. The Department has also had extensive consultation with the USDA on the efficacy of such quarantines. Most recently, the Department has had discussions with the City of New York and the borough of Richmond concerning this amendment to extend the existing quarantine on Staten Island. Representatives of the city and borough governments expressed support for the amendment.

7. Economic and technological feasibility:

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the new quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the quarantine areas to which the amendments apply are not situated in "rural areas," as defined in section 481(7) of the Executive Law.

Job Impact Statement

The rule will not have a substantial adverse impact on jobs and employment opportunities. The extension of the existing quarantine area on Staten Island and the addition of katsura as a species susceptible to infestation by the Asian long horned beetle are designed to prevent the spread of the Asian Long Horned Beetle to other parts of the State. A spread of the infestation would have very adverse economic consequences to the nursery,

forestry, fruit and maple product industries of the State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government, other states and foreign countries. By helping to prevent the spread of the Asian long horned beetle, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry, fruit and maple product industries.

Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

As set forth in the regulatory impact statement, the cost of the rule to regulated parties is relatively small. The responses received during the Department's outreach to regulated parties indicate that the rule will not have a substantial adverse impact on jobs and employment opportunities.

EMERGENCY RULE MAKING

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

I.D. No. AAM-10-10-00008-E

Filing No. 168

Filing Date: 2010-02-23

Effective Date: 2010-02-23

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

Action taken: Addition of Part 141 to Title 1 NYCRR.

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

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

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

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

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

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

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

To date, 39 infested trees in and around the Town of Randolph in Cattaraugus County have been cut and chipped. As the inspection and survey of susceptible ash trees continues in and around the Town of Randolph, the establishment of a quarantine in Cattaraugus and Chautauqua Counties is the most effective means of preventing the artificial spread

of the Emerald Ash Borer. The amendments establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the artificial movement of infested trees and materials.

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

Based on the facts and circumstances set forth above the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately establish the quarantine in Cattaraugus and Chautauqua Counties could result in the spread of the Emerald Ash Borer beyond those areas and damage to the natural resources of the State. This could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. Such actions would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Emerald Ash Borer beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule establishing the quarantine should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

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

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

Text of emergency rule: Part 141 of 1 NYCRR is repealed and a new Part 141 is added to read as follows:

Part 141

Control of the Emerald Ash Borer

Section 141.1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

Section 141.2. Quarantine area.

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

*Section 141.3. Regulated articles.**(a) Prohibited movement.*

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

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

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

(b) Regulated movement.

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

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

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

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

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

Section 141.4. Conditions governing the intrastate movement of regulated articles

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

Section 141.5. Conditions governing the issuance of certificates and permits

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

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

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

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

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

Section 141.6. Inspection and disposition of shipments

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the quarantine area, which contains, or which the inspector has probable cause to believe may contain, infestations of the Emerald Ash Borer, or articles or things regulated under this quarantine, may be examined by an inspector at any time or place. When articles or things are

found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he deems necessary to eliminate the danger of dissemination of the Emerald Ash Borer. If found to be infested, such articles or things must be free of infestation without cost to the State except that for inspection and supervision.

Section 141.7. Assembly of regulated articles for inspection

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

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

Section 141.8. Marking requirements

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate (or limited permit) issued in compliance with these regulations: provided, that:

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 23, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to twelve other states as well as to two provinces in Canada. The most recent detec-

tion of this pest occurred on June 16, 2009 in the Town of Randolph, New York which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County.

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

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

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

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

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

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

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

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

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

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

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

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

The regulations also provide that persons shipping, transporting, or receiving regulated articles may be required to enter into written compliance agreements. These agreements would allow the shipment of these

articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that Emerald Ash Borer is not spread.

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

4. Costs:

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

(b) Costs to local government: None.

(c) Costs to private regulated parties:

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

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

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

(d) Costs to the regulatory agency:

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

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

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

The small businesses affected by the regulations establishing an Emerald Ash Borer quarantine in Cattaraugus and Chautauqua Counties are the nursery dealers, nursery growers and landscaping companies located within those counties. There are 79 such businesses in those counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, it is anticipated that the appearance of the Emerald Ash Borer and its destructive potential is likely to reduce

or eliminate the market for ash nursery stock as ornamental, street and park plantings. There are also approximately 600 firewood dealers and other forest products businesses in these counties. An undetermined number of these businesses are small businesses.

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

2. Compliance requirements:

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

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

3. Professional services:

In order to comply with the regulations, small businesses shipping regulated articles from the quarantine area will require professional inspection services, which will be provided by the Department, the Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA).

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

4. Compliance costs:

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

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

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

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

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

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

5. Minimizing adverse impact:

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

6. Small business and local government participation:

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

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

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape

Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

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

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

7. Economic and technological feasibility:

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping regulated articles (exclusive of nursery stock) from the quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a certificate of inspection. Most shipments, however, will be made pursuant to compliance agreements.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

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

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

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

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

3. Costs:

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

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

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

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

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

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

Job Impact Statement

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

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

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

Department of Civil Service

NOTICE OF EXPIRATION

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

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-07-09-00002-P	February 18, 2009	February 18, 2010

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-10-10-00002-E

Filing No. 162

Filing Date: 2010-02-19

Effective Date: 2010-02-19

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

Action taken: Amendment of Parts 10 and 11; renumbering and amendment of Parts 12 through 14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; L. 2009, ch. 57

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009 and to realize \$90 million in savings to the General Fund in the current fiscal year. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

Subject: Empire Zones reform.

Purpose: Allow Department to continue implementing Zones reforms and adopt changes that would enhance program's strategic focus.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."
2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).
3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.
4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE

Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Exemption.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner"). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute's deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone's boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers' compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a non-manufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b) the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm's application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate or which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation

Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six years, all information related to the application and business annual reports.

15. The emergency rule clarifies the statutory requirement from Chapter 63 of the Laws of 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality.

16. The emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage; the rule removes the requirement that any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

17. The emergency rule clarifies the statutory requirement that certain defined "regionally significant" projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agri-business or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

20. The emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

The full text of the emergency rule is available at www.empire.state.ny.us

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 19, 2010.

Text of rule and any required statements and analyses may be obtained from: Thomas P Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany NY 12245, (518) 292-5123, email: tregan@empire.state.ny.us

Regulatory Impact Statement**STATUTORY AUTHORITY:**

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to immediately implement the statutory changes contained in Chapter 57 of the Laws of 2009 and to realize \$90 million in savings to the General Fund in the current fiscal year. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State's administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

The emergency rule conforms to provisions of Article 18-B of the General Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

Regulatory Flexibility Analysis**1. Effect of rule**

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and large businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in full compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small businesses and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION**Prohibition of Public Use of Motorized Equipment on Certain Lands in the Adirondack and Catskill Parks**

I.D. No. ENV-37-09-00007-A

Filing No. 165

Filing Date: 2010-02-23

Effective Date: 2010-03-10

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

Action taken: Addition of section 196.8 to Title 6 NYCRR.

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

Subject: Prohibition of public use of motorized equipment on certain lands in the Adirondack and Catskill Parks.

Purpose: To prohibit the public use of motorized equipment on certain land classifications within the Adirondack and Catskill Parks.

Text of final rule: The title to Part 196 is amended to read as follows:
OPERATION OF MOTORIZED VEHICLES, VESSELS, [AND] AIRCRAFT AND MOTORIZED EQUIPMENT IN THE FOREST PRESERVE

A new section 196.8 is added to 6 NYCRR to read as follows:

§ 196.8 Operation of motorized equipment in wilderness, primitive, primitive bicycle corridor and canoe areas within the Adirondack and Catskill Parks.

(a) *Applicability.* This section applies to all state owned lands in the Adirondack Park which are classified as wilderness, primitive and canoe by the Adirondack Park Agency. These lands are depicted on the New York State Department of Environmental Conservation Adirondack Forest Preserve Land Classifications Map, 2010. This section also applies to all state owned lands in the Catskill Park which are classified as wilderness or primitive bicycle corridor by the department. These lands are depicted on the New York State Department of Environmental Conservation Catskill Forest Preserve Land Classifications Map, 2010.

(b) No person or employee of a city, village, town or county government agency or employee of a state government agency other than the department shall possess or operate motorized equipment within the boundaries of an area of state land classified as wilderness, primitive, or canoe in the Adirondack Park, or an area of state land classified as wilderness or primitive bicycle corridor in the Catskill Park, except at times and locations and for purposes authorized by the department or in the performance of activities authorized by an easement or use reservation on lands subject to such easement or use reservation.

(c) The New York State Department of Environmental Conservation Adirondack Forest Preserve Land Classifications Map, 2010 and Catskill Forest Preserve Land Classifications Map, 2010 are available from and published by the New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233 and on file at the New York State Department of Environmental Conservation Central Office and Regions 3-6 Regional and Sub-Offices.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 196.8(c).

Text of rule and any required statements and analyses may be obtained from: Peter J. Frank, Bureau of Forest Preserve Management, NYS DEC, 625 Broadway, Albany, NY 12233-4254, (518) 473-9518, email: lfadk@gw.dec.state.ny.us

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

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 since the changes involved updating the dates on the two maps referenced in the regulation.

Assessment of Public Comment

Comment: It is not necessary to ban chainsaws.

Response: The regulation is necessary to fulfill the legislative objective of the Environmental Conservation Law (ECL) by “preserving the unique qualities of special resources such as the Adirondack and Catskill forest preserves” (ECL Section 1-0101(3)(d)). The regulation also is necessary to implement the guidelines of the Adirondack Park State Land Master Plan (APSLMP) and Catskill Park State Land Master Plan (CPSLMP). The APSLMP provides that in wilderness, primitive and canoe areas, “Public use of motor vehicles, motorized equipment and aircraft will be prohibited.” The APSLMP definition of motorized equipment is, “machines not designed for transporting people, supplies or material, or for earth moving but incorporating a motor, engine or other non-living power source to accomplish a task. The term includes such machines as chain saws, brush saws, rotary or other mowers, rock drills, cement mixers and generators.” The APSLMP has been determined by the courts to have the force and effect of legislation.

The Department developed the CPSLMP to satisfy the general requirements of the ECL and to assure that the management of State lands in the Adirondack and Catskill Parks generally would be consistent. The CPSLMP provides that in wilderness areas, “Public use of motor vehicles, snowmobiles, motorboats, motorized equipment, aircraft, bicycles, and other wheeled or mechanized transportation devices used for transporting people (for example an all terrain skate board), will be prohibited.” The CPSLMP defines primitive bicycle corridor as “a linear area of Forest Preserve land, adjacent to or going through, a Wilderness Area, where bicycles are permitted, but which is otherwise managed as wilderness.” As in the APSLMP, the CPSLMP definition of motorized equipment specifically includes chainsaws.

Comment: Public use of chainsaws should be permitted. Chainsaws are not significantly disturbing to peace and quiet. Very few people use them. Chainsaw use for trail clearing is limited in duration, only occurring where blowdown is located.

Response: Article XIV of the New York State Constitution provides that Forest Preserve lands “shall be forever kept as wild forest lands.” The Adirondack Park State Land Master Plan assigned classifications to Forest Preserve lands within the Park based on their characteristics and capacity to withstand use. The APSLMP defines wilderness as, “an area where the earth and its community of life are untrammelled by man—where man himself is a visitor who does not remain. A wilderness area is further defined to mean an area of state land or water having a primeval character, without significant improvement or permanent human habitation, which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions, and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation...” The APSLMP provides, “The primary wilderness management guideline will be to achieve and perpetuate a natural plant and animal community where man’s influence is not apparent.” The use of motorized equipment is perceived as a type of human influence which impairs natural conditions and reduces opportunities for solitude. To support the goals of wilderness designation and management embodied in the definition of wilderness and set forth in management guidelines, the Master Plan requires that the public use of motorized equipment be prohibited. Because primitive and canoe areas are to be managed essentially as wilderness, the APSLMP also requires that public motorized equipment use be prohibited on lands having those classifications.

The Catskill Park State Land Master Plan defines wilderness and sets forth guidelines for its management that are almost identical to those contained in the APSLMP. Lands in the primitive bicycle corridor classification are to be managed as wilderness, with the exception that public bicycle use is permitted. Therefore, the CPSLMP requires that the public use of motorized equipment be prohibited on lands having those classifications.

Comment: Volunteer use of chainsaws by the public to clear trails should be encouraged in light of limited DEC resources. Permission for public use of chainsaws to clear trails needs to be done in a practical way, for an entire trail over an entire season or longer.

Response: The Department encourages volunteer stewardship of State-owned natural resources through policy ONR-1, the “Adopt-A-Natural-Resource Policy.” ONR-1 authorizes the Department to enter into stewardship agreements with individuals or groups, allowing them to perform certain construction and maintenance activities on State lands under certain conditions. Volunteers who are listed as participants under a stewardship agreement and who meet Department safety training requirements may operate motorized equipment in wilderness, primitive and canoe areas in the Adirondack Park, as well as wilderness areas and primitive bicycle corridors in the Catskill Park, under the APSLMP and CPSLMP guidelines pertaining to administrative personnel. Volunteer stewards with specific Department approval in advance may use motorized equipment for one or more trails over periods of time for which approval is granted.

Comment: Banning chainsaw use will make it difficult for hunters to cut firewood for campfires. People will have to truck in firewood and may introduce invasive species.

Response: Visitors who camp far from roads in wilderness, primitive and canoe areas in the Adirondack Park, and in wilderness areas in the Catskill Park, may use non-motorized saws to cut dead and down wood near their campsites for use in campfires. Non-motorized saws are effective and, because they are much lighter than chainsaws, are easier to carry longer distances. Campers also may transport firewood from outside State lands for use in campfires. Those who transport firewood should take care to minimize the potential for introducing invasive species and should follow existing regulations regarding the treatment and transportation of firewood. The regulation does not prohibit the use of chainsaws in Forest Preserve areas classified as wild forest.

Comment: The regulation is necessary to implement Article XIV of the New York State Constitution and the Adirondack Park State Land Master Plan, and to protect the silence and solitude in certain Forest Preserve lands.

Response: The regulation is intended to conform with Article XIV and meet APSLMP and CPSLMP requirements designed to protect the wild character of State lands classified as wilderness, primitive and canoe areas in the Adirondack Park, as well as wilderness areas and primitive bicycle corridors in the Catskill Park.

Comment: By definition “forever wild” means as little disturbance as possible, and that should include the non-essential use of motorized implements. “Forever Wild” should have meaning backed by law and policy.

Response: The APSLMP guidelines for wilderness, primitive and canoe areas, and the CPSLMP guidelines for wilderness areas and primitive bicycle corridors, require that public use of motorized equipment be prohibited to protect the wild character of these areas. The regulation is intended to implement the guidelines by providing the means for Department staff to enforce them.

Comment: The DEC itself should abide by the prohibition on motorized equipment, with only rare exceptions in the case of search and rescue or similar emergencies.

Response: APSLMP and CPSLMP guidelines for the use of motorized equipment by administrative personnel have governed Department of Environmental Conservation staff since those documents were first adopted. The APSLMP permits the limited construction and maintenance of structures and improvements of a primitive nature, such as trails, bridges and lean-tos, to afford public recreational access to Forest Preserve lands classified as wilderness, primitive and canoe. The CPSLMP applies similar provisions to lands classified as wilderness and primitive bicycle corridor. To facilitate construction and maintenance activities, the APSLMP permits the use of motorized equipment by administrative personnel, but only "for a specific major administrative, maintenance, rehabilitation, or construction project if that project involves conforming structures or improvements, or the removal of non-conforming structures or improvements, upon the written approval of the Commissioner of Environmental Conservation." Administrative use of motorized equipment must be "confined to off-peak seasons for the area in question and normally will be undertaken at periodic intervals of three to five years, unless extraordinary conditions, such as a fire, major blow-down or flood mandate more frequent work or work during peak periods." Department trail crews may use chainsaws during a spring "chainsaw window" between April 1 and May 24 each year, as authorized by Commissioner Berle in 1976. In addition, administrative personnel may use motorized equipment "by or under the supervision of appropriate officials, in cases of sudden, actual and ongoing emergencies involving the protection or preservation of human life or intrinsic resource values - for example, search and rescue operations, forest fires, or oil spills or similar, large-scale contamination of water bodies."

The CPSLMP provides that administrative personnel "will not use motor vehicles, snowmobiles, motorized equipment, bicycles or aircraft for day-to-day maintenance or patrol of state lands designated wilderness. Administrative use of motorized equipment or aircraft may be permitted for maintenance, rehabilitation, construction, fish stocking or research projects involving conforming structures or improvements, or the removal of nonconforming structures, during two off-peak seasons each year...These "windows" will run from May 1 - June 15 and October 15 - November 15, excepting weekends. Work that cannot be scheduled within these windows may be permitted on the approval of the Commissioner." The CPSLMP also permits administrative motorized equipment use in emergencies under guidelines similar to those contained in the APSLMP. CPSLMP guidelines for administrative use of motorized equipment in wilderness also apply to primitive bicycle corridors.

Comment: Seaplanes appear to be included in the definition of motorized equipment and should not be banned.

Response: Seaplanes are not included in the definition of motorized equipment, so the regulation does not affect seaplanes. An existing regulation, 6NYCRR § 196.4, prohibits the public use of aircraft on Forest Preserve waters listed in the regulation, including those in wilderness, primitive and canoe areas. The regulation does not prohibit the public use of aircraft on lakes and ponds in wild forest areas.

Comment: The regulation should not be implemented, because DEC does not have enough staff to enforce it.

Response: The regulation is necessary to assure that the conduct of visitors to wilderness, primitive and canoe areas in the Adirondack Park and wilderness areas and primitive bicycle corridors in the Catskill Park will conform with APSLMP and CPSLMP guidelines for motorized equipment use on Forest Preserve lands in those classifications. Undoubtedly most people will abide by the regulation once they have been informed of its adoption. Department program and enforcement staff will educate the public about the existence of the regulation. Forest Rangers and Environmental Conservation Officers will be effective in ensuring compliance with the regulation in the course of their regular duties of Forest Preserve patrol, education and enforcement.

Comment: The regulation will create a public safety hazard for our New York State public works employees when trying to clean up after a snow or wind storm. What would be gained by eliminating motorized equipment? This type of equipment is only used in emergency situations.

Response: The regulation will not limit the ability of Department staff or others to use motorized equipment in conformance with the guidelines of the APSLMP and CPSLMP. Both documents provide mechanisms for the use of motorized equipment by administrative personnel for major maintenance projects, such as the removal of debris following a storm. In

addition, both documents permit the use of motorized equipment "by or under the supervision of appropriate officials," in cases of "actual and ongoing emergencies" involving the protection of human life or intrinsic resource values.

Comment: Trail maintenance is an ongoing issue in the Adirondack Park. Foot trails are in deplorable condition. Maintenance will only be that more problematic should motorized equipment be eliminated.

Response: The regulation will not reduce the existing capability of Department staff or volunteer trail stewards to maintain trails. In the Adirondacks, Department trail crews, along with trail stewards having approved chainsaw safety training and operating under stewardship agreements with the Department, may use chainsaws to remove down trees from trails in wilderness, primitive and canoe areas between April 1 and May 24 each year, as authorized by Commissioner Berle in 1976. The CPSLMP provides that, in the Catskills, chainsaws may be operated in wilderness areas and primitive bicycle corridors each year from May 1 to June 15 and from October 15 to November 15, except on weekends. In addition, in wilderness, primitive and canoe areas in the Adirondack Park, and in wilderness areas and primitive bicycle corridors in the Catskill Park, chainsaws may be used at other times of the year, with Commissioner approval, to remove major blowdown.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Hunting Regulations for Pheasants

I.D. No. ENV-10-10-00003-P

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

Proposed Action: Amendment of section 2.25 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0901, 11-0903 and 11-0905

Subject: Hunting regulations for pheasants.

Purpose: To adjust pheasant hunting seasons and bag limits to increase hunting opportunity.

Text of proposed rule: Title 6 of NYCRR, section 2.25, entitled "Upland game birds," is amended as follows:

Amend existing paragraph 2.25(b)(1) to read as follows:

(1) Pheasant hunting seasons and bag limits.

Open Season	Wildlife management units (WMUs)	Bag limits
October 1st through [December 31] <i>the last day in February</i>	3A, 3C, 3F, 3G, 3H, 3J, 3K, 3M, 3N, 3P, 3R, 3S, 4A, 4B, 4C, 4F, 4G, 4H, 4J, 4K, 4L, 4O, 4P, 4R, 4S, 4T, 4U, 4W, 4Y, 4Z, 5A, 5C, 5F, 5G, 5H, 5J, 5R, 5S, 5T, 6A, 6C, 6F, 6G, 6H, 6J, 6K, 6N, 6P, 6R, 6S, and 7A	Two per day
First Saturday after October 14th through [the day before the Southern Zone regular deer season] <i>December 31</i>	[6P, 7F, 7H, 7J, 7L, 7M, 7N, 7P, 7R, 7S, 7T, 7U, 7V, 7W, 7X, 7Y, 7Z, 8A, 8C, 8F, 8G, 8H, 8J, 8K, 8L, 8M, 8N, 8P, 8R, 8S, 8T, 8U, 8V, 8W, 8X, 8Y, 8Z, 9A, 9C, 9E, 9F, 9G, 9H, 9J, 9L, 9M, 9N, 9P, 9R, 9S, 9T, 9U, 9V, 9W, 9X, 9Y, 9Z, 10A, 10C, 10E, 10F, 10G, 10H, 10J, 10K, 10L, 10M, 10N, 10P, 10R, 10S, 10T, 10U, 10V, 10W, 10X, 10Y, 10Z, 11A, 11C, 11E, 11F, 11G, 11H, 11J, 11K, 11L, 11M, 11N, 11P, 11R, 11S, 11T, 11U, 11V, 11W, 11X, 11Y, 11Z, 12A, 12C, 12E, 12F, 12G, 12H, 12J, 12K, 12L, 12M, 12N, 12P, 12R, 12S, 12T, 12U, 12V, 12W, 12X, 12Y, 12Z, 13A, 13C, 13E, 13F, 13G, 13H, 13J, 13K, 13L, 13M, 13N, 13P, 13R, 13S, 13T, 13U, 13V, 13W, 13X, 13Y, 13Z, 14A, 14C, 14E, 14F, 14G, 14H, 14J, 14K, 14L, 14M, 14N, 14P, 14R, 14S, 14T, 14U, 14V, 14W, 14X, 14Y, 14Z, 15A, 15C, 15E, 15F, 15G, 15H, 15J, 15K, 15L, 15M, 15N, 15P, 15R, 15S, 15T, 15U, 15V, 15W, 15X, 15Y, 15Z, 16A, 16C, 16E, 16F, 16G, 16H, 16J, 16K, 16L, 16M, 16N, 16P, 16R, 16S, 16T, 16U, 16V, 16W, 16X, 16Y, 16Z, 17A, 17C, 17E, 17F, 17G, 17H, 17J, 17K, 17L, 17M, 17N, 17P, 17R, 17S, 17T, 17U, 17V, 17W, 17X, 17Y, 17Z, 18A, 18C, 18E, 18F, 18G, 18H, 18J, 18K, 18L, 18M, 18N, 18P, 18R, 18S, 18T, 18U, 18V, 18W, 18X, 18Y, 18Z, 19A, 19C, 19E, 19F, 19G, 19H, 19J, 19K, 19L, 19M, 19N, 19P, 19R, 19S, 19T, 19U, 19V, 19W, 19X, 19Y, 19Z, 20A, 20C, 20E, 20F, 20G, 20H, 20J, 20K, 20L, 20M, 20N, 20P, 20R, 20S, 20T, 20U, 20V, 20W, 20X, 20Y, 20Z, 21A, 21C, 21E, 21F, 21G, 21H, 21J, 21K, 21L, 21M, 21N, 21P, 21R, 21S, 21T, 21U, 21V, 21W, 21X, 21Y, 21Z, 22A, 22C, 22E, 22F, 22G, 22H, 22J, 22K, 22L, 22M, 22N, 22P, 22R, 22S, 22T, 22U, 22V, 22W, 22X, 22Y, 22Z, 23A, 23C, 23E, 23F, 23G, 23H, 23J, 23K, 23L, 23M, 23N, 23P, 23R, 23S, 23T, 23U, 23V, 23W, 23X, 23Y, 23Z, 24A, 24C, 24E, 24F, 24G, 24H, 24J, 24K, 24L, 24M, 24N, 24P, 24R, 24S, 24T, 24U, 24V, 24W, 24X, 24Y, 24Z, 25A, 25C, 25E, 25F, 25G, 25H, 25J, 25K, 25L, 25M, 25N, 25P, 25R, 25S, 25T, 25U, 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(a) WMUs 2A, 1A, and 1C: no Youth Hunting Days.

(b) All other WMUs: Youth Pheasant Hunting Days shall be the last full weekend (Saturday and Sunday) prior to opening of the regular pheasant season.

Text of proposed rule and any required statements and analyses may be obtained from: Bryan Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8866, email: wildliferegs@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (DEC or department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Environmental Conservation Law sections 11-0901, 11-0903 and 11-0905 specifically provide for the establishment of hunting regulations for pheasants.

2. Legislative objectives:

The legislative objectives behind the statutory provisions listed above are to authorize the department to establish, by regulation, the areas and allowable methods for hunting pheasants, including but not limited to hunting season dates and bag limits. These regulations are used by the department to provide recreational opportunities that will not be detrimental to wild pheasant populations.

3. Needs and benefits:

Pheasant hunting is an important and popular recreational activity that is strongly supported by sportsmen and sportswomen throughout New York State. More than 50,000 people hunt pheasants in New York, and the estimated annual harvest is in excess of 100,000 birds. The vast majority of birds taken are those propagated by DEC or other game bird breeders who release birds in huntable areas throughout the State. However, the current season dates and bag limits are more conservative than is necessary for stocked birds. Expansion of fall hunting seasons, by closing later or opening earlier, and allowing hunters to take male or female pheasants, provides greater opportunity for hunters to harvest birds that are released for hunting purposes. Released birds rarely survive to the following year and they do not help sustain wild pheasant populations. Therefore, the department proposes to revise pheasant hunting regulations to extend fall hunting seasons in most areas of the State, to allow take of male and female pheasants in eight Wildlife Management Units (WMUs) where only male pheasants could be taken previously, and to allow take of pheasants (by falconry only) in New York City (WMU 2A).

The department recently updated its 10-year Management Plan for Ring-necked Pheasants in New York State, 2010-2020. In preparing the plan update, department staff reviewed the status of pheasants in New York and considered regulatory changes that would simplify or expand hunting opportunity for propagated pheasants wherever wild populations would not be adversely affected. This proposal would expand seasons and allow take of female pheasants in a number of WMUs where evidence of self-sustaining wild pheasant populations, or adequate area of suitable habitat for wild pheasants, is currently lacking. Department staff determined that the changes proposed will not be detrimental to wild pheasant populations in New York. Opportunities for public comment were provided on drafts of the plan, including specific regulatory changes that are now proposed for implementation. Most of the comments received supported the proposed changes because they would expand pheasant hunting opportunities in much of the State.

In addition to the above changes in season dates and bag limits, we are proposing to open WMU 2A to pheasant hunting. Wildlife Management Unit 2A is comprised of the five boroughs of New York City, where hunting with a firearm or longbow is prohibited pursuant to the New York State Penal Law. However, licensed falconers may legally hunt for small game in New York City, so the proposed pheasant season for WMU 2A would allow take by this activity. The proposed season and bag limits will conform to regulations applicable to those established in WMU 1A (Nassau County).

4. Costs:

None beyond normal administrative costs.

5. Local government mandates:

There are no local governmental mandates associated with this proposed regulation.

6. Paperwork:

No additional paperwork is associated with this proposed regulation.

7. Duplication:

There are no other regulations similar to this proposal.

8. Alternatives:

The department considered the following alternatives related to pheasant hunting in New York:

(a) No regulatory changes. We could allow current regulations to remain in effect, but this would unnecessarily limit opportunities for small game hunters to harvest pheasants propagated and released by the department or other game bird breeders.

(b) Expand hunting opportunity even more than is proposed. For example, we considered allowing take of male or female pheasants throughout upstate New York from October 1 through the end of February. While this would greatly simplify our pheasant hunting regulations, there was some concern among staff as well as sporting organizations that this could be detrimental to wild pheasant populations that still exist in some local areas in the Lake Plains of western New York. A uniform statewide season would also create logistic challenges for the department's pheasant propagation program, as hunters would expect to have birds released throughout the State just prior to opening day. Staggered opening dates allow us to meet the demand for released birds on opening day in more areas, given current production, staff, and fiscal limitations.

9. Federal standards:

There are no Federal standards associated with pheasant hunting.

10. Compliance schedule:

Hunters would have to comply with the new regulations beginning in the fall of 2010.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend pheasant hunting regulations to provide additional recreational opportunity for licensed small game hunters in New York State. Small businesses or local governments will not be directly affected by the proposed rule making because it applies only to individual persons who are licensed to hunt small game in New York State. Based on the Department of Environmental Conservation's (department) past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making may slightly increase the number of participants or the frequency of participation in pheasant hunting statewide. Some small businesses currently benefit from pheasant hunting because hunters spend money on goods and services, and thus an increase in hunter participation could lead to positive economic benefits for such businesses. However, this rule will not impose any new reporting, record-keeping, or other compliance requirements on small businesses or local governments. Furthermore, the proposed rule changes were included in drafts of New York's recently updated "Management Plan for Ring-necked Pheasants in New York State, 2010-2020". The final draft was available for public comment from late September to mid-November 2009, with notice of availability announced via the department website, press release, Environmental Notice Bulletin, and direct mailings to stakeholders. No small businesses or local governments commented on the proposed rule changes.

For all of the above reasons, the department has concluded that this rule making does not require a formal Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend pheasant hunting regulations to provide additional recreational opportunities for licensed small game hunters all across New York State. Hunters who wish to use the additional recreational opportunities provided by the proposed rule 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. The proposed rule changes were included in drafts of New York's recently updated "Management Plan for Ring-necked Pheasants in New York State, 2010-2020". The final draft was available for public comment from late September to mid-November 2009, with notice of availability announced via the department website, press release, Environmental Notice Bulletin, and direct mailings to stakeholders, including sportsmen's organizations in rural areas throughout New York State. Comments received were very supportive of the proposed rule changes. For these reasons, the department has concluded that this rule making does not require a formal Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend pheasant hunting regulations to provide additional recreational opportunity for licensed small game hunters in New York State. Based on the department's past experi-

ence in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making may slightly increase the number of participants or the frequency of participation in pheasant hunting statewide. Pheasant hunting does not often involve professional guide services or other employment opportunities, and very few jobs exist as a direct result of pheasant hunting. Some licensed hunting guides (far less than 100) in New York may benefit from increased pheasant hunting opportunity if there are more clients to take on hunting trips. However, we expect 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.

Department of Labor

NOTICE OF EXPIRATION

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

New York State Worker Adjustment and Retraining Notification Act (WARN)

I.D. No.	Proposed	Expiration Date
LAB-07-09-00013-EP	February 18, 2009	February 18, 2010

Office of Mental Health

NOTICE OF ADOPTION

Certificate of Relief from Disabilities Related to Firearms Possession

I.D. No. OMH-52-09-00005-A

Filing No. 170

Filing Date: 2010-02-23

Effective Date: 2010-03-10

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

Action taken: Addition of Part 543 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, section 7.09(b) and (j)

Subject: Certificate of Relief from Disabilities Related to Firearms Possession.

Purpose: To establish an administrative certificate of relief from disabilities process pursuant to Federal law.

Text or summary was published in the December 30, 2009 issue of the Register, I.D. No. OMH-52-09-00005-EP.

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

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

Assessment of Public Comment

The agency received one letter of comment regarding the addition of Part 543 to Title 14 NYCRR. The issues and responses are as follows:

Issue: The writer noted that Office of Mental Health (OMH) does not mandate a psychiatric evaluation be performed and included in the submission of required documentation for applicants seeking a certificate of relief from disabilities related to firearms possession. Yet, the Office of Mental Retardation and Developmental Disabilities (OMRDD), in its Notice of Proposed Rulemaking for its appeal process for individuals wishing to purchase or possess a firearm, does require the submission of a psychiatric evaluation.

Response: In OMH's rulemaking, Section 543.5(a)(4) states, "The

applicant may provide a psychiatric evaluation performed no earlier than 90 days from the date the request for a certificate of relief was submitted to the Office, conducted by a qualified psychiatrist. The evaluation should include an opinion, and a basis for that opinion, as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest." Section 543.5(a)(5) further states that "The Office reserves the right to request that the applicant undergo a clinical evaluation and risk assessment as determined by the Commissioner or his/her designee(s). The evaluation must be performed within 45 calendar days from the date the Office requests the evaluation, unless the Office allows an extension of time."

While it is anticipated that OMH will request a psychiatric evaluation be performed in virtually all cases, there may be some instances where it is clear that an evaluation is not needed. The cost to the applicant could be prohibitive and potentially unnecessary. In addition, there may be extenuating circumstances, as in the case of an applicant who is misidentified within the NICS system, and who, in an effort to purchase/own a firearm, must petition for relief. It would be inappropriate to mandate a psychiatric evaluation be performed in that instance. In cases where the agency believes a psychiatric evaluation is necessary, OMH would rely on the clinical expertise of its own staff to conduct the evaluation.

Issue: The writer stated the belief that the applicant should notify the licensing officer responsible for issuing any license to possess a firearm in the appropriate jurisdiction.

Response: As noted within the regulatory impact statement for Part 543 of Title 14 NYCRR, this rule is a careful balancing of an individual's Constitutional right to possess/own a firearm against the important public safety concern of gun violence. Under Section 543.5(a)(3)(v) of the regulations, OMH specifically has the authority to require applicants to submit "any further information specifically requested by the Office" including any information which relates to the determination of whether the applicant for gun ownership or possession will or will not be likely to act in a manner dangerous to public safety or would be contrary to the public interest. This could include information demonstrating that the applicant has notified local licensing officers of the petition for a certificate of relief, in those instances in which such information could be potentially helpful in making a final determination on the petition. However, there are certain instances in which it would not be appropriate or necessary to require such notification, such as those instances in which an applicant is misidentified within the NICS system, and who, in an effort to purchase/own a firearm, must petition for relief. The agency believes, therefore, that the rulemaking as filed is appropriate and does not need to be amended.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Amendment of Liability for Services Regulations

I.D. No. MRD-52-09-00009-A

Filing No. 166

Filing Date: 2010-02-23

Effective Date: 2010-03-15

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

Action taken: Amendment of Subpart 635-12 and section 671.7(h) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.25, 43.02 and 43.03

Subject: Amendment of Liability for Services Regulations.

Purpose: To amend OMRDD's liability for services regulations to include a limited exception and a schedule of compliance activities.

Text or summary was published in the December 30, 2009 issue of the Register, I.D. No. MRD-52-09-00009-P.

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

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

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

Assessment of Public Comment

Comments were received from one service provider concerning the limited exception for supported employment services (SEMP) and respite services.

Comment: The provider commended OMRDD for considering the feedback related to limited users of respite and SEMP and for delaying and ultimately modifying the regulations to reflect the comments from people with developmental disabilities, their families and voluntary agencies.

Response: OMRDD sought extensive input from those affected by the regulations in the development of the proposal. OMRDD appreciates acknowledgement of its efforts.

Comment: Overall, the provider was pleased with the limited exception but is concerned with potential unintended consequences that could result for people who are not HCBS Waiver enrolled but already receive Medicaid Service Coordination (MSC).

The provider stated that an individual without MSC would be able to quickly access respite or SEMP, whereas an individual with MSC would have to complete HCBS waiver enrollment first, since admission to respite or SEMP for individuals not eligible for the limited exception is contingent upon HCBS waiver enrollment; this requirement can delay and/or impede access to these services.

Response: The provisions of the proposed regulations are unchanged in the final regulations. The limited exception will only be available for someone receiving either SEMP or respite with no other covered service. (MSC is a covered service.) OMRDD crafted this limited exception based on the understanding that individuals who receive only SEMP or respite require minimal support and that the service is for a clearly defined, limited purpose that is sufficient to meet their needs.

OMRDD considers that receipt of MSC in addition to SEMP or respite indicates that an individual likely needs more extensive services and supports. The cost of the provision of these supports and services will be significantly higher to New York State in the absence of Medicaid funding. Therefore, the individual is made subject to the requirements of the regulations that individuals must obtain and maintain Medicaid and apply for HCBS waiver enrollment or pay for services.

OMRDD recognizes that delays in obtaining Medicaid and enrolling in the HCBS waiver can cause difficulties for individuals. OMRDD is consequently working with providers to expedite submission and processing of applications for HCBS waiver enrollment. OMRDD observes that the delays experienced by individuals receiving SEMP or respite are the same as those faced by individuals receiving other services that are subject to the regulations and that the impact is not disproportionate on individuals in these situations.

Comment: The provider stated that enrollment in the HCBS waiver can be time-consuming as it includes making appointments, completing various evaluations, waiting for test results, submitting all the documents for the Level of Care Eligibility Determination and then waiting for a response from OMRDD. The provider stated that for an individual or family for whom English is not the first language, there are often extensive delays in getting current evaluations. The provider further observed that these families, in particular, may be negatively impacted by the proposed regulations.

Response: OMRDD is aware of the requirements being imposed on prospective service recipients by the Liability for Services regulations

and will, whenever possible, prioritize the processing of applications for enrollment in the HCBS waiver accordingly. Individuals, service coordinators, service providers and advocates are strongly encouraged to submit applications for both Medicaid and HCBS waiver enrollment as soon as it is determined that covered services will be applied for or may be needed.

Comment: The provider stated that people who need SEMP or respite quickly may opt out of MSC, since receiving SEMP or respite and MSC would require them to obtain Medicaid and enroll in the HCBS waiver, which can be time consuming. The provider observed that MSC is useful in assisting individuals in navigating through the process and for individuals who do not speak English, a service coordinator who speaks their language may be the only way they can communicate. The provider stated that families should not have to choose between an urgently needed service and an advocate that they depend on for assistance.

Response: OMRDD agrees that MSC can be a useful service for individuals to obtain Medicaid and enroll in the HCBS waiver. Consequently, OMRDD may provide up to three months of State-paid MSC to facilitate this process. Further, State funding may also be available to pay for any of the covered services if individuals have an immediate need for any new covered services and delaying the start of the services would endanger the individual's health or safety. Further, OMRDD has a process for providers to obtain OMRDD approval of the waiver or reduction of fees for any covered service. OMRDD considers these measures sufficient to accommodate individual circumstances where State-paid services may be necessary to facilitate the provision of new services.

Comment: The provider suggested that OMRDD remove MSC from the list of covered services. The provider stated that if an individual or family chooses to enroll in the HCBS waiver later, it would be faster since they would already have a MSC and would be able to get enrollment assistance from the MSC.

The provider also suggested that as an alternative, OMRDD allow for a six-month window for HCBS waiver enrollment during which State payments would continue for individuals who add MSC to a respite or SEMP program, or who have MSC and add a respite or SEMP program.

Response: OMRDD considers MSC as a service integral to the OMRDD system and has retained it as a covered service in the final regulations. If OMRDD were to exclude MSC, individuals would not be subject to specific requirements to apply for Medicaid or pay for the service. If a significant number of eligible individuals did not apply for Medicaid, significant additional State funds would be necessary to pay for the individuals' services. As noted above, OMRDD has established several measures to assist individuals who are seeking new services. First, State funding is available to pay for MSC for up to 90 days to assist with the Medicaid application and HCBS waiver enrollment processes and other provisions make State funding available to provide other covered services based on individual circumstances as noted above. Second, the service provider may not discontinue preexisting SEMP or respite services based on non-payment if the individual ceases to qualify for the limited exception by receiving another covered service such as MSC. (The provider can be paid for these services either by the individual or the State if OMRDD approves a fee waiver.) Finally, although the provider has the right to discontinue "other than preexisting" SEMP or respite services based upon non-payment (unless subject to a court order), this is not the only option: the provider may receive continued State payments for these services if OMRDD approves a fee waiver.

OMRDD considers these measures sufficient to address the needs of individuals transitioning on an individual basis and has not included the suggested six month window.

Comment: The provider noted that the SEMP or respite provider has no control over the length of time it takes other agencies to submit or process paperwork related to the HCBS waiver application. The provider asked if agencies should stop serving individuals as soon as they are aware that the individuals will be receiving other covered services but are not yet HCBS waiver enrolled due to delays outside of the agency's control.

Response: OMRDD is sensitive to the possibility that a SEMP or respite provider could, through no fault of its own, be unaware that a person it is serving lost his or her limited exception. The regulations have several provisions aimed at mitigating the harm to the provider in these circumstances. First, both the individual and the provider to which the individual applied for other services must notify the SEMP or respite provider that the application for other services has been made. Second, although the service provider cannot discontinue preexisting SEMP or respite services, if the individual loses his or her limited exception without obtaining Medicaid and HCBS waiver enrollment, the SEMP or respite provider will be billing the individual or liable parties. Third, if the individual is receiving "other than preexisting" SEMP or respite and loses his or her limited exception without obtaining Medicaid funding for the SEMP or respite services, the provider may discontinue the SEMP or respite services. Fourth, as noted above, providers may receive State payments if a fee reduction or waiver has been granted by the service provider and approved by OMRDD. Providers should apply for OMRDD approval of a fee reduction or waiver if the individual cannot fully pay for the services and it is not otherwise in the best interests of the individual for the provider to discontinue services. Finally, under long-standing Medicaid rules, if an individual qualifies for Medicaid and successfully enrolls in the HCBS waiver, Medicaid funding may also be available to pay for past services.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Revision of the Reimbursement Methodology Related to Allowable Costs of Ownership of Real Property

I.D. No. MRD-10-10-00009-P

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

Proposed Action: Amendment of sections 635-6.4, 635-99.1, 680.12 and 686.13 of Title 14 NYCRR.

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

Subject: Revision of the reimbursement methodology related to allowable costs of ownership of real property.

Purpose: To simplify payment of property costs and synchronize reimbursement with providers' payment obligations based on debt service.

Public hearing(s) will be held at: 11:00 a.m., April 26, 2010 at OMRDD, 44 Holland Ave., Counsel's Office Conference Rm., 3rd Fl., Albany, NY; and 11:00 a.m., April 28, 2010 at OMRDD, 44 Holland Ave., Counsel's Office Conference Rm., 3rd Fl., Albany, NY.

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

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

Text of proposed rule: Section 635-6.4 is amended as follows:

- Section 635-6.4 - Costs of ownership of real property.

(a) Unless specifically otherwise provided for in this Title, costs of ownership of real property shall be allowable in the amount of depreciation, interest, costs of alteration, construction, rehabilitation and/or renovation to real property, and costs attributable to the negotiation or settlement of sale or purchase of real property[, or in the amount of] in cases where:

(1) OMRDD and the Division of the Budget first approved the property costs before June 1, 2010; or

(2) OMRDD and the Division of the Budget first approved the property costs on or after June 1, 2010, but the costs were previously funded, in whole or in part, by New York State, any other state or the federal government.

(b) Unless specifically otherwise provided for in this Title and except as provided in paragraph (2) of subdivision (a) of this section, costs of ownership of real property shall be allowable in the amount of interest and principal or provider equity (see Subpart 635-99 of this Part), in cases where OMRDD and the Division of the Budget first approved the property costs on or after June 1, 2010.

(c) Notwithstanding the provisions of subdivisions (a) or (b) of this sec-

tion, costs of ownership of real property shall be allowable in the amount of costs related to loans from the Dormitory Authority of the State of New York (see [glossary,] Subpart 635-99 of this Part).

(d) Reimbursement for principal and interest or provider equity and interest is an allowance in lieu of reimbursement of interest and depreciation associated with the property, and in lieu of reimbursement of the underlying allowable costs, which may include allowable start-up costs, for which the mortgage, loan, or other financing is received.

[(b)] (e) Depreciation is based upon the historical cost and useful life of buildings, fixed equipment and/or capital improvements, alterations, rehabilitation and/or renovations.

(f) Principal shall be the amount which the provider borrows for the purchase, alteration, construction, rehabilitation and/or renovation of real property, for costs attributable to the negotiation or settlement of sale or purchase of the real property and for other reasonable and necessary costs related to such purchase, alteration, construction, rehabilitation and/or renovation, including, but not limited to, design fees and short term interest. Principal shall be allowable in the amount approved by OMRDD and the Division of the Budget, but shall not be greater than the lesser of:

(1) the historical cost; or

(2) the amount the provider actually borrowed.

(g) The commissioner may allow provider equity in an amount not to exceed fair market value if the provider demonstrates that allowing such provider equity:

(1) is necessary in order for the facility or program in question to continue to operate, or is necessary in order for the facility or program to open;

(2) would be an economic and efficient use of resources; and

(3) would be in the best interests of the persons who are receiving or will receive services at the facility or program in question.

Note: Current subdivisions 635-6.4(c)-(h) are renumbered as (h)-(m).

Note: Renumbered paragraphs 635-6.4(h)(1)-(8) are unchanged, except that subparagraph (8)(iii) is amended as follows:

(iii) The commissioner may allow an alternative historical cost only for transfers, purchases, alteration, construction, renovation or rehabilitation, the terms of which were agreed to after [the effective date of this regulation] July 12, 2000.

Note: Renumbered subdivision 635-6.4(i) is amended as follows:

(i) Useful life and amortization period.

(1) The useful life of depreciable assets shall be the higher of the reported useful life or the useful life from the Estimated Useful Lives of Depreciable Hospital Assets (current edition), published by the American Hospital Association. This document is available from:

(i) the American Hospital Association, 840 Lake Shore Drive, Chicago, Illinois 60611;

(ii) it may also be reviewed in person during regular business hours at the:

(a) N.Y.S. Department of State, 41 State Street, Albany, New York 12231; or

(b) by appointment at the N.Y.S. Office of Mental Retardation and Developmental Disabilities, 44 Holland Avenue, Albany, New York 12229.

(2) The amortization period for principal repayment and provider equity shall be the lesser of:

(i) the term of the indebtedness, as approved by OMRDD and Division of the Budget, related to the real property in question; or

(ii) the remaining useful life on the asset.

[(2)](3) A provider or [consumer] an individual receiving services may use a different useful life or amortization period if such different useful life or amortization period is approved by OMRDD. OMRDD shall base such approval upon historical experience, documentary evidence, loan agreements (if any) and need for the services for which the depreciable or financed assets are used.

Note: Rest of section 635-6.4 remains unchanged except for renumbering.

• Add new subdivision 635-99.1(ai) as follows and renumber rest of section 635.99.1 accordingly:

(ai) Equity, provider. The amount the provider paid, excluding the amount paid from borrowed funds, for the purchase, alteration, construction, rehabilitation and/or renovation of real property, for costs attributable to the negotiation or settlement of sale or purchase of such real property and for other reasonable and necessary costs related to such purchase, alteration, construction, rehabilitation and/or renovation, including, but not limited to, design fees and short term interest.

• Paragraph 680.12(a)(9) is amended as follows:

(9) Capital costs shall mean property costs subject to the limitations contained in this section, Subpart 635-6 of this Title, and Medicare principles of reimbursement, except that costs of ownership of real property shall not include principal or provider equity.

• Paragraph 680.12(d)(8) is amended by the addition of a new subparagraph (xiii) as follows:

(xiii) *Costs of ownership of real property shall not include principal or provider equity.*

• Paragraph 686.13(b)(3) is amended by the addition of a new subparagraph (i) as follows:

(i) *The provisions of this paragraph (3) shall only apply where costs of ownership of real property under Section 635-6.4 are limited to depreciation, interest, costs of alteration, construction, rehabilitation and/or renovation to real property, and costs attributable to the negotiation or settlement of sale or purchase of real property.*

Note: Subparagraphs 686.13(b)(3)(i) and (ii) are renumbered as (ii) and (iii).

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

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

Public comment will be received until: Five days after the last scheduled public hearing.

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

Regulatory Impact Statement

1. Statutory authority:

a. Section 13.07 of the Mental Hygiene Law sets forth the responsibility of the New York State Office of Mental Retardation and Developmental to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. Section 13.09(b) of the Mental Hygiene Law establishes OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction.

c. Section 43.02 of the Mental Hygiene Law establishes OMRDD's responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law by reimbursing debt service (principal and interest) for costs of ownership of real property in lieu of depreciation and interest. The proposed amendments will create a provider funding stream that is synchronized with the provider's outlays for mortgage debt service and simplify the process for obtaining funding for non-depreciable real property, viz., land.

3. Needs and benefits: Historically, OMRDD reimburses its voluntary residential providers for the costs associated with the ownership of real property on the basis of depreciation and interest. This has two impacts on providers and OMRDD. First, reimbursement is heavily front-loaded in comparison to the level debt service that supports most property financing. This requires OMRDD to pay more in the earlier years of the indebtedness, with a negative impact on the state's cash flow. It also requires providers to keep a separate accounting for the excess funded depreciation accumulated in the earlier years and to redirect those funds to debt service in later years of the financing term.

The second effect relates to funding for land. As land is a non-depreciable asset, OMRDD cannot reimburse land costs but rather must fund those costs for providers through separate contract processes known as State Aid agreements. This separate process creates additional administrative burdens on OMRDD - estimated at 0.4 FTE dedicated to this function - and providers.

It is noteworthy that the current regulations at 14 NYCRR Section 635-6.4(h) do provide an exception that allows reimbursement of debt service in lieu of interest and depreciation for property financed through State-backed Dormitory Authority bond programs. At the time this exception was developed, the bond program was the typical way in which property costs were financed. As OMRDD has moved away from State-backed bonds for its voluntary program, this provision has had little utility.

It is also noteworthy that OMRDD has provided reimbursement for debt service in lieu of interest and depreciation under the Organized Healthcare Delivery System (OPTS), with no reported concerns from any stakeholders.

By reimbursing property based on debt service, OMRDD will be able to streamline and simplify its internal processes and achieve modest cash flow savings.

From the providers' perspective, the proposed amendments will synchronize property reimbursement with their payment obligations, relieving them of the burden of accounting for excess funded depreciation

received in the earlier years of the financing term, and avoid the separate contracting process for land costs.

4. Costs:

a. Costs to the Agency and to the State and its local governments: OMRDD will not incur any new costs as a result of these amendments. Based on currently projected service development for the period June 1, 2010 through March 31, 2013, OMRDD estimates that implementation of the regulations will result in estimated cash flow savings to the State of \$5.5 million over the 35-month period and will reduce workload estimated at 0.4 FTE. These cash flow savings will be paid out over the term of the financing with no impact on total provider reimbursement.

There will be no additional costs or savings to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: Providers will generally receive less reimbursement in the earlier years after a transaction and greater reimbursement in the later years for a net change of zero over the transaction's financing term. However, providers will also experience a significant reduction in the burden of accounting for excess funded depreciation received in the earlier years of the financing term, and avoid the separate contracting process for land costs. Providers will also not receive interest on the funds they were required to set aside in funded depreciation accounts. However, providers' use of such accounts was limited to repayment of indebtedness and necessary improvements to the property.

c. Costs to individuals and families: There are no new costs to the individuals and families. The proposed regulations affect provider reimbursement for certified settings only.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: There is no new paperwork required. The implementation of the regulation will result in a reduction in paperwork due to the elimination for the need for State Aid agreements for the payment of the land portion of property costs.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited services for persons with developmental disabilities.

8. Alternatives: OMRDD currently uses State Aid agreements as the mechanism for paying land costs. This current process requires additional staff and paperwork to maintain. The proposed regulations providing for debt service reimbursement will result in a streamlined process with reduced workload and paperwork.

9. Federal standards: The proposed regulations do not exceed any applicable federal standards.

10. Compliance schedule: The regulation is expected to become effective June 1, 2010.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which provide developmental disabilities services under the auspices of OMRDD. While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. The regulations will only apply to new or replacement facilities acquired (not leased) by provider agencies, and will not apply to current facilities; however, it can be anticipated that the number of agencies that will be opening new or replacement facilities is similar to those currently operating facilities. As of December 2009, OMRDD estimates that up to 300 provider agencies could potentially open new or replacement facilities, and thus be affected by the regulations. The estimate is for the period from June 1, 2010 through March 31, 2013.

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. The proposed amendments will synchronize property reimbursement with provider payment obligations, relieving them of the burden of accounting for excess funded depreciation received in the earlier years of the financing term, and avoid the separate contracting process for land costs.

The proposed amendments will have no effect on local governments.

2. Compliance requirements: Providers with property approvals from OMRDD and DOB on or after June 1, 2010 will receive reimbursement of property costs based on the amended methodology instead of the current methodology (except when the property is already funded with government monies). Compared to the current requirements, the proposed amendments will simplify the accounting processes necessary for providers to properly account for the excess funded depreciation received in the earlier years of the financing term, and avoid the separate contracting process for

land costs. Overall, the compliance requirements imposed by the new methodology are significantly less than the current requirements.

3. Professional services: Providers will be able to reduce the professional services of accountants due to the simplified compliance requirements. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: Providers will generally receive less reimbursement in the earlier years after a transaction and greater reimbursement in the later years for a net change of zero over the transaction's financing term. However, providers will also experience a significant reduction in the burden of accounting for excess funded depreciation received in the earlier years of the financing term, and avoid the separate contracting process for land costs. Providers will also not receive interest on the funds they were required to set aside in funded depreciation accounts. However, providers' use of such accounts was limited to repayment of indebtedness and necessary improvements to the property.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The amendments will not result in any significant adverse economic impact for providers. Providers will generally experience a reduction in reimbursement in the earlier years after a transaction and an increase in reimbursement in the later years, so that overall reimbursement will remain the same. However, providers will experience significant savings from the reduction in the burden of accounting and simplification of the process. The reimbursement impacts cannot be minimized. Local governments will not have any adverse economic impact.

7. Small business and local government participation: OMRDD discussed the concepts related to these proposed regulations with the provider associations at meetings held in October and November, 2009. The provider associations were supportive of the proposed changes. Draft regulations were also shared with the provider associations and Willowbrook plaintiff attorneys in January, 2010.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this rule making is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. As discussed in the Regulatory Impact Statement, this proposed regulation simplifies payment of property costs and synchronizes reimbursement with providers' payment obligations based on debt service.

Job Impact Statement

A Job Impact Statement for this rule making is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. As discussed in the Regulatory Impact Statement, this proposed regulation simplifies payment of property costs and synchronizes reimbursement with providers' payment obligations based on debt service. There may be a modest reduction in provider staff time or contracted professional services related to the relief of the burden of accounting for excess funded depreciation received in the earlier years of the financing term, and avoidance of the separate contracting process for land costs. However, this is not expected to translate into any measurable loss of jobs.

Department of Motor Vehicles

NOTICE OF ADOPTION

Driver License Qualifications After Loss of Consciousness

I.D. No. MTV-51-09-00005-A

Filing No. 164

Filing Date: 2010-02-19

Effective Date: 2010-03-10

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

Action taken: Amendment of Part 9 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 502(1) and 510(3)(b)

Subject: Driver license qualifications after loss of consciousness.

Purpose: Authorizes nurse practitioners to evaluate motorists ability to safely operate a vehicle after a loss of consciousness episode.

Text or summary was published in the December 23, 2009 issue of the Register, I.D. No. MTV-51-09-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Niagara Falls Water Board

EMERGENCY/PROPOSED

RULE MAKING

NO HEARING(S) SCHEDULED

Adoption of a Schedule of Rates, Fees and Charges

I.D. No. NFW-10-10-00001-EP

Filing No. 159

Filing Date: 2010-02-16

Effective Date: 2010-02-16

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

Proposed Action: Amendment of section 1950.20 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1230-j

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

Specific reasons underlying the finding of necessity: To enable the Board to sufficiently fund its operation and in order to preserve public health, safety and welfare for the people in our service area.

Subject: Adoption of a schedule of Rates, Fees and Charges.

Purpose: To pay for the increased costs necessary to operate, maintain and manage the system, and to achieve covenants with bondholders.

Text of emergency/proposed rule: 1950.20 Schedule of Rates, Fees and Charges.

(a) This schedule sets forth the rates, fees and other charges applicable to the provision of water supply, wastewater and related services by the Niagara Falls Water Board to all property owners, users and other persons as of January 1, 20[08]10. All property owners, users and other persons who receive services from the water board shall pay to the water board the rates, fees and charges set forth in this schedule.

(b) The following rates shall be charged and collected for the use of water within the city, supplied by the water board as hereby fixed and established:

First 20,000 cu. ft. per quarter, \$2.85[2.79] per 100 cu. ft.

Next succeeding 60,000 cu. ft. per quarter, \$2.47[2.42] per 100 cu. ft.

Next succeeding 120,000 cu. ft. per quarter, \$2.09[2.05] per 100 cu. ft.

Over 200,000 cu. ft. per quarter, \$1.73[1.70] per 100 cu. ft.

The minimum charge for water consumed in any premises within the city for any quarter or portion thereof shall not be less than \$37.00[36.27].

(c) The following rates shall be charged and collected for the use of water outside the city for residential and commercial purposes supplied by the water board as hereby fixed and established:

First 20,000 cu. ft. per quarter, \$7.62 per 100 cu. ft.

Next 60,000 cu. ft. per quarter, \$6.65 per 100 cu. ft.

Next succeeding 120,000 cu. ft. per quarter, \$5.54 per 100 cu. ft.

Over 200,000 cu. ft. per quarter, \$4.66 per 100 cu. ft.

The minimum charge for water consumed in any premises located outside the city for domestic purposes for any quarter or portion thereof shall not be less than \$99.06

(d) Water used for testing fire hoses, filling tanks, swimming pools, testing sprinkler systems, and like use shall be billed at the highest residential unit rate enumerated in section 1950.20(b) above. The amount used may be either estimated in accordance with the size of the pipe through which taken at the pressure furnished, or determined by the use of a temporary meter rented to the user by the water board. The use of the latter method shall be at the discretion of the director and may require a refundable deposit.

(e) Use of hydrant for any purpose whatsoever shall be subject to a rental charge of one dollar and 50 cents (\$1.50) per day or partial day.

(f) The cost of hydrant use will include a fee of thirty-five (\$35.00) for backflow device certification, payable at the time of hydrant use application. In addition, daily hydrant and meter rental rates and security deposit amounts shall be established by the director based upon the real cost to the water board.

(g) In addition to the above schedule of rates for water consumed there shall be assessed a demand charge for each user's meter as set forth below.

Size and Type	Charge Per Quarter
Under 1" Disc	\$2.86[2.80]
1" Disc	\$7.13[6.99]
2" Disc	\$10.27[10.07]
2" Compound	\$17.13[16.79]
3" Compound	\$32.81[32.17]
4" Compound	\$48.51[47.56]
6" Compound	\$80.18[78.61]
8" Compound	\$95.88[94.00]
10" Compound	\$111.57[109.38]
12" Compound	\$128.69[126.17]

(h) The rates set forth in section 2 herein, however, shall not apply to any user of water with whom there is now outstanding a valid and binding contract with the city and/or water board to supply water at a rate different than the rates stated in this Schedule, or to users obtaining water service from the Village of LaSalle prior to May 4, 1927.

(i) In the event the water board or the director terminates water supply service to any property owner or user, such property owner, user or users located at such property shall pay a reactivation fee in the amount of seventy-five dollars (\$75.00) to the water board prior to the supply of water.

(j) There shall be small meter testing charge of one hundred dollars (\$100.00) for the bench testing of any meter less than two inches in size.

(k) An account reactivation charge of one hundred dollars (\$100.00) shall be applied whenever a meter is re-installed and an account reactivated.

(l) The water board shall charge a twenty-five dollar (\$25.00) final read fee for all owner requested meter reads.

(m) A hydrant flow test charge shall be applied whenever an owner, user or his agent requests a hydrant flow test.

(n) The annual availability charge for private fire protection service shall be:

Diameter of Service Connection	Annual Fee
2" or less	\$66.00
3"	\$95.00
4"	\$168.00
6"	\$380.00
8"	\$670.00
10"	\$1050.00
12"	\$1510.00

(o) A backflow submittal fee of twenty-five dollars (\$25.00) shall be charged for all backflow plans submitted to the water board for approval and forwarding to the state health department.

(p) There shall be a fifty dollar (\$50.00) inspection fee for each request for a cross-connection inspection.

(q) There shall be a thirty dollar (\$30.00) availability charge applied on a quarterly basis to all accounts inactivated pursuant to water board 21 N.Y.C.R.R. Part 1950.8 paragraph (m).

(r) In addition to the above rates, fees and charges, the following rates shall apply to all users with respect to sewer or wastewater services prescribed in the water board's wastewater regulations 21 N.Y.C.R.R. Part 1960. There shall be two (2) user classes as provided in Part 1960, to wit:

Commercial/Small Industrial/Residential Users (CSIRU) and Significant Industrial Users (SIU).

(a) CSIRU

Sewer rates for the CSIRU class are determined by total metered water consumption in each quarter.

The schedule of quarterly charges for the CSIRU class shall be as follows:

SCHEDULE I

Minimum charge per quarter	\$46.50[45.59] with a usage allowance of up to 1,300 cubic feet
Additional usage in excess of 1,300 cubic feet	\$3.79[3.72] per 100 cubic feet

(b) SIU

1. CONVENTIONAL POLLUTANT PARAMETER CHARGES.

Sewer rates for the SIU class each quarter are based on measured quantities of the actual discharge parameters: flow, suspended solids and soluble organic carbon. Such determination shall be made by the water board and shall be based upon five (5) representative 24 hour composite samples taken quarterly, at such locations as are adequate to provide proper representation.

The schedule of charges for conventional pollutant parameters shall be as follows:

SCHEDULE II

POLLUTANT PARAMETERS	RATE
Flow	\$2678.83[2,626.30] per million gallons
Suspended Solids	\$0.89[0.87] per pound
Soluble Organic Carbon	\$1.53[1.50] per pound

2. SUBSTANCES OF CONCERN PARAMETER CHARGES.

SIU's, who have wastewater discharge permits which limit any substance of concern listed in Schedule III below, will be billed for discharge of these substances based on the unit rates shown in Schedule III. Discharge loading for billing purposes shall be determined by arithmetic average of the last six acceptable self monitoring results. At the option of the SIU, increased self monitoring can be performed. For billing purposes, when six (6) or more acceptable results are obtained over the three (3) month billing period, all such results shall be used in the computation of the arithmetic average, with a requirement that there be at least two (2) sample results for each month. Average discharge loadings will then be multiplied by the corresponding unit rates from Schedule III to obtain total charges per quarter for each substance of concern listed in the SIU's wastewater discharge permit. All substances of concern charges will be added to the charges for conventional parameters, as specified above, to compute the total quarterly sewer rate.

SCHEDULE III

SUBSTANCES OF CONCERN UNIT CHARGES

PARAMETERS	UNIT RATE
Benzene	\$303.60[297.65] per pound
Chloroform	\$54.06[53.00] per pound
Dichloroethylenes	\$330.33[323.85] per pound
Toluene	\$14.64[14.35] per pound
Trichloroethanes	\$68.65[67.30] per pound
Trichloroethylene	\$87.26[85.90] per pound
Vinyl Chloride	\$43.86[43.00] per pound
Monochlorotoluenes	\$2.96[2.90] per pound
Tetrachloroethylene	\$40.90[40.10] per pound
Total Phenols	\$6.68[6.55] per pound

3. BILLING.

SIU charges shall be billed on a monthly basis by the water board. The first and second monthly billings in each quarter shall be estimated and shall be one third (1/3) of the total billing in the immediately preceding quarter. The third monthly bill in each quarter shall be based upon actual discharge quantities for that quarter and shall reflect adjustments for the estimated billings in that quarter.

(s) Unless the context specifically indicates otherwise, all terms contained herein shall have the meanings set forth in the regulations adopted by the water board 21 N.Y.C.R.R. Part 1950 and 1960, as applicable.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire May 16, 2010.

Text of rule and any required statements and analyses may be obtained from: John J. Ottaviano, Niagara Falls Water Board, 5815 Buffalo Avenue, Niagara Falls, New York 14304, (716) 283-9770, email: jottaviano@harrisbeach.com

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

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

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

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

Commission on Public Integrity

NOTICE OF ADOPTION

Public Access to Agency Records

I.D. No. CPI-47-09-00003-A

Filing No. 169

Filing Date: 2010-02-23

Effective Date: 2010-03-10

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

Action taken: Amendment of Part 937 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(9)(c)

Subject: Public Access to agency records.

Purpose: To provide a uniform procedure to the public for accessing the Commission's available records.

Text or summary was published in the November 25, 2009 issue of the Register, I.D. No. CPI-47-09-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Shari Calnero, Associate Counsel, Commission on Public Integrity, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: scalnero@nyintegrity.org

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00014-A

Filing Date: 2010-02-18

Effective Date: 2010-02-18

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

Action taken: On 2/11/10, the PSC adopted an order approving the Petition of 42nd and 10th Associates to submeter electricity at 440 West 42nd Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of 42nd and 10th Associates to submeter electricity at 440 West 42nd Street, New York, New York.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving the Petition of 42nd and 10th Associates to submeter electricity at 440 West 42nd Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents

per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0492SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00016-A

Filing Date: 2010-02-18

Effective Date: 2010-02-18

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

Action taken: On 2/12/10, the PSC adopted an order approving the Petition of 583 6th, LLC (Trident Developers NY, LLC), to submeter electricity at 585 6th Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of 583 6th, LLC (Trident Developers NY, LLC), to submeter electricity at 585 6th Avenue, Brooklyn, NY.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving the Petition of 583 6th, LLC (Trident Developers NY, LLC), to submeter electricity at 585 6th Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0526SA1)

NOTICE OF ADOPTION

Contributions in Aid of Construction

I.D. No. PSC-36-09-00004-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving, with modifications, Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity.

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

Subject: Contributions in aid of construction.

Purpose: To approve, with modifications, Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving, with modification, Consolidated Edison Company of New York, Inc.'s (company) amendments to PSC 9—Electricity and directed the company to monitor and examine the cost allocation and cost trigger level related to the contributions in aid of construction mechanism, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0539SA4)

NOTICE OF ADOPTION**Rehearing Petition for the Submetering of Electricity**

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

Filing Date: 2010-02-18

Effective Date: 2010-02-18

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

Action taken: On 2/11/10, the PSC adopted an order granting in part and denying in part the rehearing petition of the Riverview II Tenants Association in reference to the submetering of electricity at 47 Riverdale Avenue, Yonkers, New York.

Statutory authority: Public Service Law, art. 2

Subject: Rehearing Petition for the submetering of electricity.

Purpose: To grant in part and deny in part the rehearing petition of the tenants of Riverview II Preservation, LP.

Substance of final rule: The Commission, on February 11, 2010, adopted an order granting in part and denying in part the rehearing petition by the Riverview II Tenants Association in reference to the submetering of electricity at 47 Riverdale Avenue, Yonkers, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0439SA2)

NOTICE OF ADOPTION**Permit the Use of the General Electric Bushing Current Transformer Model 17-1200-14**

I.D. No. PSC-44-09-00017-A

Filing Date: 2010-02-18

Effective Date: 2010-02-18

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

Action taken: On 2/11/10, the PSC adopted an order approving the petition of General Electric Corporation to allow the General Electric Bushing Current Transformer Model 17-1200-14 to be used in New York State in commercial and industrial applications.

Statutory authority: Public Service Law, section 67(1)

Subject: Permit the use of the General Electric Bushing Current Transformer Model 17-1200-14.

Purpose: To approve the use of the General Electric Bushing Current Transformer Model 17-1200-14 in revenue billing accounts.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving the petition of General Electric Corporation to allow the General Electric Bushing Current Transformer Model 17-1200-14 to be used in New York State in commercial and industrial applications.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-E-0756SA1)

NOTICE OF ADOPTION**Reactive Power**

I.D. No. PSC-45-09-00003-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving Rochester Gas and Electric Corporation's amendments to PSC 19—Electricity, effective March 1, 2010.

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

Subject: Reactive Power.

Purpose: To adopt tariff changes for reactive power rates and provisions for on-site induction generators.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving Rochester Gas and Electric Corporation's amendments to PSC 19—Electricity, effective March 1, 2010 to establish reactive power rates and provisions for customers operating on-site induction generators in compliance with Commission Order issued September 22, 2009, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0751SA7)

NOTICE OF ADOPTION**Reactive Power**

I.D. No. PSC-45-09-00005-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity, effective March 1, 2010.

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

Subject: Reactive Power.

Purpose: To adopt tariff changes for reactive power rates and provisions for on-site induction generators.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity, effective March 1, 2010 to establish reactive power rates and provisions for customers operating on-site induction generators in compliance with Commission Order issued September 22, 2009, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-0751SA8)

NOTICE OF ADOPTION

Reactive Power

I.D. No. PSC-46-09-00006-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9, 2 and 4—Electricity, effective March 1, 2010.

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

Subject: Reactive Power.

Purpose: To adopt tariff changes for reactive power rates and provisions for on-site induction generators.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9, 2 and 4—Electricity, effective March 1, 2010 to establish reactive power rates, including provisions to effectuate reactive power rates for customers operating on-site induction generators, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-0751SA10)

NOTICE OF ADOPTION

Reactive Power

I.D. No. PSC-46-09-00007-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving Orange and Rockland Utilities, Inc.'s amendments to PSC 2—Electricity, effective March 1, 2010.

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

Subject: Reactive Power.

Purpose: To adopt tariff changes for reactive power rates and provisions for on-site induction generators.

Substance of final rule: The Commission, on February 11, 2010, adopted an order approving Orange and Rockland Utilities, Inc.'s amendments to PSC 2—Electricity, effective March 1, 2010 to establish reactive power rates, including provisions to effectuate reactive power rates for customers operating on-site induction generators, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-0751SA9)

NOTICE OF ADOPTION

Approval of GUSC's Petition for Financing

I.D. No. PSC-49-09-00018-A

Filing Date: 2010-02-17

Effective Date: 2010-02-17

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

Action taken: On 2/11/10, the PSC adopted an order approving Griffiss Utility Services Corporation's (GUSC) petition for financing.

Statutory authority: Public Service Law, sections 66-c, 69 and 83

Subject: Approval of GUSC's petition for financing.

Purpose: To approve GUSC's petition for financing.

Substance of final rule: Commission, on February 11, 2010, adopted an order approving Griffiss Utility Services Corporation's petition for financing of a proposed 9.4 MW biomass-fueled combined heat and power (CHP) generation facility up to a maximum of \$35 million, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-M-0776SA1)

PROPOSED RULE MAKING
HEARING(S) SCHEDULED

Major Water Rate Filing

I.D. No. PSC-10-10-00006-P

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

Proposed Action: The Commission is considering a proposal filed by United Water New York, Inc. (UWNY) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Water Service — P.S.C. No. 1.

Statutory authority: Public Service Law, section 89-c(1) and (10)

Subject: Major water rate filing.

Purpose: To consider a proposal to increase annual base rate revenues for UWNY by about \$17.8 million or 31.2 percent.

Public hearing(s) will be held at: 10:30 a.m. (Evidentiary Hearing)*, March 24, 2010 at Three Empire State Plaza, Third Fl. Hearing Rm., Albany, NY; and 7:00 p.m. (Public Statement Hearing), April 22, 2010 at Ramapo Town Hall, 237 Rte. 59, Suffern, NY.

*There could be requests to reschedule the hearings. Notification of the start of the hearing or any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case 09-W-0731.

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

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

Substance of proposed rule: The Commission is considering a proposal filed by United Water New York, Inc. (UWNY) which would increase its annual base rate revenues by about \$17.8 million or 31.2% for the rate year ending August 31, 2011. The statutory suspension period for the proposed filing runs through August 21, 2010. The Commission may adopt in whole or in part or reject terms set forth in United Water New York, Inc.'s proposal and/or other negotiated proposals.

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

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-W-0731SP1)

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

Minor Rate Filing

I.D. No. PSC-10-10-00005-P

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

Proposed Action: The Commission is considering a proposed filing by the Village of Springville to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 1 — Electricity.

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

Subject: Minor Rate Filing.

Purpose: To increase annual electric revenues by approximately \$271,660 or 7.4%.

Substance of proposed rule: The Commission is considering a proposal filed by the Village of Springville (Springville) which would increase its annual electric revenues by about \$271,660 or 7.4%. The proposed filing has an effective date of August 1, 2010. The Commission may adopt in whole or in part, modify or reject Springville’s proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (10-E-0087SP1)

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

Discontinuance of Water Service

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

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part or modify a petition filed by Edgewood Lakes, Inc. requesting approval to abandon its water system and cancel its tariff schedule.

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

Subject: Discontinuance of water service.

Purpose: To allow Edgewood Lakes, Inc. to abandon its water system and cancel its tariff schedule.

Substance of proposed rule: On February 19, 2010, Edgewood Lakes, Inc. (company) filed a petition requesting Commission approval to

abandon its water system and cancel its electronic tariff schedule, P.S.C. No. 4 - Water. Edgewood Lakes, Inc. is also requesting that the company’s name be removed from the list of water companies under the Commission’s jurisdiction. The company no longer provides water service to any customers in the Town of Rockland, Sullivan County New York.

Details of the company’s filing are available on the Commission’s Home Page on the World Wide Web (www.dps.state.ny.us) located under Access to Commission Documents – Tariffs). The Commission may approve or reject, in whole or in part, or modify the company’s request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: 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-W-0086SP1)

**Department of Taxation and
Finance**

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

Certification by Cigarette Stamping Agents

I.D. No. TAF-10-10-00004-P

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

Proposed Action: Addition of section 74.6 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 471; and 475

Subject: Certification by cigarette stamping agents.

Purpose: To implement statutory changes requiring stamping agents to certify to their compliance with the Cigarette Tax.

Text of proposed rule: Section 1. A new section 74.6 is added to such regulations to read as follows:

74.6 Agent certification (Tax Law sections 471(1) and (4))
(a) “General.” (1) Pursuant to section 471(4) of the Tax Law, no person, including but not limited to a tobacco product manufacturer, may sell unstamped packages of cigarettes to any agent until the person selling the unstamped packages of cigarettes (the supplier) receives a certification from such agent purchasing the unstamped packages of cigarettes certifying, in good faith and under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for resale in or into New York State will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(2) Before an agent may purchase unstamped packages of cigarettes for resale in or into New York State, the agent must provide to the supplier and to the department, in good faith, a certification, under penalty of perjury, that none of the unstamped packages of cigarettes the agent purchases from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(b) “Contents of certification.” The certification required by section 471(4) of the Tax Law shall provide, under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for resale in or into New York State from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law or in violation of any rule or regulation adopted pursuant to Article 20. The certification must specifically provide that:

(1) the agent will not resell unstamped packages of cigarettes in or into New York State, except as specifically authorized by law;

(2) the agent will not affix stamps to packages of cigarettes unless the certifications provided for in section 1399-pp of the Public Health Law pursuant to section 480-b of the Tax Law have been provided by the cigarette manufacturer;

(3) the agent will not affix stamps to packages of cigarettes that have not been certified by the cigarette manufacturer and marked as provided for in section 156-c of the Executive Law pursuant to section 480-b of the Tax Law;

(4) the certification applies to each of the agent's purchases for the entire period covered by the certification;

(5) the agent will only make sales of untaxed packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with subdivision (f) of this section.

(c) "List of suppliers." Certifications filed with the department must include a list of suppliers from whom the agent will purchase or otherwise acquire unstamped packages of cigarettes.

(d) "Period covered by the certification."

(1) The certification must be filed with the supplier and with the department prior to the first purchase of unstamped packages of cigarettes by the agent from the supplier on or after the date this rule first applies.

(2) An amended certification and list of suppliers must be filed with the department before the first purchase of unstamped packages of cigarettes from a supplier not listed on the current certification.

(3) The agent will be required to provide a new certification to each supplier and to the department each year on or before the date prescribed by the department.

(e) "Certification signature requirements." (1) The proprietor must sign the certification on behalf of a proprietorship; a general partner must sign the certification on behalf of a partnership; and the president, vice president, treasurer, assistant treasurer, chief accounting officer, or other officer duly authorized must sign on behalf of a corporation.

(2) The certification must be sworn to or affirmed:

(i) before a New York State notary public or any other person authorized by section 298 of the Real Property Law if the certification is sworn to or affirmed in New York State, or

(ii) before any officer authorized by, and in the manner described in, section 299 of the Real Property Law if the certification is sworn to or affirmed outside New York State. The proof of authority of the officer issuing the oath or witnessing the affirmation must meet the requirements of section 299-a of the Real Property Law.

(f) "Sales of cigarettes to Indian nations or tribes and reservation cigarette sellers."

(1) In order to ensure an adequate quantity of cigarettes on qualified reservations that may be purchased by an Indian nation or tribe for its official use or by qualified Indians on their qualified reservations without payment of taxes, the Indian nation or tribe or reservation cigarette seller shall be entitled to purchase up to a certain number of untaxed packages of cigarettes, as determined pursuant to this subdivision.

(2) The amount of untaxed packages of cigarettes for each Indian nation or tribe shall be an amount determined by the department based upon the probable demand of the qualified Indians on the nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use.

(i) Probable demand shall be determined by reference to, among other data, the United States average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of qualified Indians for each such affected Indian nation or tribe. Each September, the department will determine the annual amount of untaxed packages of cigarettes for each of the Indian nations or tribes for the forthcoming twelve-month period beginning December 1. The annual amount of untaxed packages of cigarettes will be determined using a probable demand methodology as follows: (A) the most recent U.S. Census data on tribal populations in New York State is obtained and then increased by ten percent for each Indian nation or tribe to allow for potential undercounting in Census enumeration and for nation or tribal use and (B) each Indian nation's or tribe's adjusted population is then multiplied by average annual per capita consumption amounts, as produced annually by the federal government, for cigarettes. The estimated annual consumption amounts for each Indian nation or tribe are then prorated to quarterly periods for each of the four quarters beginning with the first day of December, March, June, and September. The quarterly consumption amounts are then rounded upward to accommodate cases of 300 packs of 20 cigarettes. Using the methodology above for the twelve-month period beginning December 1, 2009, the quarterly amounts of untaxed packages of cigarettes for each of the Indian nations or tribes for any quarterly period during which these provisions apply are calculated in the table below. As indicated in subparagraph (ii) of this paragraph, these amounts are subject to adjustment based on evidence provided by the Indian nations or tribes as to their actual consumption amounts for these periods.

Indian Nation or Tribe:	NYS Population (2000 census)	Quarterly Cigarette Amount (Packs)
Cayuga	947	20,100
Oneida	1,473	31,200
Onondaga	2,866	60,600
Poospatuck (Unkechaug)	376	8,100
Seneca (Allegheny, Cattaraugus, Oil Springs)	7,967	168,600
Shinnecock	1,915	40,500
St. Regis Mohawk	13,784	291,600
Tenawanda Band of Senecas	256	5,700
Tuscarora	1,025	21,900
Total	30,610	648,300

(ii) In making a determination of probable demand, the department shall take into consideration any evidence submitted by the recognized governing body of an Indian nation or tribe relating to such probable demand (e.g., a verifiable record of previous sales to qualified Indians or other statistical evidence) and/or relating to the amount needed for such nation's or tribe's official use. In the case of the annual determination made by the department in September, any such evidence submitted by October 31 will be taken into consideration and any adjustments will be made prior to the twelve-month period beginning December 1 to which the determination relates.

(iii) The department shall publish on its Web site the amount of untaxed packages of cigarettes that may be sold for each Indian nation or tribe during each quarter.

(3) Agents must report to the department sales of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a qualified reservation. Such report must be made within 24 hours of such sales (regardless of whether such time period ends on a Saturday, Sunday, or public holiday) and in a manner as prescribed by the department. From these reports, the department will determine and publish information on its Web site concerning the remaining amount of cigarettes that may be sold during the quarter with respect to each Indian nation or tribe without exceeding the amount determined pursuant to paragraph (2) of this subdivision.

(4) Before selling any amount of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a qualified reservation, agents must exercise due diligence in determining that the sale of such untaxed packages of cigarettes will not cause the total amount of untaxed packages of cigarettes to exceed the amount determined pursuant to paragraph (2) of this subdivision. Specifically, agents must ascertain from the information published by the department pursuant to paragraph (3) of this subdivision that the untaxed packages of cigarettes may be sold without exceeding the amount of untaxed packages of cigarettes determined pursuant to this subdivision or, if the system set forth in section 471-e of the Tax Law is in effect, such sales must be made in accordance with such system.

(5) The sale by an agent of untaxed packages of cigarettes in excess of the amount determined pursuant to paragraph (2) of this subdivision constitutes a violation of the terms of Article 20 of the Tax Law.

(6) If any provision contained in this section, or the application thereof, shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this section, but shall be confined to the particular provision directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to persons not parties to the controversy in which such judgment shall have been rendered, or to other circumstances, shall not be affected thereby.

Section 2. This rule shall take effect on the date that the Notice of Adoption is published in the State Register and shall apply to tax periods commencing with the first quarter, as described in this rule, beginning after such date. The department shall consider any evidence relating to probable demand submitted prior to the effective date of the rule by the recognized governing body of an Indian nation or tribe and shall make the determination of probable demand for the initial quarterly period or periods to which the rule applies as soon as practicable following the effective date and prior to the initial quarterly period to which the rule applies.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subd. First; 471; and 475. Section 171, subdivision First provides general authority for the Commissioner of Taxation and Finance to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and the performance of his or her duties under the Tax Law. Section 471(1) imposes the tax on cigarettes, except where the State is "without power to impose such tax." Section 471(4) provides that cigarette stamping agents must provide suppliers and the Department with a certification, under penalty of perjury, that cigarettes will not be resold in violation of Article 20 of the Tax Law, which imposes the cigarette tax. Section 475 authorizes the Commissioner specifically to administer the tax on cigarettes and tobacco products imposed under Article 20 of the Tax Law, and also provides that returns may be required to be filed at such times and containing such information as may be prescribed.

2. Legislative objectives: The rule is being proposed pursuant to such authority to help enable the Department to better ensure compliance with the provisions contained in Article 20 of the Tax Law that call for the imposition of cigarette taxes. The rule provides a method whereby agents can determine whether their sales of untaxed packages of cigarettes would be in excess of the amount necessary for the use and consumption by the Indian nations or tribes and their members to better enable the agents to certify their compliance with Article 20, as required by section 471(4) of the Tax Law, with respect to their sales involving Indian reservations.

3. Needs and benefits: The rule implements the statutory provisions of section 471(4) of the Tax Law, which requires stamping agents who purchase unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, to provide that person and the Department with a certification, under penalty of perjury, that the cigarettes will not be resold in violation of Article 20 of the Tax Law.

The rule provides procedures to be followed for the certification process, such as certification signature and swearing requirements, as well as the time periods covered by the certification. In addition, in order to facilitate the agent certification with respect to sales involving Indian reservations, the rule also provides a method whereby agents can determine whether their sales of untaxed packages of cigarettes would be in excess of the amount necessary for use or consumption by the Indian nations or tribes and their members. The rule sets forth a methodology for computing probable demand of the Indian nations or tribes and their members and special reporting requirements for sales of untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers, and provides for the publication on the Department's Web site of amounts of untaxed packages of cigarettes that may be sold for each Indian nation or tribe.

4. Costs: (a) Costs to regulated parties. The regulated parties affected by this rule are approximately 75 cigarette stamping agents located in New York State. Although the implementation of the statutory amendments regarding the certification of stamping agents will have fiscal consequences in terms of collection and payment of taxes

that are already due under the Tax Law, the consequences are the result of the statute imposing the taxes. There will be no tax liability costs to these regulated parties for the implementation of and continuing compliance with this rule. The requirement for agents to provide the certification to their suppliers and to the Department is statutory. There are approximately 6 to 8 stamping agents who currently make sales involving Indian reservations that will be required to report their sales of untaxed packages of cigarettes involving Indian reservations to the Department within 24 hours. This will be a simple notification, resulting in minimal administrative costs.

(b) Costs to the State and its local governments including this agency. The cost of the development of the forms (CG-213 and CG-213-1) that stamping agents will be required to file and the cost of the technical memorandum that will be issued to explain the rule are attributable to the implementation of the statutory changes. In addition the cost associated with administering the statutory amendment is estimated at \$22,500 (50% staff time of a Tax Technician, salary grade 14). There are minimal administrative costs to the Department associated with receipt of the agents reports related to the sales of untaxed packages of cigarettes to Indian nations or tribes and creating and maintaining the Web content. Overall, it is estimated that the implementation and continued administration of the proposed amendment will have minimal fiscal impact on the Department. Although the implementation of the statutory amendments regarding the certification of stamping agents will have fiscal consequences in terms of collection of taxes that are due under the Tax Law, the consequences are the result of the statute imposing the taxes. This rule itself does not have any State or local fiscal consequences apart from the statutory amendments.

(c) Information and methodology. This analysis is based on review of the rule and statutory requirements and discussions among personnel from the Department's Office of Tax Policy Analysis, Office of Counsel, Office of Tax Enforcement and the Office of Budget and Management Analysis, including the Management Analysis and Project Services Bureau.

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

6. Paperwork: The rule imposes additional reporting on agents making sales of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a reservation. These agents must notify the Department within 24 hours of the sale.

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

8. Alternatives: An alternative method to limit the amount of untaxed packages being sold involving Indian reservations to amounts necessary for use or consumption by Indian nations or tribes and their members would be the coupon system set forth in section 471-e of the Tax Law. This rule does not implement this system, which has proved problematic and is the subject of litigation. This rule introduces a probable demand formula developed by the Department to estimate the demand for cigarettes by Indian nations or tribes and their members. Although other states have implemented various approaches to assure a quantity of untaxed cigarettes, the rule provides that the Department will use Federal data because it is the most reliable and consistent source of information regarding cigarette demand.

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

10. Compliance schedule: The rule will take effect on the date that the Notice of Adoption is published in the State Register and will apply to tax periods commencing with the first sales tax quarter (i.e., quarter beginning September 1, December 1, March 1, or June 1), beginning after such date.

Regulatory Flexibility Analysis

1. Effect of rule: The rule will affect approximately 75 cigarette stamping agents, some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule does not distinguish between different business sizes. The rule affects all stamping agents in the same manner, regardless of the size of the

business operation. Those agents selling untaxed packages of cigarettes involving Indian reservations will need to notify the Department within 24 hours of the sales.

2. Compliance requirements: The rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or compliance requirements on local governments. Section 471(4) of the Tax Law provides that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Tax Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule provides further guidance pertaining to certification requirements. The rule imposes an additional reporting requirement on agents making sales of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a reservation. These agents must notify the Department within 24 hours of the sale.

3. Professional services: The rule imposes no requirements for professional services upon small businesses or local governments. However, an affected stamping agent may decide to use professional services, in addition to those it may already employ to prepare its tax returns, to comply with the certification paperwork required pursuant to the statute and set forth in the rule.

4. Compliance costs: There are no compliance costs to local governments as a result of this rule. The regulated parties affected by this rule are approximately 75 cigarette stamping agents located in New York State. There will be no tax liability costs to these regulated parties for the implementation of and continuing compliance with this rule. The requirement for agents to provide the certification to their suppliers and to the Department is statutory. There are approximately 6 to 8 stamping agents who currently make sales involving Indian reservations that will be required to report their sales of untaxed packages of cigarettes involving Indian reservations to the Department within 24 hours. This will be a simple notification, resulting in minimal administrative costs.

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

6. Minimizing adverse impact: This rule relates to the statutory requirement that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule also provides procedures to be followed for the certification process, such as certification signature and swearing requirements, as well as the time periods covered by the certification. In addition, in order to facilitate the agent certification with respect to sales involving Indian reservations, the rule provides a method whereby agents can determine whether their sales of untaxed packages of cigarettes would be in excess of the amount necessary for use or consumption by the Indian nations or tribes and their members. The rule sets forth a methodology for computing probable demand of the Indian nations or tribes and their members and special reporting requirements for sales of untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers, and provides for the publication on the Department's Web site of amounts of untaxed packages of cigarettes that may be sold for each Indian nation or tribe.

7. Small business participation: The following organizations are being notified that the Department is developing this rule: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York Association of Convenience Stores; and the New York State Association of Wholesale Marketers and Distributors.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule will affect approximately 75 cigarette stamping agents some of which may be located in rural areas as defined by section 102(10) of the State Administrative Procedure Act. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile). The rule affects all cigarette stamping agents in the same way; it does not distinguish between cigarette stamping agents located in rural, suburban, or metropolitan areas of this State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Section 471(4) of the Tax Law provides that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule provides further guidance pertaining to certification requirements. The rule imposes an additional reporting on agents making sales of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a reservation. These agents must notify the Department within 24 hours of the sale. The rule does not require professional services. An affected stamping agent may decide to use professional services, in addition to those it may already employ to prepare its tax returns, to comply with the certification paperwork required pursuant to the statute and set forth in the rule. The rule does not impose any requirements on public entities in rural areas.

3. Costs: There are no variations in costs for public or private concerns in rural areas. The regulated parties affected by this rule are approximately 75 cigarette stamping agents located in New York State. The requirement for agents to provide the certification to their suppliers and to the Department is statutory. There are approximately 6 to 8 stamping agents who currently make sales involving Indian reservations that will be required to report their sales of untaxed packages of cigarettes involving Indian reservations to the Department within 24 hours. This will be a simple notification, resulting in minimal administrative costs. With regard to the affected stamping agents located in rural areas or elsewhere, there will be no tax liability impact.

4. Minimizing adverse impact: This rule relates to the statutory requirement that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Tax Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule also provides procedures to be followed for the certification process, such as certification signature and swearing requirements, as well as the time periods covered by the certification. In addition, in order to facilitate the agent certification with respect to sales involving Indian reservations, the rule provides a method whereby agents can determine whether their sales of untaxed packages of cigarettes would be in excess of the amount necessary for use or consumption by the Indian nations or tribes and their members. The rule sets forth a methodology for computing probable demand of the Indian nations or tribes and their members and special reporting requirements for sales of untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers, and provides for the publication on the Department's Web site of amounts of untaxed packages of cigarettes that may be sold for each Indian nation or tribe.

5. Rural area participation: The following organizations are being notified that the Department is developing this rule: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council;

the Retail Council of New York State; the New York Association of Convenience Stores, and the New York State Association of Wholesale Marketers and Distributors. These organizations include members in rural areas.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities.

This rule adds new section 74.6, Agent Certification, to implement the statutory provisions of section 471(4) of the Tax Law. It also provides procedures to be followed for the certification process, such as certification signature and swearing requirements, as well as the time periods covered by the certification. In addition, in order to facilitate the agent certification with respect to sales involving Indian reservations, the rule also provides a method whereby agents can determine whether their sales of untaxed packages of cigarettes would be in excess of the amount necessary for use or consumption by the Indian nations or tribes and their members. The rule sets forth a methodology for computing probable demand of the Indian nations or tribes and their members and special reporting requirements for sales of untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers, and provides for the publication on the Department's Web site of amounts of untaxed packages of cigarettes that may be sold for each Indian nation or tribe.