

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

Various Trees and Plants of the Prunus Species

I.D. No. AAM-12-10-00001-E

Filing No. 209

Filing Date: 2010-03-03

Effective Date: 2010-03-03

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

Action taken: Amendment of Part 140 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: This rule amends the existing plum pox virus quarantine in New York State in response to the most recent detections of this virus in the State. The purpose of the amendments is to help prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the productive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms

of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox.

In 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox virus quarantine in that portion of Niagara County. The plum pox virus was subsequently detected in four (4) other locations in Niagara County as well as one location in Orleans County. In response to these detections, on October 8, 2008, the Department adopted, on an emergency basis, amendments to the rule, which established the quarantine in Orleans County and extended the quarantine in Niagara County. This rule was adopted on a permanent basis on December 10, 2008. On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the amendments contain the necessary modifications to the quarantine. Additionally, the amendments deregulate one of the quarantine areas in the Town of Porter in Niagara County. This is due to the fact that surveys within this quarantine area have tested negative to the virus for three (3) years which justifies the lifting of a quarantine under existing federal protocols.

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 failure to immediately establish and extend the quarantine to regulate the intrastate movement of stone fruit could result in the further, unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the agricultural resources of the State, but could also result in a federal quarantine or exterior quarantines imposed by other states. Such quarantines would cause economic hardship for New York's stone fruit growers, since such quarantines may be broader than that which we propose and may vary in requirements and prohibitions from state to 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. Accordingly, it appears that this rule 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: Various trees and plants of the *Prunus* species.

Purpose: To amend the existing plum pox virus quarantine in New York State in response to the most recent detections of the virus.

Text of emergency rule: Subdivision (a) of section 140.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by [Hartland Road, which extends south to its intersection with Ditch Road; extends west on Ditch Road to its intersection with Hosmer Road; extends south on Hosmer Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road)] *Johnson Creek Road, which extends south to its intersection with Route 104 (Ridge Road); extends west on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south on Orangeport Road to its intersection with Slayton-Settlement Road; [extends] extending west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); [extends] extending south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; [extends] extending northwest on Stone Road to its intersection with Sunset Drive; [extends] extending south on Sunset Drive to its intersection with Shunpike Road; [extends] extending west on Shunpike Road to its intersection with Route 93 (Townline Road); [extends] extending south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); [extends] extending south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; [extends] extending southwest on Beach Ridge Road to its intersection with Townline Road; [extends] extending south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.*

Subdivision (b) of section 140.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(b) That area of Orleans County which is bordered on the north by Lake Ontario and bordered on the west by County Line Road; [extends] *extending south on County Line Road becoming Jackson Road to its intersection with Johnson Road; [extends] extending east on Johnson Road to its intersection with Salt Works Road; [extends] extending south on Salt Works Road to its intersection with the Orleans/Genesee County border; [extends] extending east along the Orleans/Genesee County border to its intersection with Route 98 (Quaker Hill Road); [extends] extending north on Route 98 (Quaker Hill Road) to its intersection with East Barre Road; [extends] extending east on East Barre Road to its intersection with Culver Road; [extends] extending north on Culver Road to its intersection with East Lee Road; [extends] extending east on East Lee Road to its intersection with Rich's Corners Road; [extends] extending north on Rich's Corners Road to its intersection with Route 31 (Telegraph Road) [and Keitel Road; extends north on Keitel Road to its intersection with Zig Zag Road; extends north on Zig Zag Road to its intersection with Lattin Road; extends north on Lattin Road] extending east on Route 31 (Telegraph Road) to its intersection with Densmore Road; extends north on Densmore Road to its intersection with Route 104 [(Ridge Road West)] (Ridge Road) and Kent Road; [extends west on Route 104 (Ridge Road West) to its intersection with Sawyer Road; extends north on Sawyer Road to its intersection with Roosevelt Highway; extends west on Roosevelt Highway to its intersection with Oak Orchard Road; extends north on Oak Orchard Road to its intersection with Point Breeze Road; extends north on Point Breeze Road] extending north on Kent Road to its intersection with Lake Ontario.*

Section 140.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new subdivision (c) to read as follows:

(c) *That area of Wayne County which is bordered on the north by Lake Ontario and is bordered on the east by Mapleview Heights;*

extending south on Mapleview Heights to its intersection with Wright Road; extending east on Wright Road to its intersection with Dutch Street Road; extending south on Dutch Street Road to its intersection with Lasher Road; extending south on Lasher Road to its intersection with Wilson Road; extending west on Wilson Road to its intersection with Brown Road; extending south on Brown Road to its intersection with Salter Road; extending west on Salter Road and becoming Clinton Avenue; continuing west on Clinton Avenue to its intersection with Route 414; extending south on Route 414 to its intersection with Catch Pole Road; extending west on Catch Pole Road to its intersection with Covell Road; extending south on Covell Road to its intersection with Wayne Center Rose Road; extending west on Wayne Center Rose Road and becoming Ackerman Road; continuing west on Ackerman Road to its intersection with Route 14; extending south on Route 14 to its intersection with Burton Road; extending west on Burton Road to its intersection with Middle Sodus Road; extending north on Middle Sodus Road to its intersection with Maple Street Road; extending north on Maple Street Road to its intersection with McMullen Road; extending northwest on McMullen Road to its intersection with Deneef Road; extending south on Deneef Road to its intersection with Zurich Road; extending west on Zurich Road to its intersection with Arcadia-Zurich-Norris Road; extending south on Arcadia-Zurich-Norris Road to its intersection with Henkle Road; extending west on Henkle Road to its intersection with Heidenreich Road; extending south on Heidenreich Road to its intersection with Fairville Station Road; extending northwest on Fairville Station Road to its intersection with Maple Ridge Road; extending northwest on Maple Ridge Road to its intersection with Decker Road; extending west on Decker Road to its intersection with Sand Hill Road; extending north on Sand Hill Road to its intersection with Smith Road; extending west on Smith Road to its intersection with Newark Road; extending south on Newark Road to its intersection with Desmith Road; extending west on Desmith Road to its intersection with Schilling Road; extending northwest on Schilling Road to its intersection with State Route 21; extending south on state Route 21 to its intersection with Cole Road; extending west on Cole Road to its intersection with Parker Road; extending south on Parker Road to its intersection with LeRoy Road; extending west on LeRoy Road to its intersection with Maple Avenue; extending north on Maple Avenue to its intersection with Marion Road; extending west on Marion Road to its intersection with Ontario Center Road; extending north on Ontario Center Road to its intersection with Atlantic Avenue; extending west on Atlantic Avenue to its intersection with Lincoln Road; extending north on Lincoln Road to its intersection with Haley Road; extending west on Haley Road to its intersection with County Line Road; extending north on County Line Road to its intersection with Lake Ontario.

Subdivision (a) of section 140.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and subdivision (b) is re-lettered subdivision (a) and amended to read as follows:

[(b)] (a) That area of Niagara County bordered on the north by Lake Ontario; bordered on the west by Maple Road; [extends] *extending south on Maple Road to its intersection with Wilson-Burt Road; [extends] extending east on Wilson-Burt Road to its intersection with Beebe Road; [extends] extending south on Beebe Road to its intersection with Ide Road; [extends] extending east on Ide Road to its intersection with Route 78 (Lockport-Olcott Road); [extends] extending north on Route 78 (Lockport-Olcott Road) to its intersection with Lake Ontario, in the Towns of Burt, Newfane, and Wilson in the County of Niagara, State of New York.*

Subdivision (c) of section 140.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is re-lettered subdivision (b) and amended to read as follows:

[(c)] (b) That area of Niagara County bordered on the [east] west by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; [extends] *extending east on Langdon Road to its intersection with Dickersonville Road; [extends] extending north on Dickersonville Road to its intersection with Schoolhouse Road; [extends] extending east on Schoolhouse Road to its intersection with Ransomville Road; [extends] extending south on Ransom-*

ville Road to its intersection with Route 104 (Ridge Road); [extends east] extending northeast on Route 104 (Ridge Road) to its intersection with Simmons Road; [extends] extending south on Simmons Road to its intersection with Albright Road; [extends] extending east on Albright Road to its intersection with Townline Road; [extends] extending south on Townline Road to its intersection with Lower Mountain Road; [extends] extending west on Lower Mountain Road to its intersection with Meyers Hill Road; [extends] extending south on Meyers Hill Road to its intersection with Upper Mountain Road; [extends] extending west on Upper Mountain Road to its intersection with Indian Hill Road; [extends] extending northeast on Indian Hill Road to its intersection with Route 104 (Ridge Road); [extends] extending east on Route 104 (Ridge Road) to its intersection with Porter Center Road, in the Town of Lewiston, in the County of Niagara, State of New York.

Section 140.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new subdivision (c) to read as follows:

(c) *That area of Niagara County bordered on the north by Lake Ontario extending east to the intersection of Keg Creek, extending south to its intersection with Route 18 (Lake Road); extending east on Route 18 (Lake Road) to its intersection with Hess Road, extending south on Hess Road to its intersection with Drake Settlement Road, west on Drake Settlement Road to its intersection with Transit Road; extending north on Transit Road to its intersection with Route 18 (Lake Road); extending west on Route 18 (Lake Road) to its intersection with Lockport Olcott Road; extending north on Lockport Olcott Road to the border with Lake Ontario.*

Subdivision (d) of section 140.3 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 of Orleans County bordered on the north by Route 104 (Ridge Road) at its intersection with Eagle Harbor Waterport Road; extending south on Eagle Harbor Waterport Road to its intersection with Eagle Harbor Knowlesville Road; west on Eagle Harbor Knowlesville Road to its intersection with Presbyterian Road; extending southwest on Presbyterian Road to its intersection with Longbridge Road; extending south on Longbridge Road to its intersection with State Route 31; extending west on State Route 31 to its intersection with Wood Road; extending south on Wood Road to West County House Road; extending west on West County House Road to its intersection with Maple Ridge Road; extending west on Maple Ridge Road to its intersection with Culvert Rd; extending north on Culvert Rd to its intersection with Telegraph Road; extending west on Telegraph Road to its intersection with Beales Road; extending north on Beales Road to its intersection with Portage Road; extending east on Portage Road to its intersection with Culvert Rd; extending north on Culvert Rd to its intersection with Route 104 (Ridge Road), in the Towns of Ridgeway and Gaines, in the County of Orleans, State of New York.*

Section 140.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding new subdivisions (e), (f) and (g) to read as follows:

(e) *That area of Wayne County bordered on the north by Lake Road at its intersection with Redman Road; extending east to its intersection with Maple Avenue; extending south on Maple Avenue to its intersection with Middle Road; extending west on Middle Road to its intersection with Rotterdam Road; extending south on Rotterdam Road to its intersection with State Route 104; extending west on State Route 104 to its intersection with Pratt Road; extending south on Pratt Road to its intersection with Ridge Road; extending west on Ridge Road to its intersection with Richardson Road; extending south on Richardson Road to its intersection with Tripp Road; extending south on Tripp Road to its intersection with Podger Road; extending west on Podger Road to its intersection with East Townline Road; extending north on East Townline Road to its intersection with Everdyke Road; extending west on Everdyke Road to its intersection with Russell Road; extending south on Russell Road to its intersection with Pearsall Road; extending west on Pearsall Road to its intersection with State Route 21; extending north on State Route 21 to its intersec-*

tion with State Route 104; extending east on State Route 104 to its intersection with East Townline road; extending north on East Townline Road to its intersection with Van Lare Road; extending east on Van Lare Road to its intersection with Redman Road; extending north on Redman Road to its intersection with Lake Road, in the Town of Sodus, in the County of Wayne, State of New York.

(f) *That area of Wayne County bordered on the north by Shepard Road at its intersection with Fisher Road; extending east on Shepard Road to its intersection with Salmon Creek Road; extending southwest on Salmon Creek Road to its intersection with Kenyon Road; extending west on Kenyon Road to its intersection with Furnace Road; extending north on Furnace Road to its intersection with Putnam Road; extending east on Putnam Road to its intersection with Fisher Road; extending north on Fisher Road to its intersection with Shepard Road, in the Towns of Ontario and Williamson, in the County of Wayne, State of New York.*

(g) *That area of Wayne County bordered on the northeast by Sodus Bay to its intersection with Ridge Road; extending west on Ridge Road to its intersection with Boyd Road; extending north on Boyd Road to its intersection with Sergeant Road; extending north on Sergeant Road to its intersection with Morley Road; extending east on Morley Road to its intersection with State Route 14; extending north on State Route 14 to its intersection with Sill Road; extending northeast on Sill Road to the area bordered on the northeast by Sodus Bay, in the Town of Sodus, in the County of Wayne, State of New York.*

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 31, 2010.

Text of rule and any required statements and analyses may be obtained from: Kevin King, 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. Said Section also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The proposed rule establishing a 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 further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

3. Needs and benefits:

This rule amends the existing plum pox virus quarantine in New York State in response to the most recent detections of this virus in the State. The purpose of the amendments is to help prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the *Prunus* species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which re-

duces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox.

In 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox virus quarantine in that portion of Niagara County. The plum pox virus was subsequently detected in four (4) other locations in Niagara County as well as one location in Orleans County. In response to these detections, on October 8, 2008, the Department adopted, on an emergency basis, amendments to the rule, which established the quarantine in Orleans County and extended the quarantine in Niagara County. This rule was adopted on a permanent basis on December 10, 2008. On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the amendments contain the necessary modifications to the quarantine. Additionally, the amendments deregulate one of the regulated areas in the Town of Porter in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols.

In response to these latest findings, this rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this area for three (3) consecutive years.

The amendments are necessary, since the failure to immediately establish or extend this quarantine could result in the further, unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

4. Costs:

(a) Costs to the State government:

Regulated articles in the newly established regulated areas that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicated upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit

verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the newly established regulated areas and nursery stock regulated areas that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

(b) Costs to local government: none.

(c) Costs to private regulated parties:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the newly established regulated areas and nursery stock regulated areas.

(d) Costs to the regulatory agency:

None. It is anticipated that the regulatory oversight and enforcement of the expanded quarantine would be accomplished through use of existing staff and resources.

5. Local government mandate:

None.

6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the newly established nursery stock regulated areas would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

7. Duplication:

None.

8. Alternatives:

None. The failure of the State to establish and extend the quarantine in response to the most recent findings of the plum pox virus could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated areas. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. This rule does not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business:

In response to the most recent detections of the plum pox virus, this rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County

and three (3) stone fruit growers in Niagara County are located in the newly established quarantine or regulated areas. All of these entities are small businesses.

It is not anticipated that local governments would be involved in the handling or movement of regulated articles within any part of the quarantine areas.

2. Compliance requirements:

Any regulated parties in the newly established nursery stock regulated areas would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in these newly established nursery stock regulated areas would be required to enter into compliance agreements.

The amendments would prohibit regulated parties in the newly established nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties in these newly established areas would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the newly established regulated areas would be prohibited from moving regulated articles within those regulated areas. Regulated parties would, however, be able to move regulated articles to and from the newly established regulated areas pursuant to a limited permit.

3. Professional services:

In order to comply with the rule, regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

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:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas pursuant to a compliance agreement may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

It is not anticipated that local governments would be involved in movement of regulated to or through the regulated areas.

5. Minimizing adverse impact:

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. The rule establishes and extends the quarantine to only those areas where the plum pox virus has been detected. Additionally, the rule lifts the quarantine in one area of Niagara County where the virus has not been detected for three (3) years. 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:

In 1999, a Plum Pox Virus Task Force was established in response to the initial discovery of the plum pox virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened an-

nually via teleconference and assists in outreach as needed in response to changes in the spread of the virus. Outreach efforts will continue.

7. Assessment of the economic and technological feasibility:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the newly established nursery stock regulated areas, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

In response to the most recent detections of the plum pox virus, this rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County and three (3) stone fruit growers in Niagara County are located in the newly established quarantine or regulated areas. All of these entities are located in rural areas of New York State.

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

Any regulated parties in the newly established nursery stock regulated areas would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in these newly established nursery stock regulated areas would be required to enter into compliance agreements.

All regulated parties in the newly established regulated areas would be prohibited from moving regulated articles within those regulated areas. Regulated parties would, however, be able to move regulated articles to and from the newly established regulated areas pursuant to a limited permit.

In order to comply with the proposed rule, regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

3. Costs:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas pursuant to compliance agreement may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on regulated parties in rural areas. The rule establishes and extends the quarantine to only those areas where the plum pox virus has been detected. Additionally, the rule deregulates in one area of Niagara County where the virus has not been detected for three (3) consecutive years. 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.

5. Rural area participation:

In 1999, a Plum Pox Virus Task Force was established in response to the initial discovery of the plum pox virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference and assists in outreach as needed in response to changes in the spread of the virus. Outreach efforts will continue.

Job Impact Statement

The establishment and extension of the plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. In response to the most recent detections of the plum pox virus, this rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County and three (3) stone fruit growers in Niagara County are located in the newly established quarantine or regulated areas.

A further spread of this plant infection would have very adverse economic consequences to these industries in New York 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 and by other states. By helping to prevent the further spread of the plum pox virus, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-12-10-00004-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Correctional Services, by deleting therefrom the positions of Translator (3) and by adding thereto the positions of Translator.

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

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

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

Regulatory Impact Statement

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

previously printed under a notice of proposed rule making, I.D. No. CVS-04-10-00003-P, Issue of January 27, 2010.

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-12-10-00005-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Institutions," by deleting therefrom the position of Deputy Director of Mental Retardation Research Institute (1) and by adding thereto the position of Deputy Director of Developmental Disabilities Research Institute (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-12-10-00006-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Environmental Conservation, by adding thereto the positions of øClimate Policy Analyst 4 (1) and øDirector Climate Policy Analysis (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

**Department of Environmental
Conservation**

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

Trapping

I.D. No. ENV-12-10-00016-P

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

Proposed Action: Amendment of sections 6.2 and 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

Subject: Trapping.

Purpose: To update and improve trapping regulations.

Text of proposed rule: Title 6 of NYCRR, section 6.2, entitled “Mink, muskrat, raccoon, opossum, weasel, red fox, gray fox, skunk, coyote, fisher, bobcat and pine marten trapping seasons and bag limits,” is amended as follows:

Repeal existing paragraph 6.2(a)(2) and adopt new paragraph 6.2(a)(2) to read as follows:

(2) *Raccoon, red fox, gray fox, skunk, coyote, opossum and weasel.*

“Open season”	“Wildlife management units”
November 1st to February 25th, except closed for coyote	1A, 1C and 2A
October 25th to December 10th	5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K and 6N.
December 11th to February 15th	5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K and 6N. Only restraining traps as defined in subdivision (i) of section 6.3 of this part may be used.
October 25th to February 15th	All other WMUs

Repeal existing paragraph 6.2(a)(5) and adopt new paragraph 6.2(a)(5) to read as follows:

(5) *Pine marten.*

“Open season”	“Wildlife management units”
October 25th to December 10th	5C, 5F, 5G, 5H, 5J, 6F and 6J
Closed	All other WMUs

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

Repeal existing paragraph 6.3(a)(4) and adopt new paragraph 6.3(a)(4) as follows:

(4) *Trap check.*

(i) *Traps set for taking wildlife in the Southern Zone, as defined in Environmental Conservation Law section 11-0103, must be visited once in each 24 hours.*

(ii) *Traps set for taking wildlife in the Northern Zone, as defined in Environmental Conservation Law section 11-0103, must be visited as follows:*

“Trap check interval”	“Wildlife management units”
Visited once in each 48 hour period	5C, 5F, 5G, 5H, 5J, 6F, 6J and 6N
Visited once in each 48 hour period	5A, 6A, 6C, 6G, 6H and 6K for traps set in water during the open season for beaver, otter, mink and muskrat.
Visited once in each 48 hour period	5A, 6A, 6C, 6G, 6H and 6K for body-gripping traps set on land.
Visited once in each 24 hour period	5A, 6A, 6C, 6G, 6H and 6K for restraining traps as defined in subdivision (i) of section 6.3 of this part.

Repeal existing paragraph 6.3(a)(7) and adopt new paragraph 6.3(a)(7) as follows:

(7) *It is unlawful for any person to disturb a beaver den or house (an aggregate of sticks and mud, either free-standing in water or connected to a bank) at any time. This restriction does not apply to holes in a bank without a den or house. It is unlawful for any person to trap on a beaver dam or within 15 feet thereof, measured at ice or water level, except under the following conditions:*

(i) *During an open otter season.*

(ii) *During a closed otter season when using one of the following traps:*

(“a”) *body-gripping trap that measures less than 5.5 inches;*

(“b”) *foot encapsulating trap, as defined in subdivision (i) of section 6.3 of this part;*

(“c”) leg-gripping trap (or “foothold trap”) that measures 4.75 inches or less;

(“d”) cage or box trap, as defined in subdivision (i) of section 6.3 of this part.

Amend existing paragraph 6.3(a)(10) as follows:

(10) No person shall [disturb] set or place a trap of any kind on or within a muskrat house, den or other structure constructed by a muskrat in which it can take shelter. *The boundary of the house, den or other structure shall be considered the edge of the water or ice.*

Repeal existing paragraph 6.3(a)(11).

Existing paragraphs 6.3(a)(12) through (16) are renumbered as 6.3(a)(11) through (15), respectively.

A new paragraph 6.3(a)(16) is added to read as follows:

(16) *“Use of carcasses.” Any carcass, as defined in subdivision (i) of section 6.3 of this part, used as bait and placed or used in conjunction with a leg-gripping trap (“foothold trap”) shall be completely covered at the time the trap is set or visited. Coverings shall include but not be limited to brush; branches; leaves; soil; snow; water; or enclosures constructed of wood, metal, wire, plastic or natural materials; and must completely cover the carcass so that it is not visible from directly above. The trapper shall ensure that any carcass used as bait is covered at all times.*

Repeal existing subdivision 6.3(b) and adopt new subdivision 6.3(b) to read as follows:

(b) *“Pine marten permit.”*

(1) *No person shall trap pine marten unless he or she possesses a revocable pine marten permit.*

(2) *An application for a pine marten permit may be obtained from the department’s Ray Brook or Warrensburg offices, or from the department’s web site.*

(3) *The holder of a pine marten permit must comply with all conditions stated on that permit.*

(4) *Only furbearer possession tags stamped with the word “marten” may be used to tag pine marten in accordance with the procedure provided for in subdivision (c) of this section.*

Repeal existing subdivision 6.3(e) and adopt new subdivision 6.3(e) to read as follows:

(e) *“Possession of dead animals or their parts.”*

(1) *The carcasses, flesh, head, hide, feet, fur or parts thereof of fox, mink, muskrat, opossum, raccoon, skunk and weasel legally taken may be possessed, transported and bought and sold without restriction.*

(2) *A licensed trapper or small game hunter may possess small game, as defined in Environmental Conservation Law section 11-0103, found dead on a public highway during an open season for each respective small game animal. The tagging and sealing requirements described in subdivision 6.3(c) of this section are applicable.*

Adopt new subdivision 6.3(i) to read as follows:

(i) *“Definitions.” For the purposes of implementing Title 11 of Article 11 of the Fish and Wildlife Law, and part 6 of this subchapter, these terms have the following meanings:*

(1) *Public highway. The traveled portion of a public highway. Culverts, drainage ditches, and the area under bridges are not considered the traveled portion of a public highway.*

(2) *Carcass. The dead body, organs or viscera of an animal, including fish. Feathers, bones, and hair that include no attached meat, organs or viscera are excluded from this definition.*

(3) *Suspension. This term applies to animals fully suspended in the air by means of the trap anchoring system (typically a chain, cable or wire). It does not apply to traps set in water or to traps that are directly and firmly attached to an elevated structure, such as a tree.*

(4) *Restraining trap. A device used to capture and restrain a mammal. These traps include leg-gripping traps (“foothold traps”), foot encapsulating traps, and cage or box traps.*

(5) *Foot encapsulating trap. A trap with the following mechanical attributes: The triggering and restraining mechanisms are enclosed within a housing; the triggering and restraining mechanisms*

are only accessible through a single opening when set; the opening does not exceed 2 inches in diameter; and the trap has a swivel mounted anchoring system.

(6) *Cage or box trap. A type of restraining trap that fully encloses a captured animal within wood, wire, plastic, or metal.*

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

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

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

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

Summary of Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental Conservation (department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the department to regulate the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink (“furbearers”).

2. Legislative objectives:

The legislative objective behind the statutory provisions listed above is to authorize the department to establish the methods by which furbearers may be taken by trapping.

3. Needs and benefits:

The department proposes new regulations to improve the trapping and management of furbearers in New York State. Each element of the proposal is explained below:

Regulate the use of carcasses used as bait

The department proposes to regulate the use of carcasses used as bait to attract furbearing animals to foothold traps. Trappers using foothold traps would be required to cover a carcass so that birds of prey could not see the carcass from directly above.

Birds of prey may be attracted to carcasses that are used to bring furbearing animals close to traps set on the ground. This raises the chances that an owl, hawk, or eagle may be accidentally caught in traps. The use of carcasses to attract furbearing animals is a common practice, especially to lure coyotes, bobcat, fisher, or marten to areas where foothold traps are used. This proposal does not prohibit this practice, but simply requires trappers to fully cover the carcass so that it is not visible from directly above to birds of prey. In practice, this means that the carcass would need to be covered with branches, leaves, snow, water, other natural materials, or human-constructed containers. The trapper would be required to ensure that any carcass used as bait is covered at all times. Because birds of prey rely primarily on their sense of vision, while furbearers rely heavily on locating food by scent, the proposed requirement to cover carcasses is expected to be effective at preventing incidental captures of birds of prey while having minimal impacts on the success of efforts to trap legal furbearers. Reform trap check regulation in the Northern Zone for land sets

The department proposes to establish a uniform 48 hour trap check requirement for body-gripping traps set on land in the entire Northern Zone (these traps work by killing an animal, typically within 3-5 minutes). Already, the trap check requirement is 48 hours in much of the Adirondacks and Tug Hill region. This proposal would extend the 48 hour trap check requirement to an additional six wildlife management units (WMUs) primarily in Region 6, but for body-gripping traps only.

The ECL requires a 24 hour trap check in all areas of the Southern Zone. In the Northern Zone, a 48 hour trap check is allowed but the department has regulatory authority to also establish a shorter trap check in all or parts of the Northern Zone. Currently, a 48 hour trap check is allowed for traps set in water throughout the Northern Zone. For traps set on land, a 48 hour trap check is allowed in 8 WMUs (this was done primarily in recognition of the remote nature of trapping in

the central Adirondacks). This proposal extends the 48 trap check requirement to an additional 6 WMUs, primarily in Region 6 (and also a part of Clinton County), but only for body-gripping traps. By design, body-gripping traps are designed to catch and kill an animal quickly, typically within 3-5 minutes. Therefore, from an animal welfare perspective there is no difference whether these traps are checked at a 24 hour or 48 hour interval. Allowing the longer interval will accommodate trappers who run long "trap lines" and enable them to save fuel and time when checking their traps.

Reform regulation on trapping near a beaver dam during a closed otter season (statewide)

The department proposes to allow the use of select traps on or near beaver dams during a closed otter season on a statewide basis. The current regulations prohibit the placement of any traps on or within 15 feet of a beaver dam, regardless of the species being sought, during a closed trapping season for otter. This regulation was enacted to afford protection to otter from being caught incidentally in traps set for other species, primarily beaver. Specifically, the department proposes to allow the use of the following traps on or within 15 feet of a beaver dam during a closed otter season: body-gripping traps that measure less than 5.5 inches; foot encapsulating traps with an opening that measures 2 inches or less; foothold traps that measure 4.75 inches or less; and cage or box traps.

The department has found that the majority of incidentally trapped otter are captured in traps that are commonly set for beaver. The new regulation will maintain the prohibition on the use of "beaver-sized" traps on or within 15 feet of beaver dams, thereby maintaining protection for otter. The proposal would maintain the protection of otter while providing a liberalization that would benefit trappers seeking other species including muskrat, mink, raccoon, and fox.

Extend land trapping in the Northern Zone

The department proposes to allow Northern Zone trappers to trap for all land species (e.g., foxes, coyotes, raccoon) except bobcat, fisher, and American marten until February 15th (the season currently closes on December 10th). Trappers would be required to use only live-holding devices (e.g., foothold traps, cage or box traps) during the extended trapping period to protect bobcat, fisher, and marten.

Currently, land trapping seasons in much of the Northern Zone allow for the taking of bobcat, fisher, and marten from October 25th through December 10th. During this period trappers may also harvest other furbearers, including raccoon, red fox, gray fox, skunk, coyote, opossum, and weasel. Trappers may continue to harvest these other furbearers in WMUs 6A, 6C, 6G, 6H, and 6K through February 15th. The department proposes to extend land trapping seasons for these furbearers (excluding bobcat, fisher, and marten) in those WMUs where the season currently closes on December 10th. This extension would allow for the trapping of raccoon, red fox, gray fox, skunk, coyote, opossum, and weasel in WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6F, 6J, and 6N from October 25th through February 15th resulting in a consistent season for these furbearers within the entire Northern Zone. During the lengthened trapping season in these WMUs, body-gripping traps would not be allowed to further protect fisher and pine marten.

Expand marten trapping to new WMUs

The department proposes to open four new WMUs to marten trapping (currently three WMUs are open to marten trapping). Also, the regulations pertaining to the issuance of a marten trapping permit would be simplified.

In 1978, and after a 42-year closure, New York reopened the trapping season for American (pine) martens in a 500-mi² area of the High Peaks region of the Adirondacks. Since that time the department has incrementally increased the area where trappers can legally harvest martens; currently the open trapping area consists of approximately 6,000-mi² in WMUs 5F, 5H, and 6J (i.e., central Adirondacks). An increase in the open trapping area over the past 32 years has been justified based on an expanding marten population into its historic Adirondack range. This population expansion has been documented by incidental captures by trappers targeting fishers and other furbearers, as well as observations of biologists, Environmental Conservation Officers, and Forest Rangers. Therefore, the department proposes to expand the open trapping area for martens to include WMU 5C, 5G,

5J, and 6F in addition to the existing open area of WMU 5F, 5H, and 6J. This expansion would result in an additional area of approximately 4,300-mi² where martens could be trapped. All other existing regulations for the taking of marten would remain in effect, ensuring effective harvest and population monitoring of this species. Due to a conservative marten trapping season and limited access to much of this region, the division expects that expanding the open trapping area would not negatively affect New York's marten population.

Possession of dead furbearing animals found on public highways

The department proposes to allow trappers and small game hunters to possess dead furbearers found on the highway. The regulation would allow licensed trappers or small game hunters to keep furbearing animals if found in a location and during a time when the respective trapping or small game hunting season is already open. For example, in an area with an open fisher trapping season, a licensed trapper would be able to possess a fisher found dead on a public highway.

This proposal would allow the lawful possession of road-killed animals if they are collected by a licensed individual, and the respective trapping or small game hunting season is open (small game hunters are allowed to hunt bobcats, coyotes, foxes, and raccoons). This would eliminate the waste of perfectly good pelts, and in the case of certain species (e.g., bobcat, fisher, marten, otter) enable the easier collection of biological information on animals that otherwise would not be examined. For species that require pelt seals, this regulation would be written so that trappers and small game hunters would still be mandated to get a pelt seal for the continued legal possession of road-killed animals. Thus, we will be able to collect more information on the population status of these species than currently available.

Allow trapping within 5 feet of a muskrat lodge

The department proposes to allow the setting of traps within 5 feet of a muskrat lodge. This amendment would repeal that restriction primarily to make it easier for young trappers to catch a muskrat, a species sought by most new trappers.

The current prohibition is unnecessary and does little to regulate the harvest of muskrats or their populations (traps set above the waterline and within the muskrat lodge will not be allowed. This is needed to protect the integrity of the muskrat lodge). The regulation of muskrat take is better accomplished through changes to season length and chronology.

Definition of terms

Several terms used in the Environmental Conservation Law should be defined to provide clarity for both trappers and enforcement personnel. The department proposes to define the term "public highway" to clearly include the traveled portion of the highway; to define "carcass" to provide for the enforcement of the new regulation on the restriction on the use of carcasses; to define the term "suspension" so that the prohibition on setting traps in a manner that suspends an animal is clear; and several modern traps are defined so that they are clearly allowed for use wherever foothold traps are lawful.

4. Costs:

None, other than the administrative costs associated with notifying trappers of the changes, and the costs associated with enforcing new regulations.

5. Local government mandates:

This rulemaking does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork:

The proposed rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication:

There are no other local, state or federal regulations concerning the taking of furbearing animals.

8. Alternatives:

With the exception of the proposal to regulate the use of carcasses near traps, the proposals generally liberalize trapping opportunities or simplify trapping regulations. In the case of the proposal to regulate

the use of carcasses to avoid the capture of birds of prey, the department could step up our efforts to further educate the public about the need to take measures to protect these species. However, reasonable outreach efforts have already occurred and given the serious consequences associated with capturing, injuring, or killing birds of prey, a regulatory approach with the associated enforcement capacity should now be implemented.

9. Federal standards:

There are no federal government standards.

10. Compliance schedule:

Trappers will be required to comply with the new rule as soon as it takes effect.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs 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 trap in New York State. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rulemaking may increase the number of participants or the frequency of participation in trapping. Some small businesses currently benefit from trapping because trappers spend money on goods and services, and thus an increase in trapper 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. For the above reasons, the department has concluded that this rulemaking does not require a formal Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs in New York State. Trappers will not have to comply with any new or additional reporting or record-keeping requirements, and no professional services will be needed for people living in rural areas (or elsewhere) to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse economic impacts on any public or private entities in rural areas of New York State. For these reasons, the department has concluded that this rulemaking does not require a formal Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs in New York State. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in trapping statewide. Trapping does not often involve professional guide services or other employment opportunities, and relatively few jobs exist as a direct result of trapping. The department expects that the net impact on jobs or employment opportunities to be negligible.

For all of the above reasons, the department anticipates that this rulemaking will have no impact on jobs and employment opportunities. Therefore, the department has concluded that a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

Ambulatory Patient Groups (APGs) Methodology

I.D. No. HLT-09-10-00007-E

Filing No. 211

Filing Date: 2010-03-04

Effective Date: 2010-03-04

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

Action taken: Amendment of Subpart 86-8 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807(2-a)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulation on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009, related to altering the phase-in schedule for health care providers to transition to the Ambulatory Patient Groups (APGs) reimbursement methodology for outpatient and clinic services, implementing cardiac rehabilitation as a Medicaid reimbursable service, and amending the listing of APG reimbursable and non-reimbursable services. Further, the regulation prescribes a methodology for reimbursement of out-of-state providers.

There is a compelling interest in enacting these amendments immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these provisions. APGs represent the cornerstone to health care reform. Their continued refinement is necessary to assure access to preventive services for all Medicaid recipients.

Subject: Ambulatory Patient Groups (APGs) Methodology.

Purpose: Makes refinements to APG methodology, including provisions for reimbursement of out-of-state providers.

Substance of emergency rule: The amendments to Part 86 of Title 10 (Health) NYCRR are required to update the Ambulatory Patient Groups (APGs) methodology, implemented on December 1, 2008, which governs reimbursement for certain ambulatory care fee-for-service (FFS) Medicaid services. APGs group procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

86-8.1 – Scope of services and effective dates

Section 86-8.1 of Title 10 (Health) NYCRR defines the categories of facilities subject to APGs and the time frames for implementation. The revision to subdivision (a) clarifies that ambulatory services provided by diagnostic and treatment centers and ambulatory surgery services provided by free-standing ambulatory surgery centers will be reimbursed on APGs commencing September 1, 2009. The revision to subdivision (b) deletes language that prohibits APG payments to out-of-state facilities.

86-8.2 – Definitions

The proposed amendments to section 86-8.2 of Title 10 (Health) NYCRR provide revised definitions for “discounting”, “packaging”, and “visit”. Additionally, two new subdivisions, (p-1) and (p-2), are proposed to be created to define what constitutes an episode payment and when it is appropriate to use.

86-8.6 – Rates for new facilities during the transition period

The proposed revision to section 86-8.6 of Title 10 (Health) NYCRR stipulates that the operating component of rates shall reflect:

- for general hospital outpatient clinics, effective for the period December 1, 2008 through November 30, 2009, 75% of the historical 2007 average payment per visit as calculated by the department, and 25% of APG rates as computed in accordance with this Subpart, and effective December 1, 2009 through December 31, 2010, 50% of the historical 2007 average payment per visit as calculated by the department, and 50% of APG rates as computed in accordance with this Subpart;
- for diagnostic and treatment centers, effective for the period September 1, 2009 through November 30, 2009, 75% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart, and effective for the period December 1, 2009 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;
- for free-standing ambulatory surgery centers, effective for the period September 1, 2009 through November 30, 2009, 75% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart, and for the period December 1, 2009 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;

86-8.10 Exclusions from payment

The proposed amendment to section 86-8.10 of Title 10 (Health) NYCRR removes the following APGs from the list of services that are not eligible for reimbursement pursuant to this subpart: APG 094 - Cardiac Rehabilitation; APG 371 – Level 1 orthodontics; and APG 372 level II Orthodontics.

86-8.13 Out-of-State Providers

The proposed amendment adds a new section 86-8.13, which stipulates how out-of-state providers will be reimbursed for services under this subpart.

86-8.14 Non-APG Payments

The proposed amendment adds a new section 86-8.14, which stipulates that the following services will be reimbursed based on specified rates and fees established by the Department: psychotherapy services; wheelchair evaluation services; and eyeglass dispensing services.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt 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. HLT-09-10-00007-P, Issue of March 3, 2010. The emergency rule will expire May 2, 2010.

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

Regulatory Impact Statement

Statutory Authority:

Authority for the promulgation of these regulations is contained in section 2807(2-a)(e) of the Public Health Law, section 79(u) of part C of chapter 58 of the laws of 2008 and section 129(l) of part C of Chapter 58 of the laws of 2009, which authorizes the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

Further, part C of Chapter 58 of the laws of 2009, amended Public Health Law section 2807(2-a). Amendments pertinent to these proposed regulations include: (1) section 14 of part C of chapter 58 of the laws of 2009 alters the schedule under which providers' reimbursement transitions fully to APG reimbursement (2) section 15 of part C of chapter 58 of the laws of 2009 provides authority for the commissioner of health to promulgate regulations establishing alternative payment methodologies, or utilize existing payment methodologies, when the APG methodology is not, or is not yet, appropriate or practical for specified services; and (3) sections 27 and 16-a of part C of chapter 58 of the laws of 2009 provides authority for APG reimbursement of cardiac rehabilitation services and for the commissioner of health to promulgate regulations establishing alternative payment methodologies for certain psychotherapy services.

Legislative Objective:

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through APGs.

Needs and Benefits:

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs. This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

COSTS

Costs for the Implementation of, and Continuing Compliance with this Regulation to the Regulated Entity:

There will be no additional costs to providers as a result of these amendments.

Costs to Local Governments:

There will be no additional costs to local governments as a result of these amendments.

Costs to State Governments:

There will be no additional costs to NYS as a result of these amendments. All expenditures under this regulation are fully budgeted in the SFY 09/10 enacted budget.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

There are no local government mandates.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

These regulations are in conformance with Public Health Law section 2807(2-a). Alternatives would require statutory amendments.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment will become effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals, diagnostic and treatment centers, and free-standing ambulatory surgery centers. Based on recent data extracted from providers' submitted cost reports, seven hospitals and 245 DTCs were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to further reform the outpatient/ambulatory care fee-for-service Medicaid payment system, which is intended to benefit health care providers, including those with fewer than 100 employees.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-b(1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that this reimbursement system is mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, and June 10, 2009.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-bb(2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the reimbursement system is mandated in statute.

Opportunity for Rural Area Participation:

Rural areas were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009 and June, 10, 2009.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulations, that they will not have a substantial adverse impact on jobs or employment opportunities.

EMERGENCY RULE MAKING

Hospital Inpatient Reimbursement

I.D. No. HLT-12-10-00002-E

Filing No. 210

Filing Date: 2010-03-04

Effective Date: 2010-03-04

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

Action taken: Amendment of Subpart 86-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803, 2807, 2807-c, 2807-k, 3612 and 3614

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009 related to implementing a new hospital inpatient reimbursement system based on All-Patient-Refined-Diagnosis-Related-Groups (APR-DRGs). The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute hospital inpatient rates in accordance with the new methodology by December 1, 2009.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of this new reimbursement system that is a cornerstone to health care reform.

Subject: Hospital Inpatient Reimbursement.

Purpose: Modifies current reimbursement for hospital inpatient services due to the implementation of APR DRGs and rebasing of hospital inpatient rates.

Substance of emergency rule: The amendments to sections 86-1.2 through 86-1.89 of Title 10 (Health) NYCRR are required to implement a new payment methodology for certain hospital inpatient fee-for-service Medicaid services based on All Patient Refined-Diagnostic Related

Groups (APR-DRGs). The new payment methodology proposed by these amendments provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. It develops one statewide operating base rate using an updated and more reliable cost base rather than current regional and peer group operating base rates which were determined by using extremely outdated costs. The APR-DRG payment system will incorporate patient severity of illness and risk of mortality subclasses to better match patient resource utilization and provide a more precise method for equitable reimbursement.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 1, 2010.

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

Regulatory Impact Statement**Statutory Authority:**

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Public Health Law. In addition, section 2807-c(4)(e-2) of the Public Health Law requires new per diem rates of reimbursement be implemented for certain exempt units and hospitals based on updated reported operating costs. Section 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv) and (v) requires schedules of payment to be set forth in regulations for supplemental indigent care distributions made to certain eligible hospitals.

Legislative Objectives:

After numerous discussions between the Executive, Legislature, hospital associations and other key stakeholders, the Legislature chose to create a new, modernized reimbursement methodology for the State's Medicaid hospital inpatient system. Pursuant to statute, the APR-DRG methodology was chosen as the new reimbursement system for these services.

Needs and Benefits:

The proposed regulations implement the provisions of Public Health Law section 2807-c(35) which requires a new hospital inpatient reimbursement system based on APR-DRGs and rebased costs. This methodology provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. This new payment methodology will also allow the Department to publish hospital rates more timely, and provide hospitals with greater predictability of their income streams.

The current reimbursement system for hospital inpatient services is extremely outdated, and does not effectively serve the interests of patients, providers, or the Medicaid system. Not only does the system's overall reimbursement greatly exceed the cost of providing such services, the methodology for allocating payments does not appropriately reflect the acuity of the patient, the quality of service, or the efficiency of the hospital. Over the years the current system has accrued numerous groupings, weightings, adjustments, and add-ons that have ultimately distorted the health care delivery system.

Per diem rates of payment by governmental agencies for inpatient services provided by a general hospital or a distinct unit of a general hospital for services in accord with physical medical rehabilitation and chemical dependency rehabilitation; services provided by critical access hospitals; inpatient services provided by specialty long term acute care hospitals; and services provided by facilities designated by the federal department of health and human services as exempt acute care children's hospitals are also developed using an outdated cost base which does not properly reflect current costs incurred for providing such services.

The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Utilizing an updated and more precise cost base will have the effect of reducing the total amount of Medicaid reimbursement paid to hospitals for inpatient services, which is found to be significantly overpaid. Accordingly, the State would be able to, consistent with budgetary constraints, reinvest these savings in primary and preventive care and other traditionally under-paid ambulatory care services in order to improve the quality of patient care, ensure adequate access to these services, and avoid more costly inpatient admissions.

COSTS:**Costs to State Government:**

Section 2807-c(35) of the Public Health Law requires that the rates of payment for hospital inpatient services result in a net state wide decrease

in aggregate Medicaid payments of no less than \$75 million for the period December 1, 2009 through March 31, 2010 and no less than \$225 million for the period April 1, 2010 through March 31, 2011. Effective for annual periods beginning January 1, 2010, distributions to hospitals for indigent care pool DSH payments will be made as follows: \$269.5 million will be distributed to hospitals, excluding major public hospitals, on a regional basis and within the amounts available for each region, to compensate each eligible hospital's proportional share of unmet need for calendar year 2007; \$25 million will be distributed to hospitals, excluding major publics, having Medicaid discharges of 40% or greater as determined from date reported in the 2007 Institutional Cost Report. The distributions will be proportionately distributed based on each eligible facility's uninsured losses to such losses of all the eligible facilities; \$16 million will be proportionately distributed to non-teaching hospitals based on each eligible facility's uninsured losses to such losses for all non-teaching hospitals statewide.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments because local districts' share of Medicaid costs is statutorily capped.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

There are no local government mandates.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(4)(e-2) and (35); 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv), and (v) to promulgate implementing regulations.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment establishes the new APR-DRG reimbursement methodology for discharges on or after December 1, 2009; there is no period of time necessary for regulated parties to achieve compliance.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

In aggregate, health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding, but this is not anticipated for all affected providers.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. Some billing rate codes will change, but this will have a minimal impact on providers.

The rule should have no direct effect on Local Governments.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of these amendments to 86-1.2 through 86-1.89 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services. Revenues will shift among individual hospitals.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid hospital inpatient reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

Small Business and Local Government Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing hospitals and comments were solicited from all affected parties. Informational briefings were held with such associations.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid fee-for-service reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

Rural Area Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include members from rural areas.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the reimbursement system for inpatient hospital services. The proposed regulations have no implications for job opportunities.

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

Revisions to Certificate of Need (CON) Process for Threshold Levels

I.D. No. HLT-12-10-00011-P

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

Proposed Action: Amendment of Parts 405, 410, 420, 600, 703, 705, 709 and 710 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2802 and 2803(2)(a)

Subject: Revisions to Certificate of Need (CON) Process for Threshold Levels.

Purpose: To constitute the first phase of regulatory changes as part of the Department's review of the CON process.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The proposed amendments to 10 NYCRR §§ 705.7, 705.8, 710.1, 710.5, 709.12, 709.15 and 600.3 described below, with corresponding changes to 10 NYCRR §§ 705.22, 410.3 and 420.2, represent the first phase of regulatory reforms to New York's Certificate of Need Process (CON) process. The initial phase of the reform effort is aimed at focusing the resources of the Department of Health (Department) and the State Hospital Review and Planning Council (SHRPC) on projects that involve the delivery of highly complex services, the investment of substantial resources, and/or the creation of new facilities or beds. In addition, the first stage of reform seeks to streamline the process for projects that require a less intensive review. Accordingly, the proposed regulatory amendments outlined herein will raise the project cost thresholds that establish the level of review, reduce the level of review for the acquisition by hospitals of certain medical equipment, combine limited architectural review and prior review into a single review category, and eliminate SHRPC review of certain project amendments.

Raise cost thresholds that determine the level of review:

The proposed amendments to § 710.1 and corresponding changes to § 600.3 will raise the project cost threshold for full review from \$10 million to \$15 million and the threshold for administrative review from \$3 million to \$6 million. In addition, the proposed regulation maintains the sliding threshold for administrative review of projects with a cost of up to 10 percent of operating costs, but raises the cap on projects eligible for administrative review under the sliding threshold from \$25 million to \$50 million for general hospitals. Under the proposal, facilities that are financed with publicly-backed debt would be eligible for administrative review under the sliding threshold.

Eliminate Council review of non-clinical projects and health information technology projects:

The proposed amendments to § 710.1 will eliminate full review of non-clinical and health information technology projects regardless of cost. This means that, regardless of cost, health information technology projects and projects that do not impact clinical services or space will be exempt from review by SHRPC. Non-clinical and health information technology projects with a total cost of up to \$15 million will be subject to limited review, and such projects with a cost in excess of \$15 million will be subject to administrative review.

Reduce level of review of hospital acquisitions of MRIs and CT scanners:

The proposed amendments will require only a limited review of acquisitions of an MRI or CT scanner by a general hospital. Under the proposed regulation, the acquisition of lithotripters will no longer be subject to CON review. However, the addition of lithotripsy as a service will remain subject to limited review.

Allow administrative review of certain project amendments:

The proposed amendments will eliminate SHRPC (full) review of certain non-substantive amendments to approved projects. Instead, these changes in approved projects will be reviewed administratively.

Consolidate limited architectural and prior review:

Prior review and limited architectural review will be combined into one category entitled "limited review," eliminating any confusion between the two categories and allowing for a consolidated application form. The single review category for limited review will also provide a more explicit process for projects that involve the addition or decertification of a service or implementation of health information technology and/or involve construction requiring an architectural review.

Eliminate obsolete provisions:

The amendments to § 710.1 create an opportunity to delete obsolete provisions and clarify dense or ambiguous provisions.

Update Part 705 provisions governing new medical technology demonstration projects:

These amendments will provide increased flexibility for the Depart-

ment to approve demonstration projects to test the efficacy, safety, cost-effectiveness, and need for new medical technologies in New York.

Specific amendments to Parts 705, 709, 710 and Section 600.3:

- Section 705.7 will be amended to allow for innovative forms of financing of demonstration projects with a total project cost of \$100 million or more.

- Paragraph (a) of § 705.8 will be amended to give the Commissioner of Health the authority to approve demonstration projects with a duration in excess of two years.

- Subdivision (a) of § 709.12 will be amended to apply the specified need methodology for MRIs only to certificate of need applications involving the acquisition of MRIs by facilities other than general hospitals, consistent with amendments to Part 710.

- Section 709.15, which sets forth the public need methodology for the acquisition of lithotripters, will be repealed consistent with amendments to Part 710.

- Paragraphs (3) and (4) of § 710.1(b) concerning the Capital Architectural and Program Alternatives (CAPA) will be deleted, as these provisions are no longer utilized.

- Paragraph (1) of § 710.1(c) will be amended to clarify that the addition or deletion of part-time clinic services operated by the Department or a local health department does not require CON approval. The amendment also will delete an obsolete provision requiring CON approval of any project determined to be "inappropriate" or for which there has been a prior determination of no public need. A cross-reference to the limited review paragraph of § 710.1(c) will be updated. Subparagraph (vi) will raise the cost threshold for Certificate of Need applications from \$3 million to \$6 million dollars, except for non-clinical projects and health information technology projects which are subject to a higher cost threshold.

- Subparagraphs (i) and (iii) of § 710.1(c)(2) will be amended to increase the project cost threshold for applications requiring a full review from \$10 million to \$15 million.

- Paragraph (3) of § 710.1(c) will be amended in several places to raise the project cost threshold for applications eligible for administrative review and to raise the cap on the sliding administrative review cost threshold for general hospitals. In addition, this provision will exempt the acquisition of an MRI or CT scanner by a general hospital from administrative review and authorize an administrative review of non-clinical projects and health information technology projects with a project cost in excess of \$15 million. This amendment also will eliminate CON review of lithotripters.

- Paragraph (4) of § 710.1(c) will be amended to raise the project cost threshold from \$3 million to \$6 million for projects involving repair or maintenance that are exempt from Certificate of Need approval.

- Paragraph 5 of § 710.1(c) will be amended to create a new "limited review" category which combines the existing prior review and the limited architectural review categories. The consolidated limited review category will be restricted to applications for certain construction projects and service changes with a total cost that is not in excess of \$6 million, except that non-clinical and health information technology projects will be eligible for a limited review to the extent that project costs do not exceed \$15 million. Provisions governing the submission and processing of applications for limited review projects will be moved to the beginning of the paragraph and duplicative language will be deleted.

- Paragraphs (7), (8), and (9) of § 710.1(c) will be renumbered as paragraphs (6), (7), and (8).

- Subdivisions (b) and (c) of § 710.5 will be amended to eliminate full review of certain post-approval project changes, including: increases in construction costs of up to ten percent of or \$15 million; changes in financing which do not result in an increase in project cost on a present value basis in excess of ten percent or \$15 million; and reductions in construction which account for 15 percent or more of total basic costs that result in a corresponding reduction in basic costs when fixed costs are considered.

- Corresponding changes in regards to the threshold increases in

Part 710 and project amendment changes will be made to paragraphs (1), (2), and (3) of subdivision (c) and paragraph (3) of subdivision (e) of § 600.3.

- Amendments to cross references to 710.1 in Sections 405.22, 410.3, 420.2, and 703.6 also will be made.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the proposed revisions to Title 10 NYCRR Parts 705 and 710 is sections 2802 and 2803(2)(a) of the Public Health Law (PHL), which authorize the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health, to effectuate the provisions and purposes of Article 28 of the PHL with respect to hospitals, including but not limited to, requirements for construction projects subject to Certificate of Need (CON) review.

Legislative Objectives:

PHL Article 28 governs the establishment and construction of health care facilities and the addition of certain health care facility services and equipment. The CON process has been implemented to carry out this statutory mandate. The mission of the CON process is to promote an accessible, high-quality, cost-effective health care delivery system. The Department of Health has undertaken a comprehensive review of the CON process to ensure that it advances its intended objectives, is responsive to a changing health care environment, focuses limited staff and SHRPC resources on issues and projects with the greatest impact, and is streamlined to the extent appropriate.

Current Requirements:

Title 10 NYCRR Part 705 establishes a process for approving demonstration projects to evaluate the medical efficacy, cost effectiveness, and efficiency of, as well as the need for, new medical technologies and health services.

Title 10 NYCRR Part 710 establishes criteria governing the types of medical facility construction projects, including service changes and equipment acquisitions, that require review and the level of review applicable to each type of project. The two most intensive levels of review are full review and administrative review. These types of review consider several elements: public need, financial feasibility, character and competence (or current compliance for existing operators), architectural and engineering standards, and legal matters. Projects subject to full review are reviewed by both Department staff and SHRPC. SHRPC makes a recommendation to either the Commissioner of Health or, for projects that involve the establishment or a change of ownership of a facility, to the Public Health Council (PHC) for a final determination. Administrative reviews require only a staff recommendation to the Commissioner for a final decision. Less costly and less complex projects may be subject to prior limited review or limited architectural review and are exempt from Council review.

Certain types of CON applications are subject to full review regardless of cost. For example, applications involving the establishment of an operator of a health care facility or a change in ownership of an existing operator require the review of the SHRPC and PHC regardless of the cost of the project. Similarly, applications involving the addition of highly complex services, such as cardiac services or transplants, require SHRPC review regardless of cost.

However, in most cases, the projected cost of a project is the primary determinant of its level of review. Under section 710.1, projects with a capital cost in excess of \$10 million are subject to full review. Applications with a projected capital cost of at least \$3 million and up to \$10 million are subject to an administrative CON review, although some projects may qualify for administrative review under a sliding threshold based on the facility's operating costs and the total project costs. Current regulations subject non-clinical projects with a project cost of up to \$10 million to prior limited review.

In addition to construction projects and services, the CON review process applies to expensive medical equipment, helping control the proliferation of equipment that may be subject to over-utilization or that presents patient safety concerns if used inappropriately. Currently, the acquisition of MRIs, CT scanners, and lithotripters are subject to administrative review under Part 710, which requires consideration of public need, financial feasibility, architectural and programmatic issues, and current compliance.

Section 710.5 regulates project amendments. Under current regulations, amendments of approved projects that were subject to full review require another full review including a recommendation by SHRPC. Amendments are defined to include (among other changes in the project):

- o A change in the financing of the project, unless the applicant demonstrates that the change will not result in a more expensive project on a present-value basis for third-party payors;

- o An increase in the total construction cost in excess of \$3 million and in excess of 10 percent or \$10 million whichever is less; or

- o A reduction in the scope of the project which accounts for 10 percent or more of the total costs without a corresponding reduction in construction costs.

Need and Benefits:

The CON process is an effective health care planning tool that helps to improve the distribution of health care resources, enhance health care quality, and control health care costs. The proposed changes in the CON review process are needed to respond to changes in the health care environment, maximize the effectiveness of the CON process, and use Department of Health resources most effectively. In addition, the proposed regulations eliminate obsolete provisions, clarify provisions that were difficult to understand, and make appropriate changes to other regulatory provisions that reference Parts 705 and 710.

- Demonstration Projects

The Department proposes to update Part 705 to provide more flexibility to accommodate capital-intensive demonstration projects necessary to evaluate new technologies and services that demonstrate the potential to improve outcomes, and reduce morbidity and mortality. Part 705 was written in the early 1980's to assess and approve MRIs -- an emerging technology at that time. Medical technology has evolved since Part 705 was originally adopted, and flexibility is needed to support large scale, capital-intensive projects. The Department needs flexibility to authorize demonstration projects beyond the two years currently authorized, in order to fully assess the technologies in terms of efficacy, safety, cost-effectiveness, the ramifications of the financing approaches deployed, and any additional statewide need for these projects.

- Increasing Cost Thresholds

The Department proposes to raise the monetary thresholds that determine the level of review of most projects, in order to keep pace with the increasing cost of construction and medical equipment, to expedite the processing of less complex projects, and to allow the Councils and Department staff to focus their attention and resources on the more significant projects. It has been estimated that health care facility construction costs have increased between 4 and 12 percent annually since CON cost thresholds were last adjusted 10 years ago. By streamlining and expediting CON reviews, these proposed regulations will help to reduce the regulatory burden on health care providers and will reduce project cost increases that are sometimes attributed to CON processing delays.

Increasing the cost thresholds will mean that some projects formerly subject to full review would be subject to administrative review; while projects that were subject to administrative review would be subject to lesser levels of review depending on their scope. Even with this shift, projects in excess of \$6 million would continue to require review of public need, financial feasibility, current compliance, and architectural, engineering and legal issues. However, many lower cost projects would be subject only to a limited review comprised of architectural and engineering or programmatic considerations.

The changes in review levels will not limit the Department's ability to recommend disapproval of a project deemed unnecessary, program-

matically unsound, or fiscally imprudent. If a project were to be disapproved, the applicant could submit a CON application to be processed for full review.

- Non-Clinical Projects, Health Information Technology, and Limited Reviews

Recently adopted revisions to Part 710 shifted non-clinical projects with a total cost of up to \$10 million to prior review, while non-clinical projects with a total cost in excess of \$10 million remained subject to full review. In implementing the revised regulation, it became apparent that most non-clinical projects require construction and some architectural review. Similarly, many service changes and decertifications currently covered under prior review also involve construction. In order to better address hybrid projects under the limited review process, the Department proposes to combine the two levels of review into a single "limited review" category. By removing non-clinical projects from Council review entirely, and raising the monetary threshold for non-clinical projects eligible for limited review, the Councils and Department staff may focus their attention on the projects that involve medical services and have a greater impact on the health care delivery system.

In addition, growing numbers of health care facilities are moving to adopt electronic health records and other forms of health information technology. Recognizing the important role that health information technology can play in supporting health care quality, patient safety and efficiency, the amendments provide an explicit and streamlined review process for health information technology projects.

- Medical Equipment

Over the past decade, the use of MRI and CT scanners for diagnostic purposes has become the standard of care in general hospitals. The majority of general hospitals in New York operate at least one MRI and CT scanner. MRIs and CT scanners are minimally invasive imaging tools and are available at prices that are affordable to most hospitals. Accordingly, a rigorous CON review of these types of equipment in general hospital settings is no longer necessary, and the goals of CON can be accomplished by a less intensive review. Moreover, by reducing the level of review of this equipment to limited review, the Department will facilitate these acquisitions, while assuring that the equipment is installed in a setting that meets State architectural and engineering safety standards.

Under this proposal, the initial purchase of an MRI or CT scanner by a diagnostic and treatment center would remain subject to administrative review. These devices have not become the standard of care in diagnostic and treatment centers and are supply-sensitive. Accordingly, the acquisition of this type of equipment outside of a hospital setting should be scrutinized for community need.

The Department has determined that the acquisition of lithotripters should no longer be regulated by the CON process. Lithotripters do not raise the cost and patient safety concerns that once justified review under the CON process. They are now recognized as an affordable, minimally-invasive, first-line treatment for renal stones. Because they are used to treat a specific condition, utilization of lithotripters does not appear to be supply-sensitive. Thus, eliminating CON review for lithotripters is not likely to generate a significant increase in utilization or associated health care costs. However, the addition of lithotripsy as a service will remain subject to a limited review.

Project Amendments

By reducing the number of projects that must come before the Councils repeatedly due to cost increases or other non-substantive changes, the Department seeks to target staff and Council resources more effectively. Specifically, the proposed regulatory revisions will allow administrative review of amendments to projects that are substantively unchanged, but experience:

- o a change in financing, where the project is no more costly on a present value basis over the expected life of the project than 10 percent of approved costs or \$15 million whichever is less;
- o an increase in total construction costs of up to \$6 million and up to 10 percent or \$15 million whichever is less; or
- o a reduction of scope of construction which accounts for 15 percent or more of projected costs, if there is a corresponding reduction in construction costs, which may include consideration of fixed costs.

This proposal would increase the existing dollar thresholds that trigger a Council review to reflect the increases in construction costs over the last 10 years and to conform to proposals to raise the administrative and full review thresholds.

The elimination of a second Council review of these types of amendments would reduce costly delays in construction and would allow staff and the Councils to focus resources on projects that have not previously been approved.

COSTS

Costs to the Department of Health:

The proposed amendments will impose no new costs on the Department. By raising cost thresholds and lowering the level of review for certain projects, if adopted, the amendment will help free up staff and Council resources for higher cost, more complex projects and reduce the costs of CON approval to the health care industry.

Costs to Other State Agencies:

There will be no costs to other State agencies or offices of State government.

Costs to Local Government:

There will be no costs to local government.

Costs to Private Regulated Parties:

Because the proposed amendments impose no new requirements, duties or responsibilities on any entity subject to Article 28 of the PHL, they will not result in cost increases for private regulated parties.

Local Government Mandates:

The proposed amendment will not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed amendments will impose no new reporting requirements, forms or other paperwork. The amendments actually will reduce paperwork by shifting projects to lower levels of review and removing the requirement for the filing of a CON application for the acquisition of lithotripters.

Duplication:

There are no relevant State or Federal rules which duplicate, overlap or conflict with the proposed amendments.

Alternatives:

Hospital industry groups requested that monetary thresholds be raised to even higher levels and that reviews be eliminated for MRI and CT scanners. After considering their concerns, the Department determined that a 100 percent increase in the threshold for administrative review and a 50 percent increase in the threshold for full review would be sufficient to streamline the process, while maintaining Council involvement in costly and complex projects. In addition, the Department determined that an architectural review of MRI and CT scanner acquisitions is needed to ensure patient safety.

Federal Standards:

The proposed amendments do not exceed any minimum standards of the Federal government. There are no Federal rules currently addressing the CON process.

Compliance Schedule:

The proposed amendments will be effective on the thirtieth day after publication of a Notice of Adoption in the New York State Register. A compliance schedule is not needed as the regulations will not impose any new requirements on regulated entities.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendments will not impose an adverse economic impact on small businesses or local governments, and will not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendments will not impose an adverse impact on facilities in rural areas, and will not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201 a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendments, that they will not have an adverse impact on jobs and employment opportunities.

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

Ambulatory Patient Groups (APGs) Outpatient Rate Setting Methodology

I.D. No. HLT-12-10-00012-P

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

Proposed Action: Amendment of Subpart 86-8 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807(2-a)(e)

Subject: Ambulatory Patient Groups (APGs) Outpatient Rate Setting Methodology.

Purpose: To refine APG payment methodology regarding new APG weights, new procedure-based weights & minor changes in APG payment rules.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The amendments to Part 86 of Title 10 (Health) NYCRR are required to update the Ambulatory Patient Groups (APGs) methodology, implemented on December 1, 2008, which governs reimbursement for certain ambulatory care fee-for-service (FFS) Medicaid services. APGs group procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

86-8.2 - Definitions

The proposed amendments to section 86-8.2 of Title 10 (Health) NYCRR provide an amended subdivision (c) defining procedure-based APG weights and a new subdivision (u) defining no blend APGs.

86-8.7 - APGs and relative weights

The proposed revision to section 86-8.7 of Title 10 (Health) NYCRR provides revised APG weights and also sets forth procedure-based weights to be used under APG reimbursement.

86-8.9 - Diagnostic coding and rate computation

The proposed amendments to section 86-8.9 removes the restriction on allowing a capital add-on for ancillary-only visits and replaces that with a list of APGs with which a capital add-on will not be allowed, specifically: 94 Cardiac Rehabilitation; 274 Physical Therapy, Group; 275 Speech Therapy and Evaluation, Group; 322 Medication Administration and Observation; 414 Level I Immunization and Allergy Immunotherapy; 415 Level II Immunization; 416 Level III Immunization; 428 Patient Education, Individual; 429 Patient Education, Group. The list of no blend APGs is also provided, those being: 94 Cardiac Rehabilitation; 310 Developmental and Neuropsychological Testing; 312 Full Day Partial Hospitalization for Mental Illness; 321 Crisis Intervention; 322 Medication Administration and Observation; 414 Level I Immunization and Allergy Immunotherapy; 415 Level II Immunization; 416 Level III Immunization; 426 Medication Management; 428 Patient Education, Individual; 429 Patient Education, Group; 448 After Hours Services; 451 Smoking Cessation Treatment.

86-8.10 Exclusions from Payment

The proposed amendments removes 118 Nutrition Therapy from the "never pay" APG list set forth in subdivision (h) and places it on the "if stand alone do not pay" list set forth in subdivision (i). The following additional APGs are added to the never pay APG list; 441 Class VI Chemotherapy Drugs; 442 Class VII Combined Chemotherapy and Pharmacotherapy. The following additional APGs are added to the if stand alone do not pay list: 281 Magnetic Resonance Angiography - Head and/or Neck; 282 Magnetic Resonance Angiography - Chest; 283 Magnetic Resonance Angiography - Other Sites; 292 MRI - Abdomen; 293 MRI - Joints; 294 MRI - Back; 295 MRI - Chest; 296 MRI - Other; 297 MRI - Brain; 373 Level I Dental Film; 374 Level II Dental Film; 375 Dental Anesthesia; 440 Class VI Pharmacotherapy.

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

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

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

Regulatory Impact Statement

Statutory Authority:

Authority for the promulgation of these regulations is contained in sec-

tion 2807(2-a)(e) of the Public Health Law, section 79(u) of part C of chapter 58 of the laws of 2008 and section 129(l) of part C of chapter 58 of the laws of 2009, which authorizes the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

Legislative Objective:

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through APGs.

Needs and Benefits:

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs. This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

COSTS

Costs for the Implementation of, and Continuing Compliance with this Regulation to the Regulated Entity:

There will be no additional costs to providers as a result of these amendments.

Costs to Local Governments:

There will be no additional costs to local governments as a result of these amendments.

Costs to State Governments:

There will be no additional costs to NYS as a result of these amendments. All expenditures under this regulation are fully budgeted in the SFY 09/10 enacted budget.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

There are no local government mandates.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

These regulations are in conformance with Public Health Law section 2807(2-a). Alternatives would require statutory amendments.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment will become effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals, diagnostic and treatment centers, and free-standing ambulatory surgery centers. Based on recent data extracted from providers' submitted cost reports, seven hospitals and 245 DTCs were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to further reform the outpatient/ambulatory care fee-for-service Medicaid payment system, which is intended to benefit health care providers, including those with fewer than 100 employees.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that this reimbursement system is mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, and June 10, 2009.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. The Department of Health considered approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the reimbursement system is mandated in statute.

Opportunity for Rural Area Participation:

Rural areas were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009 and June, 10, 2009.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulations, that they will not have a substantial adverse impact on jobs or employment opportunities.

Higher Education Services Corporation

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

Administration of Student Financial Aid Application Processing

I.D. No. ESC-12-10-00009-P

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

Proposed Action: Amendment of section 2201.1(a) of Title 8 NYCRR.

Statutory authority: Education Law, sections 652, 653, 655 and 661

Subject: Administration of student financial aid application processing.

Purpose: To adopt the federal financial aid deadline for submission of applications and delete outdated language.

Text of proposed rule: 8 NYCRR § 2201.1

General eligibility criteria. *Unless otherwise specified, i*[I]n order to be eligible for any general award,[:] academic performance award or fellowship, except the Regents physician loan forgiveness program, a [student] candidate for an award must satisfy the following general criteria as well as all other criteria for a particular award:

(a) Application. To be eligible to receive payment for any award under this Subchapter, a candidate must file annually with the corporation a complete formal application for payment, in the form prescribed by the [board] corporation, no later than the deadline required by the U.S. Department of Education for the Free Application for Federal Student Aid (FAFSA), or a subsequent Federal form required for need based student aid. [May 1st of the academic year for which payment is requested. Original winners of current series Nursing Scholarships must file their initial application for payment no later than October 31st of the academic year for which payment is requested.] Responses to supplemental information requests, submission of supplemental forms whether electronic or otherwise, or [R]equests to amend any information included on an application or for an adjustment to any award [or to respond to a corporation request for additional information] must be received by the corporation no later than [May 1st of the academic year for which the award was made or] 45 days from the date of the award notification, request for additional information or the application deadline [after the mailing of an award certificate or request for further information by the corporation], whichever is later. Applications received after the Federal deadline [postmarked after May 1st of the academic year for which payment is requested] shall not be processed by the corporation [and shall be returned to the applicant]. No initial award or award adjustment [awards] shall be made to candidates [applicants] who fail to respond to a corporation request for [necessary] information necessary to make a determination of award eligibility or award amount by the [specified] applicable deadline. [Requests to adjust awards after the specified deadline shall not be processed and shall be returned to the applicant.] The date of issuance of any document from the corporation and the [postmark] receipt of any document returned to the corporation by the [applicant] candidate shall be determinative. Such request shall be made upon forms prescribed by the [board] corporation and shall contain all information deemed necessary to make the amendment or adjustment. Any TAP Certifying Officer may submit corrections to the reported college of attendance for a term up to the corporation's annually announced close-out date for payment reconciliation. [The president, in his/her discretion, may establish a deadline for filing applications subsequent to May 1st of the academic year for which payment is requested in the case of students attending an institution which has a term which begins after May 1st of such academic year. Should such a later deadline be established by the president and provided the applications are received by the corporation postmarked on or before such later deadline date, such applications shall be processed for payment for the term which begins after May 1st of such academic year, but not for payment of any awards for any prior terms in such year.]

Text of proposed rule and any required statements and analyses may be obtained from: George M. Kazanjian, Senior Attorney, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1350, Albany, New York 12255, (518) 473-1581, email: regcomments@hesc.org

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

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

Regulatory Impact Statement

Statutory authority:

Article 14 of the Education Law establishes the New York State Higher Education Services Corporation (“HESC”). Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State’s administrative effort in student financial aid programs with those of other levels of government. In addition, HESC is authorized to support the administration by the federal government and institutions of post-secondary education of the federal student aid programs established under Title IV of the Higher Education Act of 1965, as amended.

HESC’s President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, regarding the application for and the granting and administration of student aid and loan programs and administrative functions in support of state and federal student aid programs. Also, consistent with Education Law § 655(9), HESC’s President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out the President’s powers, duties and functions. Finally, Education Law § 655(12) provides HESC’s President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objects and purposes of HESC.

Pursuant to Education Law § 661(2), HESC’s Board of Trustees (“Board”) must establish annual deadlines for the student financial aid programs that it administers. The Board must also prescribe applications and other forms to obtain all the student and parent information necessary to administer State student financial aid programs and loan programs established under Article 14 of the Education Law. In addition, Education Law § 653(9) empowers HESC’s Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objects and purposes of the corporation including the promulgation of rules and regulations.

Legislative objectives:

Article 14 of the Education Law, as enacted by Chapter 942 of the Laws of 1974, created HESC and empowered it to administer State sponsored student financial aid programs. It also requires HESC to coordinate the State’s student financial aid programs with those of the federal government.

Education Law § 661 establishes an application process for student financial aid programs administered by the State. These include, but are not limited to, awards made under the Tuition Assistance Program (“TAP”), academic and/or service based scholarships, and loan forgiveness programs.

Needs and benefits:

This rule will improve the efficiency and consistency with regard to the administration of student financial aid application processing and, as a result, avoid the potential for confusion on the part of applicants. This proposed rule will conform the application deadlines for State and federally funded student financial aid programs by adopting the federal deadline. The proposed rule will also delete outdated language from the current regulation, extend the time in which a Free Application for Federal Student Aid (“FAFSA”) and TAP application can be submitted, and allow TAP Certifying Officers to change college codes.

The newly conformed deadlines will aid HESC in maintaining and increasing efficiencies gained through technological innovation. Students and financial aid officers will now only need to remember a single application deadline. Moreover, HESC anticipates that the conformed deadlines will increase administrative efficiency by facilitating the use of HESC’s web-based application process.

The 2008-2009 academic year begins July 1, 2008 and ends on June 30, 2009. Currently, in order to apply for federal aid for the 2008-2009 academic year, FAFSA applications can be submitted no earlier than January 1, 2008 and must be received no later than June 30, 2009. In addition, the applicant’s college must have correct, complete information by the last day of enrollment in the 2008-2009 academic year. New York State’s financial aid deadline is currently May 1, 2009.

New York students applying for financial aid submit a FAFSA for federal aid and then must submit another application for state aid. HESC administers TAP and a comprehensive array of more than eighteen federal and state scholarships, loan forgiveness and special award programs. With the exception of a few programs with a statutory application deadline, the proposed rule will establish June 30th as the deadline for all programs. The benefit of this proposal is that it will create a single application deadline for student financial aid programs administered by HESC.

In addition to providing consistency with the federal deadline to assist applicants, HESC continues to enhance and streamline the application process with the use of an electronic application process that allows processing of both State and federal student aid applications at a ‘one-

stop-shop’ secure website. Currently, for the ‘TAP on the Web’ electronic process, New York residents can apply for both federal and state financial aid using a single online session. After filling out the FAFSA on the web, a New York State resident can link to TAP on the Web, which is pre-filled with their FAFSA data and, if applicable, historical data from HESC’s system.

By conforming the deadlines for the various student financial aid programs, and encouraging the use of electronic applications, students will be able to electronically apply for awards simultaneously and seamlessly. In 2004, more than sixty percent (60%) of all TAP applications were processed electronically saving HESC time, money and ultimately resulting in timely service to students and families. Of the 622,000 grant and scholarship applications HESC processed in 2004-05, more than 360,000 (58%) were completed on the web as part of the all-electronic application. In the 2006-07 academic year, seventy percent (70%) of all TAP applications were handled electronically, and seventy-nine percent (79%) of these applicants received their awards electronically. In the 2007-08 academic year, there were more than 616,000 TAP applications, with more than eighty-three percent (83%) of the applications filed electronically.

HESC will continue to offer a paper application process. The ‘Express TAP Application’ (“ETA”) is a paper process whereby students initiate the TAP application process by filing a FAFSA. HESC uses FAFSA data to preprint an ETA for any New York State resident who lists at least one New York State institution on the FAFSA. The preprinted ETA will include student data from the FAFSA and will provide an opportunity for the student to change or update the information. The estimated New York State net taxable income derived from the FAFSA will be preprinted on the ETA. HESC will process returned ETA forms and then issue award certificates, denials, or requests for additional information.

Costs:

i. There are no application fees, processing fees, or other costs to the applicants.

ii. It is anticipated that there will be no costs to HESC or other state agencies for the implementation of, or continuing compliance with, this rule except for any programmatic administration costs. However, any costs would be offset as a result of savings achieved through increased efficiencies.

iii. There will be no cost to local governments for the implementation of, or continuing compliance with, this rule.

Paperwork:

This rule will continue to take advantage of technology, reduce the need for paper, and facilitate increased efficiency by using technology and aligning State application deadlines with federal application deadlines. Applicants will be able to apply for loans, grants and scholarships at one time on-line. Additionally, applicants will retain the option to submit paper applications and communicate via phone or U.S. mail.

Local government mandates:

No program, service, duty, or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

Duplication:

This rule reduces the duplication and overlapping of federal and state application processing by unifying state and federal student financial aid application deadlines. Also, HESC has taken steps to provide a seamless and streamlined application process incorporating the FAFSA.

Alternatives:

The ‘no action’ alternative was not a viable option for consideration. Continuation of the current application processes, with different deadlines, increases the possibility for confusion and the potential for inconsistencies.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government. In fact, the proposal would change the current application deadline to that used by the federal government for the FAFSA.

Compliance schedule:

HESC, students, colleges and any other party impacted by this proposal are already in compliance and, therefore, will be able to comply with this rule immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation’s (HESC) Notice of Proposed Rulemaking seeking to amend section 2201.1 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. HESC finds that this rule will not impose reporting, record keeping or compliance requirements on small businesses or local governments. This proposal provides for consistency by conforming program deadlines and application processes.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (HESC) Notice of Proposed Rulemaking seeking to amend section 2201.1 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. HESC finds that this rule will not impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas. The proposal conforms program deadlines and application processes.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's Notice of Proposed Rulemaking seeking to amend section 2201.1 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it could only have a positive impact or no impact on jobs and employment opportunities. The proposal conforms program deadlines and application processes.

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: 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.

Regulatory Impact Statement

1. Statutory Authority:

a. Section 13.07 of the New York State Mental Hygiene Law establishes that OMRDD shall have responsibility for seeing that persons with developmental disabilities receiving care and treatment have their personal and civil rights protected.

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

c. Section 16.00 of the New York State Mental Hygiene Law enables the commissioner of OMRDD to regulate and assure the quality of services provided to persons with developmental disabilities.

2. Legislative Objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b) and 16.00 of the New York State Mental Hygiene Law by conforming OMRDD requirements related to the control of tuberculosis (TB) to current recommended national practices. This furthers OMRDD's responsibility to assure the consistent high quality of services for persons with developmental disabilities by fostering healthy environments.

3. Needs and Benefits: OMRDD promulgated regulations related to the control of tuberculosis over 15 years ago. The recommendations of the Centers for Disease Control (CDC), the Association for Professionals in Infection Control (APIC) and the New York State Department of Health (NYSDOH) concerning the screening for and control of tuberculosis have changed substantially since the current regulation was written. The OMRDD system of residential facilities has also changed substantially from primarily large institutions and campuses to small community based residences. Implementation of many of the provisions of the current regulation (e.g. isolation procedures) is not feasible in the newer settings. New screening and treatment methods have also been developed which the current regulation does not permit.

OMRDD is proposing that the current regulations be repealed in their entirety and that new regulations be added that are consistent with current recommendations and reflective of the current OMRDD service delivery system.

A key difference between the current regulations and the proposed regulations is in the requirement for annual testing. The current regulations require an annual Mantoux Skin Test (a.k.a. PPD) for all individuals receiving services, employees, and others throughout the OMRDD system. The proposed regulation maintains the requirement for annual testing only in Developmental Centers. The new regulations continue the requirement for initial testing (e.g. when an individual begins to receive services or an employee is hired).

An annual testing requirement in non-institutional settings is not consistent with current recommended practices and is not necessary for the effective control of tuberculosis.

The elimination of annual testing will have many benefits for individuals receiving services, employees and agencies providing services. The administration of unnecessary tests can be detrimental for individuals receiving services. For some individuals, the administration of the PPD may cause anxiety and agitation. Sometimes the person needs to be restrained, sedated or placed under general anesthesia to accomplish the test. Other individuals and employees may be inconvenienced by the yearly ordeal of TB testing and sometimes incur personal expenses associated with the tests. Staff time and effort involved in testing can be more productively used. The volume of required annual tests can tax limited nursing resources, which can detract from the provision of more important nursing services. The administrative burden of documenting the annual testing and maintaining records can be eliminated. Finally, agencies can save the substantial cost incurred for the administration of these unnecessary tests.

The regulation also excludes non-certified programs and services, in conformance with federal recommendations.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Procedures for the Control of Tuberculosis (TB)

I.D. No. MRD-12-10-00010-P

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

Proposed Action: Repeal of Subpart 635-8 and addition of section 633.14 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Procedures for the control of tuberculosis (TB).

Purpose: To conform OMRDD requirements related to the control of TB to current national recommended practices.

Substance of proposed rule (Full text is posted at the following State website: www.omr.state.ny.us): • The proposed regulation repeals existing out-of-date OMRDD requirements on the control of tuberculosis (TB) in 14 NYCRR Subpart 635-8 and adds a new Section 633.14 containing updated requirements.

- TB testing. The existing regulation requires most service recipients, employees, volunteers and independent contractors to be tested for TB annually. The proposed regulation would require service recipients, employees, volunteers and independent contractors (excluding those who reside, work or volunteer in a developmental center) to have an initial TB test with a follow-up TB test only if the person is exposed to TB or the person exhibits TB symptoms. For those who live, work or volunteer in a development center, an annual TB test continues to be required.

- Testing technology. The existing regulation only allows for testing with the purified protein derivative (PPD) Mantoux skin test. The proposed rule allows for new TB testing techniques.

- Treatment of TB. Subpart 635-8 contains requirements, including isolation rooms at developmental centers, for the treatment of someone with active TB. The proposed regulations require people who have active TB be treated by their own healthcare provider in conjunction with the local health department.

- Applicability to non-certified services. The existing regulation applies to developmental centers, certified facilities and non-certified services. The proposed regulation would only apply to developmental centers and certified facilities. Non-certified services would no longer be required to comply.

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

Several additional considerations prompted this initiative by OMRDD:

- the need to modify language regarding testing methods to accommodate new techniques
- the need to revise out-of-date information
- the need to modify testing requirements for children based on the American Academy of Pediatrics newest recommendations
- the need to clarify testing requirements for individuals in residential settings given State Department of Health (NYSDOH) guidance document issued in 2006
- the need to clarify exemptions for testing

The proposed regulations integrate changes based on the most current tuberculosis recommendations and included a thorough evaluation of current requirements conducted in collaboration with the DDSO Infection Control Nurses, DDSO Nursing Management Teams, DDSO Medical Directors, and the Family Care Community of Practice. The proposed changes were also reviewed and the key changes were found “reasonable and appropriate” by Margaret J. Oxtoby, M.D., Director, Bureau of Tuberculosis Control, New York State Department of Health.

4. Costs: Except in developmental centers, routine annual TB testing of individuals receiving services and employees, volunteers and others is eliminated. This will result in annual cost savings in several ways.

The vast majority of individuals receiving services are Medicaid recipients. For individuals accessing the required TB testing through a private physician’s office or clinic, Medicaid will save at a minimum the cost of the TB test itself. This savings will be realized 50% by the state and 50% by the federal government.

Generally, providers (including OMRDD as a provider) assume the cost of testing employees, volunteers, etc., and sometimes the provider assumes the cost of testing individuals receiving services. When the provider pays for the testing, the savings generated will accrue 100% to the provider (either OMRDD or the voluntary provider). The following accounts for the cost of the TB test itself. However, associated savings will also be realized which are difficult to quantify due to the avoidance of various costs of TB testing. This includes the cost of testing volunteers and others besides employees, the cost of the clinician’s time to administer and read the test, travel time and expense, lost work time, savings associated with documentation, etc. There may be additional Medicaid costs that are avoided which are associated with the administration of the TB test to some individuals, such as the cost of anesthesia or sedation.

Methodology:

OMRDD estimates that there are 9425 individuals living in State operated residences (except for developmental centers). About 70% of TB tests to these individuals are administered by the state directly (generating savings to OMRDD), and about 30% are administered at Medicaid cost. For the additional 5356 individuals in state-operated day programs who do not live in certified residences, it is assumed the tests are administered at Medicaid cost. An estimated 41,969 individuals live in voluntary operated residences or attend voluntary operated day programs. The cost of these individual’s tests are generally paid by Medicaid. OMRDD estimates that there are 16,500 employees in state-operated programs (excepting Developmental Centers). OMRDD also estimates 56,000 employees in voluntary operated programs. OMRDD estimates that the rate of attrition is 8% per year. New employees must have a TB test so the number of employee tests that are avoided are correspondingly reduced. TB testing is estimated to cost \$21.90 per test.

Additional savings will result from the exclusion of non-certified programs from the proposed regulation. These are difficult to quantify.

a. Costs to the Agency and to the State and its local governments:

Annual Federal share of Medicaid savings: \$549,169

Annual State share of Medicaid savings: \$549,169

OMRDD’s anticipated annual direct savings as a provider: \$343,950 is saved in the cost of the actual test. Associated savings cannot be quantified.

Local governments: There is no effect on local government. While a local Medicaid share exists for some individuals, there is an overall cap on Medicaid costs for local governments. Therefore, the Medicaid savings will be realized by the state and federal governments and not the localities.

b. Costs to private regulated parties:

OMRDD estimates that the current regulation requires annual testing for 56,000 employees of voluntary providers at a cost of \$21.90 per test. Again, OMRDD assumes 8% attrition, which reduces the number of tests avoided. This is expected to result in direct annual savings of \$1,128,288 for voluntary providers. Providers will also save in associated costs as noted above, which cannot be quantified.

5. Local Government Mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: OMRDD and voluntary agencies will reduce the amount of paperwork because of the elimination of the requirement for annual testing. Documentation of these tests and retention of these records will be eliminated.

7. Duplication: None.

8. Alternatives: OMRDD had considered deletion of the requirement for annual tests for children receiving services in accordance with the recommendation of the American Academy of Pediatrics. However, after analysis of other national recommendations and deliberation, OMRDD decided to extend the deletion of the annual testing requirement for all individuals and staff, except in institutional settings.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the Federal government.

10. Compliance Schedule: It is OMRDD’s intent to finalize the proposed amendments as quickly as allowed by the requirements of the State Administrative Procedure Act.

Regulatory Flexibility Analysis

1. Effect on small businesses: These proposed amendments apply to organizations that operate facilities under the auspices of OMRDD.

While most of the organizations employ more than 100 people overall, many of the facilities operated by the organizations at discrete sites (e.g. small residences) employ fewer than 100 employees at each site, and each site (if viewed independently would therefore be classified as a small business. Some smaller organizations which employ fewer than 100 employees would themselves be classified as small businesses.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that the proposed amendments will not cause undue hardship to small business providers due to increased costs or increased compliance requirements. In fact, OMRDD has determined that with the elimination of annual testing for tuberculosis (TB) for the majority of those who are employed or receive services from the small businesses, the business will experience savings.

The proposed amendments result in no new costs for local government.

2. Compliance requirements: Existing facilities with current operating certificates will need to develop new policies and procedures for the control of TB to be compliant with the proposed amendments. The proposed amendments contain no compliance requirements for local government.

3. Professional services: No additional professional services are required as a result of these proposed amendments. Regulated parties will be able to use the existing professional services more effectively with the elimination of the outdated requirements as proposed in the amendments. The proposed amendments will have no impact on the professional service needs of the local government.

4. Compliance costs: There are no compliance costs to local governments. Small business will experience a savings in compliance costs.

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

6. Minimizing adverse economic impact: These proposed amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: Draft copies of the proposed amendments were distributed to each of the 9 provider associations at a Provider Association meeting for distribution to their membership.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rulemaking proposes to conform OMRDD requirements related to the control of tuberculosis to current national recommended practices.

Job Impact Statement

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The rulemaking proposes to conform OMRDD requirements related to the control of tuberculosis to current national recommended practices.

Office of Parks, Recreation and Historic Preservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Safe Boating Education Program

I.D. No. PKR-12-10-00003-P

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

Proposed Action: Repeal of Part 451 and addition of new Part 451 to Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, section 3.09(8); and Navigation Law, sections 75-79

Subject: Safe boating education program.

Purpose: To update the boating education program and the instructor certification program.

Substance of proposed rule (Full text is posted at the following State website: www.nysparks.state.ny.us): Section 451.1 summarizes the purposes and scope of the safe boating program administered by the Office of Parks, Recreation and Historic Preservation's (State Parks) Marine Services Bureau.

Section 451.2 explains that all unsupervised youth operators of vessels and all persons age 14 or older who operate personal watercraft must carry a commissioner-issued boating safety certificate (certificate) or qualify for an exemption.

Section 451.3 describes the application and New York State safe boating course (course) requirements for receiving a certificate.

Section 451.4 defines the temporary certificate that is issued by the instructor upon course completion and the permanent certificate that is subsequently issued by the commissioner. Explains that the permanent certificate is issued to adults only after payment of the \$10 fee to State Parks and that youth operators do not pay that fee.

Section 451.5 describes who is exempt from carrying a certificate.

Section 451.6 outlines under what circumstances a certificate could be suspended or revoked by the commissioner.

Section 451.7 contains definitions.

Section 451.8 outlines the requirements and basic principles of the course.

Section 451.9 prescribes the requirements for record keeping for individual instructors or for certified commercial organizations administering the course on behalf of their affiliated commercial instructors.

Section 451.10 prescribes the requirements for instructor certification by State Parks.

Section 451.11 prescribes the requirements for certification of commercial organizations that offer the course on behalf of affiliated commercial instructors.

Section 451.12 describes the circumstances when an application for a commercial organization certificate will be denied or when the certificate will be suspended or revoked.

Section 451.13 outlines course advertising guidelines.

Section 451.14 establishes that failing to comply with this regulation is a violation under Section 73-c of the Navigation Law.

Section 451.15 contains the severability clause.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, New York State Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.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:

OPRHP is repealing the boating safety regulation at 9 NYCRR Part 451 and adopting a new updated, expanded rule. Parks, Recreation and Historic Preservation [PRHP] Law § 3.09[8] authorizes the Office of Parks, Recreation and Historic Preservation (OPRHP or State Parks) to generally "adopt, amend or rescind" regulations. Section 10 of the Navigation (Nav.) Law authorizes the Commissioner to administer that statute and implement Navigation Law § 75-79 through regulation. Navigation Law § 77 specifically authorizes the commissioner to adopt rules designed to result in further knowledge and observance of the principles of safe boating. The proposed rule continues the boating education program, certification of unsupervised youth operators and unsupervised personal watercraft (PWC or jet skis) operators age 14 or over, and certification of volunteer instructors and instructors who charge a fee for teaching the safe boating course: these are all elements of the existing program. The rule, however, now requires all instructors to use the New York Course materials (course), and allows the commissioner to certify commercial organizations to administer the program for commercial instructors who charge a fee for teaching the course. The rule continues voluntary participation in this boating education program by instructors or commercial organizations who request approval from the commissioner to teach the course to youths who must take the course and to adults who choose to take the course.

Navigation Law, Article 4 (Part 5) requires the Commissioner to

- Establish "a comprehensive educational program designed to advance boating safety" for youths, and for persons age 14 or over operating a PWC. (Nav. Law § 75).
- Prepare and disseminate water safety information. (Nav. Law § 76).
- Issue boating safety certificates and collect an initial \$10 fee. (Nav. Law § 78).
- Use discretion in designating and certifying qualified instructors. (Nav. Law § 79).

Youths (between the ages of 10 and up to but not including age 18) may operate a motorized vessel if they first obtain a Commissioner-issued boating safety certificate under this rule or other (e.g., Coast Guard/Power Squadron) certification, or are supervised and accompanied in the vessel by an adult age 18 or older. (Nav. Law. § 49[1]). Additionally, all persons age 14 or older (youths and adults) may operate PWC¹ if they first obtain a Commissioner-issued boating safety certificate under this rule, or obtain another (e.g., Coast Guard/Power Squadron) certification, or they are supervised and accompanied by an adult who has a certificate and has completed a Commissioner-approved safe boating course. Nav. Law § 49[1-a])

2. Legislative Objectives:

The State Legislature has required the Commissioner to protect and encourage "public interest in the prudent and equitable use of the waters of the state" (Nav. Law § 75) as well as to foster public interest in boating. The Commissioner may certify qualified instructors. (Nav. Law § 79). When Sections 77, 78 and 79 were first enacted in 1959, State Parks' staff and volunteers primarily taught the course. Today, there is increasing public demand for the course and for New York-issued boating safety certificates even though the State Legislature only requires the course and certificates for youths who operate vessels without adult supervision, and for all persons age 14 or over who operate PWCs. In addition, the State Legislature's decision to provide State-approved rate reductions in boating liability insurance obtained from qualified insurers has provided the incentive for many adult boaters to voluntarily take the safe boating course (Nav. Law § 78-a). Finally, the State Legislature's decision in 2004 to allow instructors to charge a fee to youths taking the course has broadened the role of commercial entities that market and administer the course. (Nav. Law § 79). To meet public demand, the Commissioner has decided to continue and foster opportunities for the public to take free courses taught by volunteer instructors, but also to expand opportunities for the burgeoning industry that offers the course for a fee to children and adults. Under the rule the commissioner may certify qualified commercial organizations to manage affiliated commercial instructors to teach the

course. But, individual commercial instructors would not be precluded from continuing to operate and teach the course as sole proprietors.

3. Needs and Benefits:

Although the Agency is required to foster an interest in boating, it also recognizes that inexperience and lack of proper operator training often contribute to accidents and fatalities on the water. Therefore, we have designed a safe boating program that will continue to protect the public health and welfare of all New York residents through standards that will ensure youth operators, PWC operators and other adults who opt to take the course are properly trained. The existing regulation was last amended ten years ago in 1999 and requires updating. Under this proposal, the Commissioner would

1. provide boating safety certificates to qualified students,
2. certify qualified volunteer and commercial instructors,
3. certify commercial organizations that manage and administer instructional materials for more than one affiliated instructor,
4. clarify roles and responsibilities,
5. standardize course instruction and materials, and
6. provide sanctions for non-compliance.

The proposed regulation balances the public's continuing demand for free courses conducted by certified volunteer instructors with the public's increased willingness to pay commercial entities for this service. Additionally, the new regulation could accommodate a mandatory phased-in boating safety program for all adult operators should the State Legislature require one in the future.

4. Cost:

a. Costs to regulated parties: State Parks would continue to provide free application forms, instructional and examination documents, and course materials to certified volunteer and commercial instructors. Volunteer instructors would continue to teach the course without requiring a fee and could continue to request a nominal donation for the not-for-profit or public entity sponsoring the course or offering space in the training facility. Commercial instructors or commercial organizations would continue to charge a fee for the course but could not charge students for the text books they may receive from State Parks. Students age 18 and over would continue to pay the statutory \$10.00 fee to State Parks for the boating safety certificate. State Parks would continue to assess boaters a \$10.00 processing fee for replacing certificates.

b. Costs to agency, state and local governments: State Parks' costs for the program would remain the same. Instructors would continue to receive the textbook from this Agency. We are investigating ways to make the New York safe boating textbook prepared by Agency staff available to students including on line through State Parks' website. There would be no costs to local governments.

c. Source: The I Love New York Waterway Fund would continue as the revenue source for the program. This revenue source is funded by the \$10 fee for the boating safety certificate - a self-sustaining program.

5. Local Government Mandates:

The proposed amendment would not impose any program service, duty or other responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

State Parks would continue to provide applications and course materials directly to instructors or managers of commercial organizations. All students would continue to fill out the applications that State Parks provides to instructors or to the managers/owners of commercial organizations. Instructors or managers of commercial organizations would continue to send State Parks the completed forms for the youth operators. Adults would continue to send their applications and completed forms directly to State Parks. The instructors or managers would continue to issue temporary boating safety certificates to students and account to State Parks for unused forms and materials. State Parks would continue to issue permanent boating safety certificates to students.

7. Duplication:

None.

8. Alternatives:

The alternatives considered were (1) to directly administer the program and attempt to provide the service solely through State Parks' employees and through volunteers or (2) to completely privatize the program and issue an RFP and contract to the winning bidder. Neither option would implement statutory requirements. State Parks does not have the manpower to teach the program, and there are not enough volunteer instructors to adopt a purely volunteer program. On the other hand, State Parks is not authorized to administer a safe boating program using only commercial for-profit entities. Also, complete privatization of the program (requiring everyone to pay a fee for instruction) would shut out those who cannot afford to pay for it, thereby impeding the State's goal of requiring all unsupervised youth operators and all PWC operators age 14 and over to receive instruction on how to safely operate vessels and practice safe boating principles.

9. Federal Standards:

None, however, New York's standards are consistent with the U.S. Coast Guard's and the National Association of State Boating Law Administrators' (NASBLA) uniform nationwide standards.

10. Compliance Schedule:

The regulation would take effect on the date established in the Notice of Adoption.

¹ The term Personal Watercraft (PWC) for purposes of this RIS also includes specialty prop-craft which are uncommon in NY and defined separately by statute (compare the definitions in subdivisions 30 and 31 of Navigation Law Section 2).

Regulatory Flexibility Analysis

1. Effect of rule:

The State Legislature in New York requires youths (between the age of 10 up to but not including age 18) who operate vessels without adult supervision and all persons age 14 and over who operate personal watercraft (jet skis) to successfully complete a safe boating course. The rule continues the Office of Parks, Recreation and Historic Preservation's (State Parks') boating safety education program that presently allows volunteer instructors or commercial (paid) instructors to participate.

Small businesses that currently provide boating education as a sideline to driver education classes that are regulated by the Department of Motor Vehicles, and small businesses associated with the boating industry that provide classes as a courtesy to their customers could be affected by the rule. The rule officially recognizes these business entities as commercial instructors or commercial organizations and facilitates their teaching of the course to members of the public who are willing to pay a fee for their services. The rule allows the commissioner to certify qualified commercial organizations to manage affiliated commercial instructors to teach the course. Individual commercial instructors could also continue to operate as sole proprietors.

2. Compliance requirements:

Reporting, recordkeeping and requirements for transmitting application and course completion materials to State Parks for the students of volunteer or commercial instructors would not increase under the new rule.

3. Professional services:

None required.

4. Compliance costs:

None. State Parks will continue to provide the applications, course materials and a hard copy textbook to instructors, and is investigating how to provide the textbook on line for students.

5. Economic and technological feasibility:

Small business participation in this program is not required by the Navigation Law. Compliance with the rule is simple. Both volunteer and commercial instructors must meet the same certification standards and requirements under the rule or qualify for an exemption.

6. Minimizing adverse impact:

The program is designed to implement the State Legislature's decision to allow instructors to charge both adults and children a fee for teaching the course, it is intended to standardize boating safety instruction statewide and accommodate the increased interest commercial instructors have expressed in teaching the program. The rule should encourage qualified commercial instructors and qualified commercial organizations to market and provide the appropriate instruction and course materials.

7. Small business and local government participation:

About 159 commercial instructors or 92 small businesses currently provide the safe boating class. For outreach purposes before finalizing the proposed rule, State Parks sent out 690 emails and letters notifying volunteer and commercial instructors, small businesses and other organizations that the draft regulation was posted on our website for informal preliminary comments. Twenty comments were received. Five of the 19 comments were from small businesses and 15 were from individuals. After reviewing and discussing the comments internally, State Parks staff made about 15 revisions to the draft proposed regulation.

Applicability

Several comments said the regulation should be applied to all boaters or that supervision should be better defined. These changes would require statutory amendments.

Passing Grade on Examination

The passing grade was changed from 75 to 76 in response to a comment that a grade of 75 was not attainable under the test currently given.

Exemptions

In response to many comments from instructors on exemptions, the section was clarified to encompass all applicable certifications, licenses, memberships and statuses. We rejected the suggestion that the original exemption document should be carried at all times in favor of allowing a copy to be carried on the water with follow-up production of originals if requested by a law enforcement or judicial officer.

Boating Course Requirements

Comments on the boating course requirements and use of State Parks textbook were reviewed. References to a minimum (6 pre-registered) and maximum (30 per instructor) class sizes were clarified. Comments suggesting use of other state or commercial textbooks or other state examinations as substitutes for the New York course were rejected so that we will be able to ensure consistent, quality and up-to-date instruction statewide through use of our own materials. Other comments on break times and lead instructor requirements are not appropriate for including in the regulation and will be addressed in the instructor manual. The agency will continue to require at least two weeks notice and pre-registration of classes so sufficient time is available to mail out the forms and materials. Therefore, the program can not accommodate the comment that instructors be allowed to teach classes on demand to any number of students.

Paperwork

One comment objected to perceived new paperwork requirements; however, the major paperwork changes involve new applications for instructors and commercial organization certifications. Comments were received on the amount of student record forms the agency should be making available for pre-registered classes. Some said the number should be less than 250 others said more than 250. The language was changed to state "batches of no more than 250 maximum" would be sent for pre-registered courses. The time frame for returning the forms to State Parks was extended to 21 days after course conclusion to accommodate instructors affiliated with a commercial organization that manages the paperwork for them.

Instructor Certification

Some comments criticized the time it takes to receive instructor certification as being too long and asked to have the instructor course given more frequently. The Agency begun processing instructor certifications more quickly and encourages applications be submitted prior to the busy summer season when staff have other duties to the public. The rule also commits the Agency to offering the "Introduction to the New York Safe Boating Safety Course" to potential instructors at least once a month in Albany.

Commercial Organizations

Questions were raised about the status of the new commercial organizations that would be certified under the rule with respect to business auditing, insurance and standards for owners, managers and instructors. Since the rule would recognize an entity that has already been delivering this service to the public, the Agency decided to consider suggested alternatives and retain flexibility to address these issues on a case-by-case basis in subsequent guidance documents and in the instructor's manual.

Suspension or Revocation of Certificates and Instructor and Commercial Organization Certifications

In response to comments the procedures for suspension or revocation were clarified.

Training Facilities

We received many comments critical of the new definition of "training facility;" however, the Agency will not allow courses to be taught in private homes or substandard rooms. The quality of the physical space where the course is taught affects the students' ability to learn the material. Although private homes may be adequate, the time and space requirements of the course can be easily manipulated and not easily monitored in those locations. Furthermore, all training facilities must be accessible to persons with disabilities. It must be comfortable and provide easy access to the public and agency staff.

Fees

Several comments said the agency lacked authority for the new fees contained in the draft for fingerprinting and background checks, and processing instructor or commercial organization certifications. Consequently, those fees were removed and State Parks will seek statutory approval to assess them. Other comments stated that the regulation would result in fewer volunteer instructors teaching the course. In general, the Agency believes that, taken as a whole, the proposed rule strikes the appropriate balance between encouraging volunteer and commercial instructors to teach the course. Some commented that volunteer instructors could abuse the provision allowing nominal donations to not-for-profits and governments for their programs or use of their facilities. In response, volunteer instructors will be required to keep additional records about these charges.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas affected:

County	Total Reg Boats	Classes	Students	Instructors
Albany	9910	40	689	35

Allegany	1893	4	65	4
Broome	7424	18	427	10
Cattaraugus	2961	4	85	4
Cayuga	5504	16	431	6
Chautauqua	6935	20	376	8
Chemung	4332	6	83	1
Chenango	2358	3	32	2
Clinton	5925	15	258	7
Columbia	2997	7	75	11
Cortland	2199	2	15	4
Delaware	1333	2	19	3
Dutchess	7799	17	410	16
Erie	25348	57	945	22
Essex	4480	7	95	8
Franklin	4275	12	128	6
Fulton	4525	23	374	4
Genesee	2280	0	0	1
Greene	2440	8	78	6
Hamilton	2071	6	53	6
Herkimer	3720	10	157	8
Jefferson	10827	14	271	13
Lewis	1986	3	77	4
Livingston	3920	8	234	7
Madison	4418	8	199	7
Monroe	28588	23	604	2
Montgomery	2127	1	21	49
Niagara	8788	6	148	13
Oneida	11094	30	569	18
Onondaga	22521	35	865	7
Ontario	7505	8	187	8
Orange	9902	25	528	1
Orleans	2186	0	0	12
Oswego	9343	16	329	4
Otsego	2769	8	61	25
Putnam	3256	12	199	5
Rensselaer	6197	10	181	20
Saratoga	13792	34	518	26
Schenectady	6327	21	295	10
Schoharie	1187	3	40	6
Schuyler	1720	14	156	4
Seneca	2962	8	128	11
St Lawrence	10142	9	157	3
Steuben	5370	7	278	4
Sullivan	3378	12	202	8
Tioga	2555	4	70	4
Tompkins	3689	0	0	1
Ulster	5988	28	403	11
Warren	7559	27	523	10
Washington	3556	5	34	5
Wayne	6812	7	189	8
Wyoming	1726	0	0	2
Yates	2687	8	219	6

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

Reporting, recordkeeping and transmission of application and course completion materials to State Parks by volunteer or commercial instructors for their students would not increase under the new rule. The rule would now require all instructors to distribute the textbook provided by

State Parks to their students. Services of professionals would not be required under the rule.

3. Costs:

None. State Parks will continue to provide the applications and course materials to instructors and will also now provide the textbooks for students.

4. Minimizing adverse impact:

There will be no adverse impacts to rural areas.

5. Rural area participation:

For outreach purposes before finalizing the proposed rule, State Parks sent out emails and letters notifying volunteer and commercial instructors and small businesses and other organizations in rural areas that the draft regulation was posted on our website for informal preliminary comments.

Job Impact Statement

The purpose of the rule is to continue a boating safety education program that is implemented by volunteer instructors and also by commercial instructors who may charge a fee for teaching the course. The rule will allow the commissioner to certify commercial organizations to set up training facilities and process forms and paperwork for commercial instructors. It will not have a substantial adverse impact on jobs or employment opportunities and could facilitate job creation.

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-W-0091SP1)

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

Inclusion of CFL Fixtures in Previously Approved EEPS Programs

I.D. No. PSC-12-10-00014-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 modifications to previously approved Energy Efficiency Portfolio Standard (EEPS) programs. The modifications would allow the inclusion of compact fluorescent light (CFL) fixtures as eligible measures in the EEPS programs.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: The inclusion of CFL fixtures in previously approved EEPS programs.

Purpose: To encourage cost effective electric energy conservation in the State.

Substance of proposed rule: The Commission is considering modifications to previously approved energy efficiency programs that would allow the inclusion of compact fluorescent light (CFL) fixtures as eligible measures in all appropriate Energy Efficiency Portfolio Standard programs. The Commission approved the programs in various orders as part of the Energy Efficiency Portfolio Standard (EEPS) in Cases 07-M-0548, et al. and has previously authorized the New York State Energy Research and Development Corporation (NYSERDA) to include CFL fixtures in its Multifamily Performance Program.

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

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

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

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

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

(07-M-0548SP19)

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

Recommendations Made by Staff Intended to Enhance the Safety of Con Edison's Gas Operations

I.D. No. PSC-12-10-00015-P

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

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-10-04-00009-P	March 10, 2004
PSC-52-06-00013-P	December, 27, 2006
PSC-01-08-00024-P	January 2, 2008
PSC-11-08-00010-P	March 12, 2008
PSC-22-08-00005-P	May 28, 2008
PSC-28-08-00007-P	July 9, 2008
PSC-35-08-00015-P	August 27, 2008
PSC-36-08-00021-P	September 3, 2008
PSC-42-08-00012-P	October 15, 2008
PSC-50-09-00004-P	December 16, 2009
PSC-50-09-00006-P	December 16, 2009

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

Transfer of Water Supply Assets

I.D. No. PSC-12-10-00013-P

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

Proposed Action: The PSC is considering a Joint Petition by Braeside Aqua Corp., Orchard Lake Park Homeowners Association, and the Town of Blooming Grove for approval to transfer its assets serving Orchard Lake Park to the Town of Blooming Grove, Orange County at no cost.

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

Subject: Transfer of water supply assets.

Purpose: Transfer the water supply assets of Braeside Aqua Corp. serving Orchard Lake Park to the Town of Blooming Grove at no cost.

Substance of proposed rule: On February 25, 2010, Braeside Aqua Corp. (the company), Orchard Lake Park Homeowners Association (Association), and the Town of Blooming Grove (Town) filed a joint petition with the Commission requesting approval to transfer the water supply assets serving the Association to the Town at no cost. Braeside Aqua Corp. is also seeking approval for the dissolution of the company and authorization to file a Certificate of Dissolution with the New York Department of State, pursuant to Public Service Law § 108. The company currently provides flat rate water service to approximately 115 residential customers in the Association's development known as Orchard Lake Park in the Town of Blooming Grove, Orange County. The Commission may approve or reject, in whole or in part, or modify the company's request.

Proposed Action: The Commission is considering whether to order Consolidated Edison Company of New York, Inc. (Con Edison) to implement the recommendations made in the Staff Report on the April 24, 2009 natural gas explosion that occurred at 80-50 260th Street, Queens, NY.

Statutory authority: Public Service Law, sections 65(1), 66(1) and (2)

Subject: Recommendations made by Staff intended to enhance the safety of Con Edison's gas operations.

Purpose: To require that Con Edison implement the Staff recommendations intended to enhance the safety of Con Edison's gas operations.

Substance of proposed rule: On April 24, 2009, a gas explosion occurred at 80-50 260th Street, Queens, New York, in the service territory of Consolidated Edison Company of New York, Inc. (Con Edison or Company). Department of Public Service Staff (Staff) conducted an extensive investigation into the causes of the explosion and Con Edison's response to a call reporting gas odors on the block, received prior to the explosion. On November 12, 2009, Staff filed a detailed report (Staff Report) explaining the findings of its investigation and making nine recommendations intended to enhance the safety of the Company's gas operations. The Commission is considering whether to order Con Edison to implement these and any additional recommendations or actions the Commission deems necessary to enhance the safety of Con Edison's gas operations. The Commission may also consider related matters.

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

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

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

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

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

(09-G-0380SP1)

State University of New York

NOTICE OF WITHDRAWAL

Proposed Amendments to the Traffic and Parking Regulations at the State University of New York College at Oneonta

I.D. No. SUN-09-10-00008-W

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

Action taken: Notice of proposed rule making, I.D. No. SUN-09-10-00008-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on March 3, 2010.

Subject: Proposed amendments to the traffic and parking regulations at the State University of New York College at Oneonta.

Reason(s) for withdrawal of the proposed rule: Incorrect text attached to proposal.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Proposed Amendments to the Traffic and Parking Regulations at the State University of New York College at Oneonta

I.D. No. SUN-12-10-00007-P

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

Proposed Action: Amendment of section 564.4 of Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Proposed amendments to the traffic and parking regulations at the State University of New York College at Oneonta.

Purpose: To amend existing regulations to add or modify locations of certain stop and yield signs, and address uninspected vehicles.

Text of proposed rule: Section 564.4 is amended to read as follows:

§ 564.4 Traffic and parking regulations

(a) No person shall drive a vehicle on university streets, roads or highways at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards when existing, but in no event shall a person drive a vehicle in excess of 25 miles per hour unless a different speed is authorized and indicated by the university or the department of transportation.

(b) In addition to the maximum speed of 25 miles per hour established under subdivision (a) of this section, the following additional regulations are established for this campus:

(1) Twenty miles per hour is established as the maximum speed limit at which vehicles may proceed on or along the following roadways on the grounds of the State University of New York, College at Oneonta, City of Oneonta, Otsego County:

- (i) East Dormitory Road;
- (ii) West Dormitory Road; and
- (iii) South Dormitory Road.

(2) Fifteen miles per hour is established as the maximum speed limit at which vehicles may proceed on or along the following roadways on the grounds of the State University of New York, College at Oneonta, City of Oneonta, Otsego County:

- (i) Morris Drive
- (ii) Grant Drive

(3) Fifteen miles per hour is established as the maximum speed limit at which vehicles may proceed on or along the following roadways on the grounds of the State University of New York, College at Oneonta, Town of Oneonta, Otsego County:

- (i) Upper Sports Field Drive

(2)4 Standing is prohibited on or along both sides of all highways on the grounds of the State University of New York, College at Oneonta, City of Oneonta, Otsego County.

(3)5 Designates the following intersections on the grounds of the State University of New York, College at Oneonta, City of Oneonta, Otsego County as stop, or yield, intersections as indicated below:

Intersection of	with stop sign on	entrance from
(i) Ravine Parkway	West Dormitory Road	Southeast
[(ii) Ravine Parkway	North spur of Bugbee Road	Southeast
(iii) Ravine Parkway	South spur of Bugbee Road	Northeast]
[(iv)] (ii) Bugbee Road	East Dormitory Road	South
[(v)] (iii) West Dormitory Road	Easterly intersection of South Dormitory Road	South
(iv) Ravine Parkway	Morris Drive	East
(v) West Dorm Drive	Morris Drive	West

Intersection of	with yield sign on	entrance from
(i) Bugbee Road	Blodgett Drive	North
(ii) Easterly spur of South Dormitory Road from West Dormitory Road	westerly spur of South Dormitory Road from West Dormitory Road	Northwest
(iii) Ravine Parkway	Driveway Health Center	Northwest
	Parking lot	

(6) Designates the following intersections on the grounds of the State University of New York, College at Oneonta, Town of Oneonta, Otsego County as stop, or yield, intersections as indicated below:

Intersection of	with stop sign on	entrance from
(i) West Street	Bugbee Road	East
[(ii) South spur of Bugbee Road	North spur of Bugbee Road from	Northwest
from Ravine Parkway	Ravine Parkway	
(iii) Bugbee Road	Blodgett Drive	North

(iv) Easterly spur of South Dormitory Road from West Dormitory Road	Westerly spur of South Dormitory Road from West Dormitory Road	Northwest
(v) Ravine Parkway	Driveway from Health Center Parking Lot]	Northwest
(ii) Ravine Parkway	North spur of Bugbee Road	Southeast
(iii) Ravine Parkway	South Spur of Bugbee Road	Northeast
(iv) West Street	Upper Sports Field Drive	East
Intersection of (i) South spur of Bugbee Road from Ravine Parkway	with yield sign on North spur of Bugbee from Ravine Parkway	entrance from Northwest

([4]7) The following roadways on the grounds of the State University of New York, College at Oneonta, City of Oneonta, Otsego County, are designated for one-way traffic:

(i) West Dormitory Road from Bugbee Road to its westerly intersection with South Dormitory Road, for traffic proceeding in a southerly, thence westerly direction only.

(ii) South Dormitory Road from its westerly intersection with West Dormitory Road to its easterly intersection with West Dormitory Road, for traffic proceeding in a northeasterly direction only.

(c) Traffic and parking regulations are in force at all times, 24 hours a day, seven days a week. All traffic signs must be observed. Parking is restricted to designated areas only.

(d) Parking areas available for students, faculty and staff will be indicated by signs.

(e) No parking shall be allowed in service drives, loading zones, reserved parking spaces on grass or lawns or within 10 feet of crosswalks or 20 feet of intersections.

(f) No person shall park a vehicle on the premises of the university in such manner as to interfere with the use of a fire hydrant, fire lane or other emergency zone, create any other hazard or unreasonably interfere with the free and proper use of a roadway or pedestrian way. Any vehicle parked so as to constitute a hazard or restrict the normal flow of traffic or interfere with campus operations may be towed and the owner shall be liable for towing charges.

(g) Abandoned vehicles will be removed from campus and disposed of as provided for in the Vehicle and Traffic Law. An abandoned vehicle is one for which the State registration has expired or a vehicle parked illegally for more than 96 hours. *A vehicle parked on campus with an unexpired/expired inspection certificate or unexpired/expired registration certificate will be in violation of campus parking rules and regulations.*

(h) Parking in any campus parking area while vehicle is undergoing major repairs is prohibited.

(i) No vehicle shall be left in any campus parking areas during Christmas and spring recesses without authorization from university police.

(j) Pedestrians have the right of way at all times.

(k) The position of any car when parked shall be such that the whole of the vehicle is located within the boundaries of the parking space. The fact that other vehicles are parked improperly shall not constitute an excuse for parking any part of the vehicle over any line.

(l) No official temporary barricades may be removed.

(m) The removal of parking and traffic signs is prohibited and violators shall be subject to payment of a fine and disciplinary action.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, State University of New York, System Administration, State University Plaza, S325, Albany, NY 12246, (518) 443-5400, email: Lisa.Campo@SUNY.edu

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: Education Law § 360(1) authorizes the State University Trustees to make rules and regulations relating to parking,

vehicular and pedestrian traffic and safety on the State-operated campuses of the State University of New York.

2. Legislative objectives: The present measure makes technical amendments to the parking and traffic regulations applicable to the State University of New York College at Oneonta.

3. Needs and benefits: Posted speed limits and placement of stop and yield signs at intersections have not been changed for a number of years. The revisions proposed will result in safer travel on campus. Additionally, it will allow the campus to deal with vehicles that are uninspected or have expired inspection certificates.

4. Costs: None.

5. Local government mandates: None.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: There are no viable alternatives.

9. Federal standards: There are no related Federal standards.

10. Compliance schedule: SUNY Oneonta will notify those affected as soon as the rule is effective. Compliance should be immediate.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Oneonta.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Oneonta.

Job Impact Statement

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Oneonta.

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-12-10-00008-E

Filing No. 215

Filing Date: 2010-03-08

Effective Date: 2010-03-08

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations to be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same

day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the Board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 business days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 business days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires June 5, 2010.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL

within 10 days of the examination. Guidance was provided in 2002 to some participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the

practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137(1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.