

# 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

---

---

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

#### Applicability of Requirements Relating to the Production, Processing and Manufacture of Milk and Milk Products

**I.D. No.** AAM-41-10-00001-P

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

**Proposed Action:** This is a consensus rule making to repeal section 2.1 and add new section 2.1 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18, 46, 46-a, 50-k, 71-a, 71-n and 214-b

**Subject:** Applicability of requirements relating to the production, processing and manufacture of milk and milk products.

**Purpose:** To require certain producers, processors and manufacturers of milk products to comply with the current PMO.

**Text of proposed rule:** Part 2 of 1 NYCRR is amended by repealing section 2.1 and adding a new section 2.1, to read as follows:

*§ 2.1. Applicability*

(a) *The provisions of this Part shall apply to dairy farms, dairy farmers and raw milk producers, and shall apply to milk plants and persons who operate milk plants, that do not have a sanitation compliance rating of ninety or better, as set forth in the latest Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers List. The provisions of this Part shall also apply to milk plants and persons who operate milk plants that manufacture frozen desserts and/or melloream.*

(b)(i) *The sanitation provisions of this Part shall not apply to dairy*

*farms or dairy farmers, or to milk plants and persons who operate milk plants, that have a sanitation compliance rating of ninety or better, as set forth in the latest Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers List (“IMS List”), except as set forth in paragraph (ii) herein. Dairy farms and dairy farmers, and milk plants and persons who operate milk plants, that have such a sanitation compliance rating shall comply with the sanitation requirements set forth in the Grade A Pasteurized Milk Ordinance, 2009 Revision, published by the United States Department of Health and Human Services, Washington, D.C. (“PMO”) except to the extent that any provision of the PMO is in conflict with a provision of state and/or federal law and except as provided in paragraph (ii) herein. A copy of the PMO is available for public inspection at the Division of Milk Control and Dairy Services, Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, and at the Department of State, 41 State Street, Albany, New York 11231.*

*(ii)(a) The provisions of sections 2.3; 2.4; 2.5(a); 2.6(b); 2.7(b), (d)(1), (d)(2) and (d)(3); 2.27(e); 2.34(i); 2.38(g); 2.48(a)(4); 2.64, and 2.65 of this Part shall apply to dairy farms and dairy farmers, and to milk plants and persons who operate milk plants, that have a sanitation compliance rating of ninety or better, as set forth in the latest IMS List, and such provisions shall supersede any requirements set forth in the PMO that are to the contrary or are not otherwise identical.*

*(c) Every term used in subdivision (b) of this section that is defined in the Grade A Pasteurized Milk Ordinance, 2009 edition, shall have the meaning ascribed to such term therein.*

*(d) The provisions of this Part shall preempt any local law, ordinance, rule or regulation enacted by any city, village, town, county, or by any department, agency, board, office or other division thereof, whether enacted prior to or after the effective date of this Part, to the extent that any such enactment is different from or inconsistent with the provisions of this Part.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Casey McCue, Division of Milk Control & Dairy Services, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-8870, email: Casey.McCue@agmkt.state.ny.us

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

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

#### Consensus Rule Making Determination

The proposed rule will amend 1 NYCRR Part 2 to incorporate by reference the 2009 edition of the Grade A Pasteurized Milk Ordinance (“the 2009 PMO”) and make the provisions thereof applicable to producers, processors and manufacturers of “Grade A” milk and milk products that have a sanitation compliance rating of ninety or better, as set forth in the latest Sanitation Compliance and Enforcement Ratings of the Interstate Milk Shippers Conference (“IMSC”), and who may, therefore, ship such foods in interstate commerce. The proposed rule will also require such producers, processors and manufacturers to continue to comply with a limited number or provisions presently in 1 NYCRR Part 2. Finally, the proposed rule provides that the provisions of the 2009 PMO will not apply to those producers, processors and manufacturers of milk and milk products who do not have such a rating and may not, with certain exceptions, ship such foods in interstate commerce. Instead, such businesses will be required to continue to comply with the provisions of 1 NYCRR Part 2, as presently set forth.

The proposed rule is non-controversial. The 2009 PMO is a publication of the Food and Drug Administration (“FDA”) of the United States Department of Health and Human Services and contains sanitation guidelines for the production of raw milk that will be pasteurized, the processing of such milk for drinking, and the manufacture of milk products such as cottage cheese and yogurt. Pursuant to an agreement between the states, each state causes inspections to be made of the premises of each producer, processor and manufacturer of “Grade A” milk and milk products, located within its borders, that wishes to ship such foods in in-

terstate commerce. After an inspection is conducted, the inspected business is given a "rating" that reflects its adherence to the sanitation guidelines set forth in the 2009 PMO. The states have agreed that no producer, processor or manufacturer of "Grade A" milk and milk products may ship such foods in interstate commerce unless and until it has received a sanitation compliance rating of ninety or better, indicating that it is in substantial compliance with such sanitation guidelines. As a result of this agreement between the states, every producer, processor and manufacturer of "Grade A" milk and milk products located in New York that ships such foods in interstate commerce must, and already does, have a sanitation compliance rating of ninety or better, indicating that it is in substantial compliance with the provisions of the 2009 PMO.

Based upon the preceding, the proposed rule will not have an adverse impact upon New York's producers, processors and manufacturers of "Grade A" milk and milk products because those businesses that ship such foods in interstate commerce are already required to be in substantial compliance with the 2009 PMO (as well as with the limited number of provisions of 1 NYCRR Part 2 that will continue to apply to them). Those producers, processors and manufacturers that either do not ship such foods in interstate commerce or ship non-Grade A milk and/or milk products in interstate commerce will not be required, pursuant to the terms of such proposed rule, to comply with the 2009 PMO, but, rather, will be required to continue to comply with the provisions of 1 NYCRR Part 2.

Not only will the proposed rule have no adverse impact upon New York's producers, processors and manufacturers of "Grade A" milk and milk products, but such businesses will favor adoption of such proposed rule because the FDA has indicated that New York's ability to give "ratings" to such businesses will be jeopardized unless it adopts the 2009 PMO, which could, in turn, cause such businesses to no longer be able to ship such foods in interstate commerce.

For the preceding reasons, the proposed rule is non-controversial and is a consensus rule, as defined in State Administrative Procedure Act section 102(11).

#### **Job Impact Statement**

The proposed rule will not have an adverse impact on jobs or on employment opportunities.

The proposed rule will amend 1 NYCRR Part 2 to incorporate by reference the 2009 edition of the Grade A Pasteurized Milk Ordinance ("the 2009 PMO") and make the provisions thereof applicable to producers, processors and manufacturers of "Grade A" milk and milk products, located in New York, that have a sanitation compliance rating of ninety or better, as set forth in the latest Sanitation and Compliance Enforcement Ratings of the Interstate Milk Shippers Conference ("IMSC"), and that may, therefore, ship such foods in interstate commerce. Such producers, processors and manufacturers will also be required to continue to comply with a limited number of provisions contained in 1 NYCRR Part 2, notwithstanding there being contrary or different requirements set forth in the PMO. Those producers, processors and manufacturers of milk and milk products that do not have such a sanitation compliance rating are not allowed, with certain exceptions, to ship such foods in interstate commerce; and such entities will not be required to comply with the provisions of the 2009 PMO but will, rather, have to continue to comply with the provisions of 1 NYCRR Part 2, as presently set forth.

Producers, processors and manufacturers of "Grade A" milk and milk products that have such a sanitation compliance rating are already required to comply with the provisions of 1 NYCRR Part 2, and requiring them to continue to adhere to certain provisions thereof places no additional requirements upon them. Furthermore, such producers, processors and manufacturers are also already required to comply with the provisions set forth in the 2009 PMO in order to ship such foods in interstate commerce because all fifty states have agreed, as parties to the IMSC, not to accept any "Grade A" milk or milk products, produced, processed or manufactured in another state that have not been produced, processed or manufactured in substantial compliance with the 2009 PMO. Here, too, the proposed rule places no additional requirements upon such producers, processors and manufacturers, and, as such, the proposed rule will have no adverse impact upon jobs or employment opportunities.

## Office of Children and Family Services

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

#### **Removal of the Requirement to Report an Alien Receiving Referral Services and Protective Services to US Homeland Security**

**I.D. No.** CFS-41-10-00023-P

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

**Proposed Action:** Amendment of section 403.7(b) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 427(1)

**Subject:** Removal of the requirement to report an alien receiving referral services and protective services to US Homeland Security.

**Purpose:** To remove the requirement to report an alien receiving referral services and protective services to US Homeland Security.

**Text of proposed rule:** Subdivision (b) of section 403.7 is amended to read as follows:

(b) An alien who is unlawfully residing in the United States or who fails to furnish evidence that he/she is lawfully residing in the United States, shall not be eligible for any social services except information and referral services and protective services for adults and children. [In the case of protective services, the social services district may provide such services considering the nature of the problem and the degree of its emergency and, at the same time, shall report the cases to the United States Immigration and Naturalization Service or nearest consulate of the country of the applicant or recipient for its appropriate action. The provision of protective services is limited until such time when an appropriate consulate or Immigration and Naturalization Services assumes its responsibilities for such cases.]

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

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

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL authorizes the commissioner of OCFS to establish regulations for the administration of public assistance and care within New York State, both by state and by local government units.

Section 427(1) of the SSL authorizes the commissioner of OCFS to adopt regulations necessary to implement Title 6 of Article 6 of the SSL relating to child protective services.

##### 2. Legislative objectives:

Sections 122(2) and 398-e of the SSL provide that an alien, including a non-qualified alien as defined by applicable federal statute, who sometimes is referred to as an undocumented alien, is eligible for protective services for adults or children to the extent that such person is otherwise eligible for such services pursuant to the SSL and OCFS regulations.

##### 3. Needs and benefits:

The proposed regulation clarifies that a person residing unlawfully in the United States or who can not produce evidence that he or she is lawfully residing in the United States is eligible for adult protective services and child protective services, and repeals the reporting requirement currently imposed on social services districts in cases involving such persons. Under the current regulatory language, when an individual involved in an adult or child protective case is determined to be an alien unlawfully residing in the United States or when such individual cannot produce evidence of lawful residence, the social services district is to report such person either to the United States Immigration and Naturalization Service (now the

United States Citizenship and Immigration Services of the Department of Homeland Security) or to the nearest consulate of the country of the applicant or recipient for appropriate action. The proposed regulation repeals this notice requirement. In addition, the proposed regulation repeals the current limitation on the provision of adult or child protective services to the person upon assumption of responsibility for the case by either the federal government or the consulate.

Neither federal nor state statute requires notification of the federal government in such cases. The proposed regulation does not preclude a social services district, in appropriate cases, from seeking assistance from a foreign consulate on behalf of its national.

The proposed regulation addresses safety concerns regarding children and family members involved in adult and child protective services cases. The concerns addressed by the proposed regulation include the ability of the social services district to focus on the safety of the person(s) involved in the case.

#### 4. Costs:

The proposed regulation does not impose any additional costs on local social services districts. Districts report that the current regulation is rarely used as there have been a very small number of cases where districts have been providing protective services to this population. Where they have been providing protective services to this population, when needed, neither federal authorities nor foreign consulates have been assuming responsibility in such cases. Therefore no additional services will be provided by local social services districts as a result of the proposed regulations. There is no adverse fiscal impact to OCFS or the State related to the regulatory amendment.

#### 5. Local government mandates:

The proposed regulation eliminates the mandate currently imposed on social services districts to report persons involved in adult protective services or child protective services cases who are unlawfully residing in the United States or who are not able to produce evidence of lawful residence to either the federal government or the nearest appropriate consulate.

#### 6. Paperwork:

No additional paperwork requirements are required by the proposed regulation.

#### 7. Duplication:

The proposed regulation does not duplicate other state or federal requirements.

#### 8. Alternatives:

A regulatory amendment is required to repeal the current regulatory standard. There are no other alternatives.

#### 9. Federal standards:

Federal statute requires that the State notify the United States Citizenship and Immigration Services of individuals who are not lawfully present in the United States when the State determines an individual's status as part of an eligibility determination in connection with an application for specified federal benefits. (See sections 404(b) and 408 of the Personal Responsibility and Work Opportunity Reconciliation Act [P.L. 104-193, as amended by P.L. 105-55].) The specified federal benefits to which the federal mandate applies do not include protective services for adults or children. (See Federal Interagency Notice, 65 Fed. Reg. 58302 [September 28, 2000.]) Therefore, there is no federal requirement that social services districts report persons who are not lawfully residing in the United States or who are not able to produce evidence of lawful residence in adult or child protective cases to either the federal government or a foreign consulate.

#### 10. Compliance schedule:

The proposed regulation will take effect upon adoption.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

The proposed regulation will have no effect on small businesses. Social services districts, which are a unit of local government, will be affected by the proposed regulation. The proposed regulation clarifies that a person residing unlawfully in the United States or who can not produce evidence that he or she is lawfully residing in the United States, is eligible for adult protective services and child protective services. The proposed regulation eliminates the current requirement that social services districts report such persons involved in adult protective services or child protective services cases to either the United States Citizenship and Immigration Services or the nearest appropriate consulate. In addition, the proposed regulation repeals the current limitation on the provision of adult or child protective services to such person upon assumption of responsibility for the case by either the federal government or the consulate.

#### 2. Compliance requirements:

The proposed regulation eliminates the mandate currently imposed on social services districts to report persons involved in adult protective or child protective services cases who are unlawfully residing in the United States or who are not able to produce evidence of lawful residence to either the federal government or the nearest appropriate consulate. Districts

advise OCFS that they have been providing protective service to this population and that neither federal authorities nor foreign consulates have been assuming responsibility in such cases and therefore no additional services will be required by social services districts as a result of the proposed regulation.

#### 3. Professional services:

No professional services are needed to comply with the proposed regulation.

#### 4. Compliance costs:

The proposed regulation does not impose any additional costs on local social services districts. Districts report that the current regulation is rarely used as there have been a very small number of cases where districts have been providing protective services to this population. Where they have been providing protective services to this population, when needed, neither federal authorities nor foreign consulates have been assuming responsibility in such cases. Therefore no additional services will be provided by local social services districts as a result of the proposed regulations. There is no adverse fiscal impact to OCFS or the State related to the regulatory amendment.

#### 5. Economic and technological feasibility:

The proposed regulation is economically and technically feasible. The proposed regulation eliminates the requirement that social services districts report persons involved in adult protective services or child protective services cases who are unlawfully residing in the United States or who are not able to produce evidence of lawful residence to either the federal government or the nearest appropriate consulate.

#### 6. Minimizing adverse impact:

The proposed regulation does not affect small businesses and has no adverse impact on social services districts. Therefore, this issue was not considered.

#### 7. Small business and local government participation:

OCFS solicited input from several social services districts (Erie, New York City, Suffolk, Oswego, Wayne and Clinton) regarding the proposed regulation. Responding social services districts indicated that there have been a very small number of cases where a district has been providing protective services to this population and that neither federal authorities nor foreign consulates have been assuming responsibility for such cases.

Nevertheless, those districts responding to OCFS supported the proposed regulation.

### **Rural Area Flexibility Analysis**

#### 1. Types and estimated numbers of rural areas:

The proposed regulation affects all social services districts statewide, including the 44 social services districts located in rural areas. The proposed regulation does not affect small businesses.

#### 2. Reporting, recordkeeping and other compliance requirements:

The proposed regulation clarifies that a person residing unlawfully in the United States or who can not produce evidence that he or she is lawfully residing in the United States, is eligible for adult protective services and child protective services. The proposed regulation eliminates the current requirement that social services districts report such persons involved in adult protective services or child protective services cases to either the United States Citizenship and Immigration Services or the nearest appropriate consulate. In addition, the proposed regulation repeals the current limitation on the provision of adult or child protective services to such person upon assumption of responsibility for the case by either the federal government or the consulate.

The proposed regulation imposes no new reporting or recordkeeping requirements.

#### 3. Costs:

The proposed regulation does not impose any additional costs on local social services districts. Districts report that the current regulation is rarely used as there have been a very small number of cases where districts have been providing protective services to this population. Where they have been providing protective services to this population, when needed, neither federal authorities nor foreign consulates have been assuming responsibility in such cases. Therefore no additional services will be provided by local social services districts as a result of the proposed regulations. There is no adverse fiscal impact to OCFS or the State related to the regulatory amendment.

#### 4. Minimizing adverse impact:

The proposed regulation does not affect small businesses and has no adverse impact on social services districts. Therefore, this issue was not considered.

#### 5. Rural area participation:

OCFS solicited input regarding the proposed regulation from several social services districts, including Oswego, Wayne and Clinton counties, which are rural. Responding social services districts indicated that there have been a very small number of cases where a district has been providing protective services to this population and that neither federal authorities nor foreign consulates have been assuming responsibility for such cases.

Nevertheless, those districts responding to OCFS supported the proposed regulation.

#### **Job Impact Statement**

A full job impact statement has not been prepared for the proposed regulation because it does not result in the loss of any jobs. The proposed regulation clarifies that a person residing unlawfully in the United States or who can not produce evidence that he or she is lawfully residing in the United States is eligible for adult protective services and child protective services, and repeals the reporting requirement currently imposed on social services districts in cases involving such persons.

## State Commission of Correction

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

#### **Prisoner Population Counts**

**I.D. No.** CMC-41-10-00004-P

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

**Proposed Action:** Amendment of sections 7003.5 and 7003.6 of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(6) and (15)

**Subject:** Prisoner population counts.

**Purpose:** To eliminate the requirement for overlapping officer shifts in conducting prisoner population counts.

#### **Text of proposed rule:**

Section 7003.5 of Title 9 is amended to read as follows:

§ 7003.5 Prisoner population counts

(a) Prisoner population counts shall:

(1) be conducted at the completion *and commencement* of each regularly scheduled shift;

(2) be conducted by the facility staff member completing such regularly scheduled shift; [in conjunction with the facility staff member beginning the next regularly scheduled shift; and]

(3) be conducted by the facility staff member beginning the next regularly scheduled shift; and

[(3)] (4) include an accounting of all prisoners housed in or otherwise assigned to the facility area in which such count is conducted.

(b) The results of each prisoner population count conducted pursuant to paragraphs (2) and (3) of subdivision (a) of this section shall be recorded in writing. Such written records shall include the:

(1) date and time of the count;

(2) facility area in which the count was conducted;

(3) number of prisoners accounted for; and

(4) name[s] of facility staff member[s] conducting the count.

(c) Subsequent to each prisoner population count conducted pursuant to paragraph (3) of subdivision (a) of this section, the written records of the results of each count compiled pursuant to subdivision (b) of this section shall be immediately forwarded to the chief administrative officer. Upon receipt of the results of all prisoner population counts, the chief administrative officer shall determine the total prisoner population count. Such total prisoner population count shall account for each prisoner committed to the facility.

(d) Total prisoner population counts shall be made in writing and shall include the:

(1) date and time of such count;

(2) the results of such count; and

(3) signature of the chief administrative officer.

(e) The chief administrative officer shall immediately initiate appropriate emergency procedures in response to any discrepancy in the prisoner population count.

Section 7003.6 of Title 9 is amended to read as follows:

§ 7003.6 Requirements of facility staff members prior to assuming responsibilities in an assigned facility area

(a) Each facility staff member shall, prior to assuming responsibilities in an assigned facility area, [perform the following:] *obtain all necessary keys for the assigned area in accordance with the provisions of section 7003.9 of this Part.*

[(a)] (b) Upon assuming responsibilities in an assigned facility area

*and following the completion of duties set forth in section 7003.5 of this Part, each facility staff member shall review the records maintained pursuant to section 7003.3(j) of this Part and, subsequent to such review, initial such written records.[:]*

[(b) obtain all necessary keys for the assigned area in accordance with the provisions of section 7003.9 of this Part;

(c) inspect all supplies, equipment, locks, gates, bars, screens, security windows and other securing devices; and

(d) perform any other necessary security functions as determined by the chief administrative officer.]

(c) *Where a facility staff member's assignment to a facility area is scheduled to exceed one (1) hour, such facility staff member shall, upon assuming responsibilities in the assigned facility area and following the completion of duties set forth in subdivision (b) of this section, inspect all supplies, equipment, locks, gates, bars, screens, security windows and other securing devices, and perform any other necessary security functions as determined by the chief administrative officer.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Associate Attorney, New York State Commission of Correction, 80 Wolf Road, 4th Floor, Albany, New York 12205, (518) 485-2346, email: Brian.Callahan@scoc.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:

Subdivision (6) of section 45 of the Correction Law authorizes the Commission of Correction to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities in New York State. Subdivision (15) of section 45 of the Correction Law allows the Commission to adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of its functions, powers and duties.

2. Legislative objectives:

By vesting the Commission with this rulemaking authority, the Legislature intended the Commission to set minimum standards regarding various aspects of security in local correctional facilities, including the performance of prisoner population counts.

3. Needs and benefits:

In response to Governor David A. Paterson's Executive Order No. 17, Commission of Correction Chairman Thomas A. Beilein convened a workgroup to undertake a regulatory review of the Commission's Rules, Regulations and Minimum Standards for the Management of County Jails and Penitentiaries. Participants included sheriffs, jail administrators, and representatives of the New York State Division of the Budget, New York State Sheriffs' Association and the New York State Association of Counties. Of the various issues discussed, a consensus did agree that the regulations controlling the performance of prisoner population counts could be safely relaxed.

Current Commission regulations require that prisoner population counts be performed at the completion of each regularly scheduled shift by the oncoming officer in conjunction with the off-going officer. Such counts are generally conducted while inmates are confined to their individual cell or group housing unit, thereby minimizing facility movement and instability. To achieve and ensure this required overlap of officer shifts, several county correctional facilities have incurred significant overtime expenditures and other expenses. By amending the regulation to require separate counts by the oncoming and off-going officers, the results of which must be immediately forwarded to and reconciled by the facility's chief administrative officer, the Commission is convinced that such unnecessary county expenditures can be eliminated without sacrificing facility security and public safety.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. The regulation eliminates a currently required overlap of correction officer shifts, thus potentially reducing costs associated therewith. The amendment will generate savings for some counties immediately, such as Westchester, who indicated in the workgroup that it would save in excess of \$300,000.00 annually. Thereafter, the change provides an opportunity for counties to implement cost saving measures, depending on the vehicle they have in place to meet the requirements of the current regulation. If, for example, the shift overlap has been made part of a collective bargaining agreement, they will have the opportunity to negotiate it out, an opportunity which the workgroup requested. Otherwise, if it is merely a work rule issue, a county could see savings sooner rather than later in the form of reduced overtime expenditures.

b. Costs to the agency, the state and local governments for the imple-

mentation and continuation of the rule: None. The regulation does not apply to state agencies or governmental bodies. As set forth above in subdivision (a), there will be no additional costs to local governments.

c. This statement detailing the projected costs of the rule is based upon the Commission's oversight and experience relative to the operation and function of a county correctional facility.

5. Local government mandates:

None.

6. Paperwork:

This rule does not require any additional paperwork on regulated parties.

7. Duplication:

This rule does not duplicate any existing State or Federal requirement.

8. Alternatives:

The alternative, maintaining the current regulations relative to prisoner population counts, was explored by the Commission. This alternative was rejected upon the Commission's finding, as set forth above, that unnecessary county expenditures, relative to correction officer shift overlaps for the purpose of prisoner population counts, can be eliminated without sacrificing facility security and public safety.

9. Federal standards:

There are no applicable minimum standards of the federal government.

10. Compliance schedule:

Each county correctional facility is expected to be able to achieve compliance with the proposed rule immediately.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to eliminate the current requirement that correction officer shifts overlap for the purpose of conducting prisoner population counts. Accordingly, it will not have an adverse impact on small businesses or local governments, nor impose any additional reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

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

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to eliminate the current requirement that correction officer shifts overlap for the purpose of conducting prisoner population counts. Accordingly, it will not impose an adverse economic impact on rural areas, nor impose any additional recordkeeping, reporting, or other compliance requirements on private or public entities in rural areas.

#### **Job Impact Statement**

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to eliminate the current requirement that correction officer shifts overlap for the purpose of conducting prisoner population counts. As such, there will be no impact on jobs and employment opportunities.

---



---

## Division of Criminal Justice Services

---



---

### NOTICE OF ADOPTION

#### **Partial Match Policy for the DNA Databank**

**I.D. No.** CJS-29-10-00013-A

**Filing No.** 1004

**Filing Date:** 2010-09-22

**Effective Date:** 2010-10-13

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

**Action taken:** Amendment of Part 6192 of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 837(13), 995-b(9) and (12)

**Subject:** Partial match policy for the DNA Databank.

**Purpose:** To provide guidance in the event of an inadvertent match between a casework evidence DNA profile and an offender DNA profile.

**Text or summary was published** in the July 21, 2010 issue of the Register, I.D. No. CJS-29-10-00013-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Natasha M. Harvin, Division of Criminal Justice Services, Four Tower Place, Albany, New York 12203, (518) 457-8413, email: natasha.harvin@dcjs.state.ny.us

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

The Commission on Forensic Science (Commission) was established pursuant to chapter 737 of the Laws of 1994 (see, Executive Law Article 49-B). Although, technically, it is an independent entity, the Commission has no staff, administrative support or budget, and relies on the Division of Criminal Justice Services' (Division) Office of Forensic Services for the resources necessary to carry out its powers and duties. Pursuant to Executive Law § 995-b(9), the Commission was charged with promulgating a policy for the establishment and operation of a DNA identification index. The New York State DNA Databank became operational in 1996 and, since its inception, the policy for the establishment and operation of a DNA identification index has been promulgated by the Division in Part 6192 of Title 9 of the NYCRR.

Currently, when a crime scene DNA sample is submitted to a New York State forensic laboratory, laboratory officials only report if the sample exactly matches a particular individual in the State's DNA Databank. Under existing regulations, laboratory officials are not permitted to inform the police of inadvertent "near matches" that may indicate that the perpetrator is a close blood relative of the individual whose DNA is on file and could greatly limit the pool of potential suspects. Because they have no specific authority to share information, discovered inadvertently, that may be vital evidence in a criminal investigation and may be the key to stopping a serial rapist or murderer or to exonerating an innocent individual, they have declined to do so and expressed concerns regarding the same.

To address these concerns, a rule was proposed to amend Part 6192 to codify a partial match policy which provides guidance to forensic laboratories in the event of an inadvertent match between a casework evidence DNA profile and an offender DNA profile. The DNA Subcommittee of the Commission on Forensic Science reviewed the partial match policy and made a recommendation to adopt the policy to the Commission pursuant to Executive Law § 995-b(13) on November 13, 2009. The Commission formally voted to adopt the policy on December 11, 2009. Of note, in response to the same aforementioned concerns, the Combined DNA Identification System (CODIS) Unit within the FBI Laboratory instituted an Interim Plan (CODIS Bulletin #: BTU072006, dated July 20, 2006), which allows for the release of an offender's identifying information in certain circumstances. Although the Commission approved the policy, in accordance with Executive Law § 995-b(12, 13[b]), approval of the binding recommendation is required. Subsequently, the NYS DNA Subcommittee issued a binding recommendation dated March 5, 2010, as approved at the November 13, 2009 DNA Subcommittee meeting, concerning the release of information on a partial DNA match; the binding recommendation was adopted at the June 29, 2010 Commission meeting.

After receiving the necessary approval from the Governor's Office of Regulatory Reform (GORR), the Division formally proposed an amendment to 9 NYCRR Part 6192 which was published in the July 21, 2010 State Register under I.D. No. CJS-29-10-00013-P. This publication initiated a 45-day public comment period which technically ended on Saturday, September 4, 2010, but the Division received written public comments through Tuesday, September 7, 2010, the next succeeding workday (see, General Construction Law § 20).

The Division received written comments from one organization – the New York Civil Liberties Union (NYCLU) – on September 7, 2010. The comments focused on issues which had been raised on numerous occasions at a number of public meetings, considerably debated, and considered and addressed by the Commission. Thereafter, the Commission voted 8 to 3, to adopt this policy.

NYCLU's comments and the Division's responses are grouped as follows:

#### Statutory Authority

##### Comment:

NYCLU contends that the Division and the Commission lack the statutory authority to promulgate the proposed partial match policy regarding the use of forensic DNA. Citing *Weiss v. City of New York* (731 N.E.2d 594, 596 [2000]) and *Gallo v. Pataki* (831 N.Y.S.2d 896, 898 [Sup. Ct., 2007]), it further noted that "[r]egulatory enactments must be in harmony with the statute; rules and regulations may be promulgated only to the extent they are consistent with the will of the legislature."

##### Response:

As provided in the State Register, the statutory authority for the Com-

mission and the Division to promulgate regulations to codify a partial match policy to provide guidance in the event of an inadvertent match between a casework evidence DNA profile and an offender DNA profile is found in Executive Law §§ 837(13), 995-b(9) and (12).

Pursuant to Executive Law § 837(13), the Division has the authority to “[a]dopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of the functions, powers and duties of the division.” Executive Law § 995-b(9) provides that “[a]fter reviewing recommendations from the division of criminal justice services, the commission, in consultation with the DNA subcommittee, shall promulgate a policy for the establishment and operation of a DNA identification index consistent with the operational requirements and capabilities of the division of criminal justice services.” Pursuant to Executive Law § 995-b(12), the Commission has the power to “[p]romulgate standards for a determination of a match between the DNA records contained in the state DNA identification index and a DNA record of a person submitted for comparison therewith.”

In addition to the foregoing statutes, pursuant to Executive Law § 995-b(1), the Commission has the authority to “develop minimum standards and a program of accreditation for all forensic laboratories in New York State...and approval of forensic laboratories for the performance of specific forensic methodologies...” In accordance with Executive Law § 995-b(2), the above-mentioned standards and program shall be designed to achieve, among other things, the following objectives:

- Accurate, effective, efficient and reliable forensic laboratories, including forensic DNA laboratories;
- Forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable;
- Cooperation and coordination among forensic laboratories and other criminal justice agencies;
- Compatibility with other state and federal forensic laboratories in order to share and exchange information, data and results of forensic analyses and tests, to the extent consistent with the provisions of Article 49-B and any other applicable areas of law.

Additional duties of the Commission include the authority to: (1) “upon the recommendation of the DNA Subcommittee, designate one or more approved methodologies for the performance of forensic DNA testing;” and (2) receive “binding recommendations for adoption” from the DNA Subcommittee “addressing minimum scientific standards to be utilized in conducting forensic DNA analysis including, but not limited to, examination of specimens...and methods employed to determine probabilities and interpret test results” (see, Executive Law § 995-b[11], [13][b]).

The State DNA Databank, which contains, inter alia, DNA profiles of convicted offenders, was created so that law enforcement officials can identify the perpetrators of crimes when DNA evidence is found at a crime scene (see, Executive Law § 995-c(6)(a) [“DNA records contained in the state DNA identification index shall be released...to a federal law enforcement agency, or to a state or local law enforcement agency or district attorney’s office for law enforcement identification purposes upon submission of a DNA record in connection with the investigation of the commission of one or more crimes...”]). Utilization of the proposed partial match policy will afford law enforcement officials more opportunity to solve crimes, prevent additional ones from occurring, and prevent innocent people from being wrongfully accused.

Based upon the broad jurisdiction of the Commission and the legality of the DNA Databank, the proposal of the partial match policy is warranted.

#### Privacy Concerns

##### Comment:

NYCLU contends that the proposed partial match policy poses serious risks to the privacy rights of individuals whose DNA profile is held in the State’s Databank, and to the privacy rights of those individuals’ family members.

##### Response:

The proposed rule is designed to ensure that the partial match policy is applied fairly and in accordance with constitutional safeguards and accepted scientific procedures.

Throughout its commentary, the NYCLU referred to the partial match policy as “familial searching.” While the NYCLU uses partial match reporting and familial searching interchangeably, the two practices are viewed by the Division and the Commission, as well as by virtually all others, as distinguishable.

The partial match policy will not authorize “familial searching” – which is intentionally singling out particular individuals and actively searching their DNA profiles – as is currently allowed in a small number of states, such as California and Colorado. The proposed policy applies

only to the sharing of information discovered inadvertently, or unintentionally, during a routine search of the DNA Databank.

Additionally, the policy describes the events that need to transpire for the release of an offender’s name. There are two distinct parts: (1) the process of releasing the offender’s name in the event of a partial match with the national DNA database (known as CODIS); and (2) the process of a partial match obtained from a New York State CODIS search.

A forensic laboratory that has a partial match must complete an application, to the Division, requesting the name of the offender. Also, as part of the application, the submitting laboratory must confirm the following: (1) a local DNA index system search has been performed using the profile in the Forensic Index; (2) the forensic DNA profile derives from a single source and contains at least ten of the CODIS core loci; (3) the submitting agency and the appropriate prosecutor have committed to pursue further investigation of the case if the name is released and agree to provide follow-up information to the Division regarding the outcome of the case; (4) and the release of the name will be followed by a report to the investigating agency.

Furthermore, the policy is based on recommendations made by, among others, the Scientific Working Group on DNA Analysis Methods (SWG-DAM) Ad Hoc Committee on Partial Matches. The Commission also engaged in considerable debate and discussion as to whether it should authorize the release of information from the DNA Databank in response to a partial match. The Commission took action only after the matter was thoroughly debated by its members and researched by a working group of the DNA Subcommittee, which elicited technical information from top scientists, including: Dr. George Carmody, who chaired the FBI’s Scientific Working Group on DNA Analysis Methods; human geneticist Dr. Ranajit Chakraborty, a renowned human geneticist; Dr. Mecki Prinz, Director of the New York City Office of the Chief Medical Examiner Lab; and Dr. Barry Duceman, Director of Biological Science at the New York State Police. It was also discussed extensively by the DNA Subcommittee itself.

The legal and policy implications associated with a partial match policy were discussed by the Commission at several meetings, after an opinion on the legality was obtained from the Division. A few members of the Commission expressed the opinion that such a policy should not be implemented. They opined that the privacy concerns were not outweighed by the benefits of this proposal and that action should be legislative. Ultimately, however, a majority of the Commission members voted in favor (8-3) of implementing the partial match policy and the concomitant regulatory changes due to the untenable ethical bind that lab personnel were placed in by not releasing this information -- which was inadvertently obtained and which simply provides an investigative lead. The regulatory amendments will help ensure that laboratory officials provide relevant information to law enforcement while protecting the confidentiality of information in the DNA Databank.

#### Racial Disparities

##### Comment:

NYCLU noted that the use of DNA partial matching techniques will be used primarily to pursue criminal investigations of Blacks and Latinos.

##### Response:

As previously mentioned, the partial match policy will not permit familial searches, which are intentional. Instead, the new policy will authorize the sharing of information discovered inadvertently. Also, a routine search of the DNA Databank resulting in an inadvertent near hit is rare. Therefore, particular families or ethnic groups will not be targeted or singled out.

Accordingly, based upon the assessment of all of the foregoing comments, the Division does not withdraw or revise the proposed regulation.

## Education Department

### EMERGENCY RULE MAKING

#### Annual Professional Performance Reviews for Teachers in the Classroom Teaching Service

**I.D. No.** EDU-18-10-00015-E

**Filing No.** 1002

**Filing Date:** 2010-09-23

**Effective Date:** 2010-09-26

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

**Action taken:** Amendment of section 100.2(o) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided) and 305(4)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment relates to annual professional performance reviews of teachers in the classroom teaching service.

As part of the current Annual Professional Performance Review ("APPR") set forth in section 100.2 of the Commissioner's regulations, school districts and BOCES are required to perform annual evaluations of their teachers and the evaluation must be based on at least eight evaluation criteria prescribed in regulation. As part of its reform agenda for strengthening teaching, the Board of Regents have made a policy determination to make four major changes to the current requirements for the annual professional performance reviews of teachers.

First, the proposed amendment requires school districts and BOCES to include student growth as a mandatory criteria to be used in the evaluation of teachers. The proposed amendment defines student growth as a positive change in student achievement between at least two points in time as determined by the school district or BOCES, taking into consideration the unique abilities or disabilities of each student, including English language learners.

Secondly, the proposed amendment requires school districts and BOCES to implement the following uniform qualitative rating categories/criteria in the evaluation of its teachers: Highly Effective, Effective, Developing and Ineffective. The proposed amendment also defines each of these quality rating categories/criteria.

The proposed amendment also requires that school districts and BOCES to provide timely and constructive feedback to the teacher. The proposed amendment requires school districts and BOCES to include in their professional performance review plan a description of how it will provide timely and constructive feedback to its teachers on all criteria evaluated, including data on student growth for each of their students, the class and the school as a whole and feedback and training on how the teacher can use such data to improve instruction as part of the teacher's APPR.

Lastly, the proposed amendment eliminates the reporting requirements which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated as unsatisfactory.

Following the Board of Regents adoption of the proposed amendment by emergency action at its April 2010 meeting, the Legislature and the Governor enacted Chapter 103 of the Laws of 2010. This new law establishes a new comprehensive annual evaluation system for teachers and principals based on multiple measures of effectiveness, including student achievement measures, which will result in a single composite effectiveness score for every teacher and principal. It also provides for the establishment of an advisory committee comprised of representatives of teachers, principals and other stakeholders that will make recommendations to the Commissioner and Regents prior to the adoption of implementing regulations and the use of a value-added growth model in evaluations. Department staff are conducting a review of the provisions of the statute and evaluating its impact on the existing APPR regulation. When the Department's review and the work of the advisory committee is complete, we anticipate making further revisions to the proposed amendment. Pursuant to section 202 of the State Administrative Procedure Act, these revisions may not be adopted until publication of a Notice of Revised Rule Making in the State Register and expiration of a 30-day public comment period. However, the emergency rule adopted at the July 2010 Regents meeting will expire on September 26, 2010. A lapse in the emergency rule

will cause disruptions in the administration of annual professional performance reviews of teachers.

Emergency action is necessary at the September 2010 Board of Regents meeting in order to ensure that the rule remains continuously in effect until such time as it can be revised to conform to Chapter 103 of the Laws of 2010 and adopted as a permanent rule, after expiration of the 30-day public comment period for revised rule makings prescribed in the State Administrative Procedure Act, and thereby avoid disruption in the annual professional performance reviews of teachers.

**Subject:** Annual professional performance reviews for teachers in the classroom teaching service.

**Purpose:** To require school districts and BOCES to provide timely and constructive feedback to teachers as part of their annual evaluation.

**Substance of emergency rule:** The Commissioner of Education proposes to amend section 100.2(o) of the Commissioner's regulations, relating to the Annual Professional Performance Review (APPR) for teachers in New York State. The following is a summary of the substance of the proposed amendment.

Annual Professional Performance Review for Teachers

Section 100.2(o) will be repealed effective May 1, 2010.

A new subdivision 100.2(o) will be added, effective May 1, 2010.

A new paragraph (1) of subdivision (o) of section 100.2 shall be added and shall apply for school years commencing on or after July 1, 2000 and ending prior to June 30, 2001. This paragraph shall contain the same provisions as the prior version of 100.2(o) that expires on May 1, 2010, except the requirement that school districts and BOCES report on an annual basis information related to the school district's efforts to address the performance of teachers whose performance is unsatisfactory has been eliminated.

A new paragraph (2) of subdivision (o) shall be added for school years commencing on or after July 1, 2011. The requirements for the annual professional performance reviews of teachers shall be the same as in paragraph (1) of this subdivision, except for the following changes:

Section 100.2(o)(2)(b) will add a new definition of "teacher providing instructional services" to be a teacher in the classroom teaching service as defined in section 80-1.1 of the Commissioner's regulations.

Section 100.2(o)(2)(iii) creates four quality rating categories/criteria to be used in the annual professional performance review of teachers (Highly Effective, Effective, Developing and Ineffective) and defines each of these categories.

Section 100.2(o)(2)(iii)(a) defines a teacher rated as Highly Effective being a teacher who is performing at a higher level than is typically expected based on the evaluation criteria listed in the subdivision, including acceptable rates of student growth.

Section 100.2(o)(2)(iii)(b) defines a teacher rated as Effective being a teacher who is performing at a level that is typically expected of a teacher based on the evaluation criteria listed in the subdivision, including acceptable rates of student growth.

Section 100.2(o)(2)(iii)(c) defines a teacher rated as Developing as one who is not performing at a level that is typically expected of a teacher based on the evaluation criteria listed in the subdivision, including less than acceptable rates of student growth.

Section 100.2(o)(2)(iii)(d) defines a teacher rated as Ineffective as one whose performance is unacceptable based on the evaluation criteria listed in the subdivision, including unacceptable or minimal rates of student growth.

Professional Performance Review Plan

Section 100.2(o)(2)(iv)(a)(1) requires the governing body of each school and BOCES to adopt a professional performance review plan of its teachers by September 1, 2011.

Content of the Plan

Section 100.2(o)(2)(iv)(b)(1)(vii) adds student growth as a new evaluation criteria. This item defines student growth as follows: the teacher shall demonstrate a positive change in student achievement for his or her students between at least two points in time as determined by the school district or BOCES, taking into consideration the unique abilities and/or disabilities of each student, including English language learners. Student achievement is defined as a student's scores on State assessments for tested grades and subjects and other measures of student learning, including student scores on pre-tests and end-of-course tests, student performance on English language proficiency assessments and other measures of student achievement determined by the school district or BOCES to be rigorous and comparable across classrooms.

Section 100.2(o)(2)(iv)(b)(4) requires the APPR plan to describe how the new rating categories (Highly Effective, Effective, Developing and Ineffective) are used to differentiate professional development, compensation, and promotion for teachers providing instructional services. The procedures for implementation of the rating categories shall be consistent with the requirements of article 14 of the Civil Service Law.

Section 100.2(o)(2)(iv)(b)(5) requires the plan to describe how the school district or BOCES will provide timely and constructive feedback to teachers on all criteria evaluated as part of their annual evaluation, including providing teachers with data on student growth for each of their students, the class and the school as a whole. The plan must also describe how the school or BOCES will provide feedback and training on how the teacher can use such data to improve instruction.

Section 100.2(o)(2)(iv)(b)(6) requires the plan to describe how the school district or BOCES addresses the performance of teachers whose performance is evaluated as ineffective, and shall require a teacher improvement plan for teachers so evaluated or documentation of a prior teacher improvement plan, which shall be developed by the district or BOCES in consultation with such teacher.

#### Variance

Section 100.2(o)(2)(vii)(a) grants a variance from the requirements of this paragraph, upon a finding by the commissioner that a school district or BOCES has executed prior to May 1, 2010 an agreement negotiated pursuant to article 14 of Civil Service Law whose terms continue to effect and are inconsistent with such requirement.

**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. EDU-18-10-00015-P, Issue of May 5, 2010. The emergency rule will expire November 21, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148 EB, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statute by requiring school districts and BOCES to provide timely and constructive feedback to teachers as part of their annual evaluations; implementing uniform designated rating categories for the evaluation of teachers, and requiring that school districts and BOCES include a ninth evaluation criteria, i.e., student growth, in the evaluation of their teachers.

##### 3. NEEDS AND BENEFITS:

As part of the current Annual Professional Performance Review ("APPR") set forth in section 100.2 of the Commissioner's regulations, school districts and BOCES are required to perform annual evaluations of their teachers and the evaluation must be based on at least eight evaluation criteria prescribed in regulation. As part of its reform agenda for strengthening teaching, the Board of Regents have made a policy determination to make four major changes to the current requirements for the annual professional performance reviews of teachers.

First, the proposed amendment requires school districts and BOCES to include student growth as a mandatory criteria to be used in the evaluation of teachers. The proposed amendment defines student growth as a positive change in student achievement between at least two points in time as determined by the school district or BOCES, taking into consideration the unique abilities or disabilities of each student, including English language learners.

Secondly, the proposed amendment requires school districts and BOCES to implement the following uniform qualitative rating categories/criteria in the evaluation of its teachers: Highly Effective, Effective, Developing and Ineffective. The proposed amendment also defines each of these quality rating categories/criteria.

The proposed amendment also requires that school districts and BOCES to provide timely and constructive feedback to the teacher. The proposed amendment requires school districts and BOCES to include in their professional performance review plan a description of how it will provide timely and constructive feedback to its teachers on all criteria evaluated, including data on student growth for each of their students, the class and the school as a whole and feedback and training on how the teacher can use such data to improve instruction as part of the teacher's APPR.

Where the Commissioner finds that a collective bargaining agreement was executed by a school district or BOCES pursuant to Article 14 of the Civil Service Law prior to the effective date of this regulation and whose terms are inconsistent with the new provisions of this regulation the Commissioner will grant a variance from that portion of the regulation for the duration of the existing collective bargaining agreement.

Lastly, the proposed amendment eliminates the reporting requirements which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated as unsatisfactory.

#### 4. COSTS:

(a) Costs to State government: The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local governments: The proposed amendment will not impose any additional costs on local governments, including school districts and BOCES.

(c) Costs to private regulated parties: In general, the proposed amendment does not impose any additional compliance costs on school districts and BOCES. The Annual Performance Review already requires teachers to measure student's progress in learning based on the analysis of available student performance data. Secondly, the proposed amendment requires districts and BOCES to utilize four designated quality rating categories/criteria. The addition of such rating categories should not impose any additional costs.

Finally, the proposed amendment requires the district/BOCES to provide timely and constructive feedback to teachers as part of their annual evaluation. This feedback should already be provided to teachers to guide their analysis of student progress. If teacher training is necessary, all districts are already required to provide professional development to improve the quality of teaching within the district. Therefore, providing training to teachers to interpret and use student growth data to improve instruction should be incorporated into their current professional development plan, thus avoiding any additional training costs.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the amendment will not impose any additional costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to both school districts and boards of cooperative educational services. Therefore, the mandates in Section 3 apply to school districts and BOCES. The State Education Department has determined that uniform requirements are necessary to ensure the quality of the State's teaching workforce and consistency in the evaluations of teachers in the classroom teaching service across the State.

#### 6. PAPERWORK:

The proposed amendment requires school districts and BOCES to include in their professional performance plan a description of how it will provide timely and constructive feedback to its teachers, including data on student growth for each of their students, the class and the school as a whole and feedback and training on how the teacher can use such data to improve instruction as part of the teacher's APPR.

#### 7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements.

#### 8. ALTERNATIVES:

The proposed amendment establishes the evaluation criteria for teachers employed in the classroom teaching service in school districts and BOCES. Because these requirements apply to teachers, school districts and BOCES located in all areas of the State, no viable alternatives were considered.

#### 9. FEDERAL STANDARDS:

There are no Federal standards that establish procedures for the evaluation of teachers.

#### 10. COMPLIANCE SCHEDULE:

School districts and BOCES will be required to comply with the proposed amendments by the 2011-2012 school year.

#### Regulatory Flexibility Analysis

##### (a) Small businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and relates to the annual professional performance reviews for teachers in the classroom teaching service. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### (b) Local governments:

The proposed amendment relates to the criteria for the evaluation of teachers in the classroom teaching service in school districts and BOCES across New York State.

##### 1. EFFECT OF RULE:

The proposed amendment applies to school districts and BOCES located in New York State and relates to the evaluation of teachers in the classroom teaching service.

##### 2. COMPLIANCE REQUIREMENTS:

As part of the current Annual Professional Performance Review ("APPR") set forth in section 100.2 of the Commissioner's regulations, school districts and BOCES are required to perform annual evaluations of their teachers and the evaluation must be based on at least eight evaluation

criteria prescribed in regulation. As part of its reform agenda for strengthening teaching, the Board of Regents have made a policy determination to make four major changes to the current requirements for the annual professional performance reviews of teachers.

First, the proposed amendment requires school districts and BOCES to include student growth as a mandatory criteria to be used in the evaluation of teachers. The proposed amendment defines student growth as a positive change in student achievement between at least two points in time as determined by the school district or BOCES, taking into consideration the unique abilities or disabilities of each student, including English language learners.

Secondly, the proposed amendment requires school districts and BOCES to implement the following uniform qualitative rating categories/criteria in the evaluation of its teachers: Highly Effective, Effective, Developing and Ineffective. The proposed amendment also defines each of these quality rating categories/criteria.

The proposed amendment also requires that school districts and BOCES to provide timely and constructive feedback to the teacher. The proposed amendment requires school districts and BOCES to include in their professional performance review plan a description of how it will provide timely and constructive feedback to its teachers on all criteria evaluated, including data on student growth for each of their students, the class and the school as a whole and feedback and training on how the teacher can use such data to improve instruction as part of the teacher's APPR.

Where the Commissioner finds that a collective bargaining agreement was executed by a school district or BOCES pursuant to Article 14 of the Civil Service Law prior to the effective date of this regulation and whose terms are inconsistent with the new provisions of this regulation the Commissioner will grant a variance from that portion of the regulation for the duration of the existing collective bargaining agreement. Lastly, the proposed amendment eliminates the reporting requirements which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated as unsatisfactory.

### 3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

### 4. COMPLIANCE COSTS:

In general, the proposed amendment does not impose any additional compliance costs on school districts and BOCES. The Annual Performance Review already requires teachers to measure student's progress in learning based on the analysis of available student performance data.

Secondly, the proposed amendment requires districts and BOCES to utilize four designated quality rating categories/criteria. The addition of such rating categories should not impose any additional costs.

Finally, the proposed amendment requires the district/BOCES to provide timely and constructive feedback to teachers as part of their annual evaluation. This feedback should already be provided to teachers to guide their analysis of student progress. If teacher training is necessary, all districts are already required to provide professional development to improve the quality of teaching within the district. Therefore, providing training to teachers to interpret and use student growth data to improve instruction should be incorporated into their current professional development plan, thus avoiding any additional training costs.

### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to school districts and BOCES and relates to the criteria for the evaluation of teachers in the classroom teaching service. The State Education Department has determined that uniform annual professional performance review standards are necessary to ensure the quality of the State's teaching workforce across the State for teachers in the classroom teaching service. Therefore, no exemption from these requirements has been provided for local governments. However, the Department has eliminated the current reporting requirement which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated unsatisfactory.

### 7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES across the State. Comments on the proposed rule were also solicited from the BOCES District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators.

### *Rural Area Flexibility Analysis*

1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS: The proposed amendment will affect teachers in school districts and boards of cooperative services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

### 2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

As part of the current Annual Professional Performance Review ("APPR") set forth in section 100.2 of the Commissioner's regulations, school districts and BOCES are required to perform annual evaluations of their teachers and the evaluation must be based on at least eight evaluation criteria prescribed in regulation. As part of its reform agenda for strengthening teaching, the Board of Regents have made a policy determination to make four major changes to the current requirements for the annual professional performance reviews of teachers.

First, the proposed amendment requires school districts and BOCES to include student growth as a mandatory criteria to be used in the evaluation of teachers. The proposed amendment defines student growth as a positive change in student achievement between at least two points in time as determined by the school district or BOCES, taking into consideration the unique abilities or disabilities of each student, including English language learners.

Secondly, the proposed amendment requires school districts and BOCES to implement the following uniform qualitative rating categories/criteria in the evaluation of its teachers: Highly Effective, Effective, Developing and Ineffective. The proposed amendment also defines each of these quality rating categories/criteria.

The proposed amendment also requires that school districts and BOCES to provide timely and constructive feedback to the teacher. The proposed amendment requires school districts and BOCES to include in their professional performance review plan a description of how it will provide timely and constructive feedback to its teachers on all criteria evaluated, including data on student growth for each of their students, the class and the school as a whole and feedback and training on how the teacher can use such data to improve instruction as part of the teacher's APPR.

Where the Commissioner finds that a collective bargaining agreement was executed by a school district or BOCES pursuant to Article 14 of the Civil Service Law prior to the effective date of this regulation and whose terms are inconsistent with the new provisions of this regulation the Commissioner will grant a variance from that portion of the regulation for the duration of the existing collective bargaining agreement. Lastly, the proposed amendment eliminates the reporting requirements which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated as unsatisfactory.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes uniform evaluation standards for teachers employed in the classroom teaching service in school districts and BOCES across the State. The State Education Department has determined that uniform standards for the evaluation of teachers should be applied across the State. Therefore, no exemption has been provided from these requirements for school districts and BOCES located in rural areas of the State. However, the Department has eliminated the current reporting requirement which previously required school districts and BOCES to annually report information related to the school district's efforts to address the performance of teachers whose performance is rated unsatisfactory.

### 5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State. Comments on the proposed rule were also solicited from the District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators, the constituencies of which include those from rural areas.

### *Job Impact Statement*

The purpose of the proposed amendment is to require school districts and BOCES to provide timely and constructive feedback to teachers as part of their annual evaluations; designate uniform quality rating categories/criteria for the evaluation of teachers; and mandate that a ninth evaluation criteria, i.e., student growth be utilized in the evaluation of teachers. Because it is evident from the nature of this regulation that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were

taken. Accordingly, a job impact statement is not required and one has not been prepared.

## EMERGENCY RULE MAKING

### Limited Permits and Experience, Supervision, and Endorsement Requirements for Licensure as a LCSW in New York

**I.D. No.** EDU-26-10-00007-E

**Filing No.** 1003

**Filing Date:** 2010-09-23

**Effective Date:** 2010-09-24

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

**Action taken:** Amendment of sections 74.3, 74.4, 74.5, 74.6 and 74.7; and addition of section 74.9 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 212(3), 6501(not subdivided), 6504(not subdivided), 6506(6), 6507(2)(a), 6508(1), 7704(2)(c), 7705(1), and 7706(1) through (5)

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

**Specific reasons underlying the finding of necessity:** The proposed amendments clarify the requirements for licensure as a licensed clinical social worker (LCSW), for the practice of clinical social work by a licensed master social worker (LMSW), and for the insurance privilege available to certain LCSWs. Legislation enacted in 2002 defined the scopes of practice for LMSWs and LCSWs and the requirements for licensure. The legislation also restricted the practice of these professions to those licensed or otherwise authorized to practice. The implementation of the law has been challenging, due to exemptions in law and the unique situation of licensure in one profession (LMSW) leading to licensure in another profession (LCSW) when additional requirements are satisfied.

When this law was enacted, it provided an exemption from licensure for individuals in certain programs until January 1, 2010. This date was subsequently changed to June 1, 2010 and then to July 1, 2013 and will require public and private agencies, including state government, to ensure an adequate supply of qualified, licensed professionals. However, the stringent standards of New York's licensing requirements have limited the ability of agencies to provide acceptable supervised experience for those seeking licensure as LCSWs. Therefore, agencies are at risk of not having sufficient staff to provide essential health services to individuals, families and communities. While part of the problem may be addressed only through legislation, the proposed amendments will, in conjunction with new legislation, play a significant part in addressing this serious problem.

Since the emergency regulations became effective, the State Board for Social Work has been able to approve the experience of hundreds of applicants for licensure as a LCSW who previously did not meet the existing requirements for licensure. It is also anticipated that hundreds of other LMSWs, who have not completed sufficient supervised experience to meet the requirements established in the existing regulations, will now submit applications as their experience will satisfy the more flexible requirements established in this emergency action.

The proposed amendments were published in the State Register on June 30, 2010. During the 45-day public comment period, the Department received comments from professional associations, state and private agencies and interested individuals. Based upon the comments submitted, the proposed amendment was revised to allow certain individuals who started their experience for the insurance privilege prior to January 1, 2011, to submit experience obtained prior to licensure as an LCSW toward the experience requirements for the insurance privilege. A Revised Rule Making will be published in the State Register on September 22, 2010.

Pursuant to section 202 of the State Administrative Procedure Act, these revisions may not be adopted until publication of a Notice of Revised Rule Making in the State Register and expiration of a 30-day public comment period. However, the emergency rule adopted at the June 2010 Regents meeting will expire on September 26, 2010. A lapse in the emergency rule will cause disruptions in the licensure process.

Emergency action is necessary at the September 2010 Board of Regents meeting in order to ensure that the rule remains continuously in effect until such time as it can be revised and adopted as a permanent rule, after expiration of the 30-day public comment period for revised rule makings prescribed in the State Administrative Procedure Act, and thereby avoid disruption in the processing of applications for licensure as a clinical social worker.

An emergency action is also necessary for the preservation of the gen-

eral welfare in order to expedite the processing of applications for licensure as an LCSW in New York by enabling applicants to obtain advance approval of the settings for their experience and of their supervision arrangements and by providing clarity regarding acceptable settings and supervisors for licensure. By reducing the number of hours of experience and the hours of supervision required for licensure as a LCSW, the proposed amendment will produce more qualified social workers to address the social work needs of residents of the State of New York.

**Subject:** Limited permits and experience, supervision, and endorsement requirements for licensure as a LCSW in New York.

**Purpose:** To expedite the processing of applications for licensure and to provide clarity regarding acceptable supervised experience.

**Substance of emergency rule:** The Commissioner of Education proposes to promulgate regulations, relating to licensure as a licensed master social worker (LMSW) and a licensed clinical social worker (LCSW), limited permits for applicants in these professions, the practice of clinical social work by a LMSW under supervision, the requirements for insurance reimbursement pursuant to the Insurance Law, the supervised practice of licensed master social work by certain social workers, and the endorsement of a license as a LCSW in another jurisdiction for practice in New York State. The following is a summary of the substance of the regulations.

Supervised experience for licensure as a LCSW

Section 74.3(a) requires an applicant to complete three years of full-time, supervised experience in diagnosis, psychotherapy and assessment-based treatment planning, or the part-time equivalent, over a period of at least 36 months and not more than six years, in accordance with the requirements of section 74.6. The full-time experience shall consist of not less than 2,000 client contact hours.

Section 74.3(a)(1) requires that experience completed in New York must be completed as a Licensed Master Social Worker (LMSW) or permit holder, except in limited circumstances, and provides that experience in another jurisdiction may be accepted if completed in an authorized setting under a qualified supervisor, as determined by the department.

Section 74.3(a)(2) requires an applicant to complete the experience in an acceptable setting, as defined in subdivision (a) of section 74.6.

Section 74(a)(3) requires an applicant to complete the experience under a qualified supervisor, as defined in paragraph (2) of subdivision (c) of section 74.6.

Section 74.3(a)(4) requires the supervisor to retain records of the applicant's supervised experience and to submit documentation of the supervised experience on forms prescribed by the department. The department may request clarification of the supervisor's qualifications or the authority of the setting to provide professional services. If the supervisor is deceased or not available, a licensed colleague may submit verification of the applicant's experience.

Limited Permit for LMSW and LCSW applicant

Section 74.4(a)(1) is amended to clarify that the applicant for a permit to practice licensed master social work must meet the moral character and education requirements to be eligible for a permit.

Section 74.4(a)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6.

Section 74.4(a)(3) is amended to clarify that the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Section 74.4(b)(1) is amended to clarify that the applicant for a permit to practice licensed clinical social work must meet the moral character requirements, in addition to clinical education and supervised experience requirements, to be eligible for a permit.

Section 74.4(b)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6, and may not be issued for a private practice owned or operated by the applicant.

Section 74.4(b)(3) is amended to clarify that the supervision of a LCSW permit holder must meet the requirements in subdivision (c) of section 74.6. In addition, the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Authorization qualifying certain LCSW for insurance reimbursement

Section 74.5(a) is amended to increase the application fee from \$85 to \$100 and to clarify that a licensed clinical social worker must meet the requirements in section 3221(l)(4)(d) or 4303(n) of the Insurance Law to qualify for insurance reimbursement.

Section 74.5(c) is amended to clarify that the LCSW must complete 2,400 client contact hours of psychotherapy experience over a period of not less than three years. The amendment allows applicants who started their experience to qualify for insurance reimbursement prior to January 1, 2011 to submit any experience obtained prior to licensure as a licensed clinical social worker provided that such experience, in the determination of the department, satisfies the experience requirements for such reim-

bursement and is obtained after the experience used to satisfy the experience requirements for licensure as an LCSW. The amendment also clarifies that experience to qualify for insurance reimbursement commenced on or after January 1, 2011 shall be obtained only after licensure as a licensed clinical social worker in New York.

Section 74.5(c)(1) defines an acceptable setting for experience toward the psychotherapy privilege, which may include a private practice owned or operated by the applicant, who is licensed as a LCSW and authorized to practice psychotherapy.

Section 74.5(c)(2) requires the LCSW to submit for review and approval by the State Board for Social Work a plan for supervised experience that meets the requirements for the privilege. The plan shall be submitted to the State Board for Social Work before the applicant starts the experience for the privilege. Section 74.5(c)(2)(i) requires the plan to specify individual or group consultation of no less than two hours a month or enrollment in a program authorized to provide psychotherapy that is offered by an institution of higher education or a psychotherapy institute chartered by the Board of Regents. The amendment eliminates peer supervision for the privilege.

The amendment to 74.5(c)(2)(ii) clarifies that a qualified supervisor includes a LCSW who holds the privilege or the equivalent as determined by the department, a licensed psychologist competent in psychotherapy, or a licensed physician who is qualified to practice psychiatry, as determined by the department.

Supervision of certain qualified individuals providing clinical social work services.

Section 74.6 is amended to clarify the supervision required for a LMSW or other qualified individual to practice clinical social work under supervision, in a setting acceptable to the Department.

Section 74.6(a)(i) defines an acceptable setting for the supervised practice of licensed clinical social work as including a professional business entity authorized to provide services in licensed clinical social work, a sole proprietorship or professional partnership owned by licensees who provide services that are within the scope of practice of licensed clinical social work, a hospital or clinic authorized under the Public Health law, a program or facility authorized under the Mental Hygiene law, a program or facility authorized under federal law or an entity defined as exempt or otherwise authorized to provide services that are within the scope of licensed clinical social work.

Section 74.6(a)(2) defines a qualified individual authorized to provide licensed clinical social work services under supervision as a LMSW, an individual with a limited permit to practice licensed clinical social work in New York, or an individual otherwise authorized to provide clinical social work services in a setting acceptable to the department and under appropriate supervision.

Section 74.6(b) allows a qualified individual to submit to the State Board for Social Work a plan for supervised experience in New York toward licensure as a LCSW for review and approval. The plan shall include a copy of documentation establishing that the agency or setting is an acceptable setting, as defined in section 74.6(a); a copy of the license of the qualified supervisor, as defined in section 74.6(c); a plan for supervision of the qualified individual accompanied by an attestation by the supervisor that he or she is responsible for services provided by the qualified individual; and, if a third-party is supervising the qualified individual, an affirmation from a designated representative of the setting that the setting is authorized to provide clinical social work services and the setting will ensure appropriate supervision of the qualified individual who is providing such services.

Section 74.6(c) is amended to clarify the supervision of a qualified individual seeking licensure as a LCSW to include at least 100 hours of in-person individual or group supervision, distributed appropriately over the period of the supervised experience. In addition, the qualified individual shall be under the general supervision of a qualified supervisor who shall review the qualified individual's diagnosis and treatment of each client, discuss the cases, provide oversight to the qualified individual in developing skills as a licensed clinical social worker, and regularly review and evaluate the professional work of the qualified individual.

There are no changes to section 74.6(c)(2), which requires the supervisor to be licensed and registered as a licensed clinical social worker, licensed psychologist or physician who is competent as a psychiatrist, in the determination of the department.

Section 74.6(d) defines the supervision of a LMSW who is providing clinical social work services under supervision but who is not using the experience to satisfy the experience requirements for licensure as a LCSW.

Section 74.6(d)(1) defines the supervision to be contact between the LMSW and supervisor during which the LMSW apprises the supervisor of the diagnosis and treatment of each client; the LMSW's cases are discussed; the supervisor provides the LMSW with oversight and guidance in diagnosing and treatment clients; the supervisor regularly reviews and evaluates the professional work of the LMSW; and the supervisor

provides at least two hours per month of in-person individual or group clinical supervision.

Section 74.6(d)(2) requires the supervisor to meet the definition of a qualified supervisor in section 74.6(c)(2).

Section 74.6(e) requires the supervisor to maintain records of client contact hours in diagnosis, psychotherapy and assessment-based treatment planning and supervision hours provided to the qualified individual and to produce a log of hours, if requested.

Supervision of certain social workers providing licensed master social work services.

The title of section 74.7 is amended and section 74.7 is amended to authorize a person with a bachelor of social work or master of social work degree, acceptable to the department, to perform activities and services within the scope of practice of a licensed master social worker as defined in paragraphs (a) and (b) of subdivision (1) of section 7701 of the Education Law, under the supervision of a LMSW or LCSW. The amendment clarifies that nothing in this section authorizes the use of the title "LMSW" or "LCSW" or the practice of licensed clinical social work, as defined in the Education Law.

Endorsement of certain LCSW applicants

A new section 74.9 is added to the Regulations of the Commissioner of Education to establish requirements for endorsement of a license to practice licensed clinical social work issued by another jurisdiction. The applicant must demonstrate licensure in good standing as a LCSW in another jurisdiction(s) and at least 10 years of practice in the 15 years preceding the application, submit the application and fee established in law for licensure and initial registration, and complete coursework in the identification and reporting of suspected child abuse or neglect.

*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. EDU-26-10-00007-P, Issue of June 30, 2010. The emergency rule will expire November 21, 2010.

*Text of rule and any required statements and analyses may be obtained from:* Christine Moore, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Subdivision (3) of section 212 of the Education Law authorizes the Commissioner of Education to charge a fee for permits in regulation.

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the article of the Education Law that pertains to the particular profession.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Paragraph (6) of section 6506 of the Education Law authorizes the Board of Regents to indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the requirements.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations relating to the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

Paragraph (c) of subdivision (2) of section 7704 of the Education Law establishes the experience requirements for licensure as a clinical social worker.

Section 7705 of the Education Law authorizes the department to issue a limited permit for a period of not more than twelve months to practice licensed clinical social work or licensed master social work to an applicant who has met all requirements for licensure except those relating to the examination and provided that the individual is under the general supervision of a licensed master social work or a licensed clinical social worker.

Subdivision (2) of Section 7706 of the Education Law provides that nothing shall prevent an individual possessing a baccalaureate of social work degree or its equivalent from performing social work services under supervision by a licensed master social worker or a licensed clinical social worker, in accordance with the Commissioner's regulations.

Subdivision (3) of section 7706 of the Education Law provides that nothing shall prevent a licensed master social worker from performing clinical social work services in a facility setting and under supervision in accordance with the Commissioner's regulations.

Subparagraphs (A) and (D) of paragraph (4) of subsection (l) of section 3221 of the Insurance Law and subsections (i) and (n) of section 4303 of the Insurance Law authorize licensed clinical social workers with satisfac-

tory experience to qualify for reimbursements under certain group health insurance policies for psychotherapy services, in accordance with the Commissioner's regulations.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of these sections of the Education Law by clarifying existing experience and limited permit requirements for licensure as a licensed master social worker and licensed clinical social worker, by clarifying experience requirements for the insurance privilege available to certain LCSWs, and by establishing requirements for the endorsement of a license issued in another jurisdiction.

#### 3. NEEDS AND BENEFITS:

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised post-graduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement of 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes his or her master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(j)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from \$85 to \$100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy. However, the current regulations allow experience completed before licensure to be submitted and this amendment clarifies the intent of the law that experience must be after licensure as an LCSW over a period of not less than three years. Under the proposed amendment, the applicant would have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Commissioner's regulations establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registra-

tion as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title "LMSW" or "LCSW."

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of an LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

#### 4. COSTS:

(a) Costs to State government: The proposed regulations will not impose any additional cost on State government, including the State Education Department, over and above the costs imposed by Article 154 of the Education Law for administering these professions.

(b) Cost to local government: The proposed amendment establishes requirements for licensure as a licensed master social worker or licensed clinical social worker. The regulation will not impose additional costs on local government.

(c) Cost to private regulated parties: The proposed regulation will increase the cost of the application for the insurance privilege available to certain licensed clinical social workers from \$85 to \$100. The proposed regulation will not impose any other costs on applicants for the licenses over and above those imposed by Article 154 of the Education Law. The proposed regulation simply clarifies the standards for acceptable experience and the issuance of limited permits, and provides an option for endorsement of a professional license for certain applicants seeking licensure in New York.

(d) Cost to the regulatory agency: As stated above in Costs to State government, the proposed regulation does not impose costs on the State Education Department beyond those imposed by statute.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of Article 154 of the Education Law by establishing experience and supervision requirements that individuals must meet to be licensed as a licensed master social worker and licensed clinical social worker. Therefore, the proposed regulation does not impose any program, service, duty or responsibility upon local governments.

#### 6. PAPERWORK:

Applicants seeking licensure as a licensed clinical social worker will be required to submit to the department verification of their supervised experience to meet the licensure requirement. The applicant's licensed supervisor(s) will also be required to maintain documentation of the applicant's supervised practice and hours of supervision and will be responsible for submitting a copy of such documentation to the Department upon its request. Applicants seeking authorization for insurance reimbursement and individuals seeking licensure as a clinical social worker will also be required to submit for review and approval by the State Board for Social Work, a plan for supervised experience before the applicant commences its supervised experience requirement.

**7. DUPLICATION:**

The proposed regulation does not duplicate other existing State or Federal requirements.

**8. ALTERNATIVES:**

There was discussion about changing requirements for licensure and practice through an amendment to Article 154 of the Education Law, but it was determined that the changes included in the proposed regulations are within the authority of the State Education Department and that the promulgation of such regulations would be the more efficient way to achieve the clarifications necessary to ensure an adequate supply of qualified licensed master social workers and licensed clinical social workers.

**9. FEDERAL STANDARDS:**

There are no Federal standards for the licensure of master social workers and clinical social workers, the subject of the proposed amendment.

**10. COMPLIANCE SCHEDULE:**

Applicants for licensure or certification must comply with the regulation on the stated effective date.

**Regulatory Flexibility Analysis**

The proposed amendments to section 145-2.2 of the Regulations of the Commissioner of Education relate to the standards for academic progress for the tuition assistance program for the 2010-2011 academic year. The purpose of the proposed amendment is to implement Chapter 53 of the Laws of 2010 and provide clarity as to what constitutes a program of remedial study to determine whether the 2006 or 2010 standards of academic progress apply for the 2010-2011 academic year.

The amendment will not impose any adverse economic impact, recordkeeping, reporting, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the regulation that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken.

**Rural Area Flexibility Analysis****1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to applicants seeking licensure as a licensed master social worker ("LMSW") or licensed clinical social worker ("LCSW") in New York State. The proposed amendment seeks to change New York State licensure requirements to conform to current practice in these professions, to expand opportunities for applicants to meet the experience requirement under qualified supervisors, and allow for the endorsement of licenses issued in other jurisdictions for qualified licensed clinical social workers seeking to become licensed in New York State. Applicants for licensure in these fields include individuals located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

**2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised post-graduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement for 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes their master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in

an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(l)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from \$85 to \$100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy. The proposal also specifies that experience must be after licensure as an LCSW over a period of not less than three years. Under the proposed amendment, the applicant would have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Regulations of the Commissioner of Education establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registration as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title "LMSW" or "LCSW."

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of a LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

**3. COSTS:**

The proposed amendment increases the fee for licensed clinical social workers seeking authorization to qualify for insurance reimbursement from \$85 to \$100.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment revises the experience and limited permit

provisions and establishes new endorsement requirements for the licensure of clinical social workers in New York State. These requirements are in place to ensure competency of licensed professionals and thereby safeguard the public.

Due to the nature of the proposed amendment, the State Education Department does not believe it to be warranted to establish different requirements for institutions located in rural areas.

#### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the State Board for Social Work and from statewide professional associations whose memberships include individuals who live or work in rural areas.

#### **Job Impact Statement**

The purpose of the proposed amendment is to clarify existing requirements for limited permits for licensed master social workers (LMSW) and licensed clinical social workers (LCSW) and experience and supervision requirements for licensure as a LCSW in New York and for the insurance privilege available to certain LCSWs. The proposed amendment will expedite the processing of applications for licensure as a LCSW in New York State, will provide clarity regarding acceptable supervised experience for licensure as a LCSW and for the insurance privilege to ensure public protection, and will establish requirements for the endorsement of certain out-of-state licensed clinical social workers.

Because it is evident from the nature of the proposed regulation that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2010, the State Education Department received the following comments.

COMMENT: Several commenters expressed concern with the requirement that a candidate applying for the psychotherapy privilege must complete the supervised experience requirement after becoming a licensed clinical social worker ("LCSW"), as opposed to the prior regulations which allowed an individual to complete the experience prior to licensure stating this change could eliminate a year or more of supervised experience completed while the applicant was under supervision and taking the licensure examination.

RESPONSE: The Department will revise its regulations to allow individuals who started their experience for the insurance privilege prior to January 1, 2011 to meet the experience requirements under the prior requirements, which allowed applicants to complete their experience before licensure.

COMMENT: Several commenters strongly support the amendments related to supervised experience for licensure as an LCSW and the supervision of a BSW or MSW providing certain services, as the amendments provide a level of flexibility that reflects the settings in which social workers practice while maintaining appropriate standards for licensure as an LCSW.

RESPONSE: The Department appreciates the response and support.

COMMENT: The proposed amendment to 74.6 would allow a Licensed Master Social Worker to provide diagnosis, psychotherapy, and assessment-based treatment planning under supervision. Would you want your child to be treated by an LMSW who was not required to study differential diagnosis and to understand the DSM-IV-TR, academically?

RESPONSE: Section 7701(c) of the Education Law authorizes an LMSW to practice clinical social work, including diagnosis, psychotherapy and assessment-based treatment planning, under supervision in a setting acceptable to the Department. The proposed regulation requires the LMSW to be under supervision and is consistent with the Education Law; therefore, no change is needed.

COMMENT: SED should consider amending the regulations to include the Licensed Mental Health Counselor as an acceptable supervisor for a LMSW who is providing clinical social work services.

RESPONSE: Section 7704(2)(c) of the Education Law specifically defines a qualified supervisor as a LCSW, licensed psychologist or a psychiatrist. The law does not allow the Department to define in regulation any other supervisor for the LMSW practicing clinical social work.

COMMENT: Section 74.3(a) should be amended to allow the Department to approve interruptions for good cause in the requirement for supervised experience to be completed in no more than six continuous years.

RESPONSE: Section 7704(2)(c) of the Education Law requires an applicant to have at least three years full-time supervised experience over a continuous period not to exceed six continuous years and does not provide for interruptions in supervised experience.

COMMENT: Please amend 74.3(a)(4) to require the verification of supervised experience to be submitted by a licensed colleague of the supervisor, not the applicant, if the supervisor is deceased or not available.

RESPONSE: The regulation provides flexibility when an applicant's former supervisor cannot be located. The suggested change is not necessary.

COMMENT: Please amend the regulations to establish a time limit for the Department to respond to limited permit applications.

RESPONSE: Applications are processed in a timely manner when the applicant has submitted all necessary information. It is not necessary to establish this timeline in regulation.

COMMENT: Is the limit on supervising 5 permit holders at one time enforced across disciplines (e.g., LMSW, LMHC) and does the limit include clinical supervision of LMSWs?

RESPONSE: The proposed amendment restricts a licensed professional to supervising no more than five permit holders, in any combination of professions that he/she is competent to practice and supervise and does not include clinical supervision of licensees.

COMMENT: Section 74.6 establishes a process by which an LMSW may file a supervision plan for prior review but does not address a change in supervisor and how will this impact the supervision and experience accrued?

RESPONSE: If the LMSW or supervisor should leave the setting, a new plan may be submitted to the State Board and the LMSW could complete the experience under the new approved plan. Once the new plan is approved by the Department, the LMSW could complete the remainder of the experience under the new plan.

COMMENT: Please define good moral character and how a supervisor or applicant can demonstrate good moral character or respond to any questions about his/her moral character.

RESPONSE: Section 28-1 of the Regents Rules sets out the process by which a question of the applicant's moral character is investigated and reviewed to determine if the applicant has met the requirement.

COMMENT: Please clarify the process for obtaining a permit, including information on where to obtain the permit, cost, and the application.

RESPONSE: Applications, instructions and other information about permits, including costs, are available on our website: [www.op.nysed.gov/prof/sw/](http://www.op.nysed.gov/prof/sw/).

COMMENT: Language in 74.4(a)(2) and 74.4(b)(2) should be amended to allow a LMSW or LMSW permit holder to provide services in a private practice that he or she owns and operates.

RESPONSE: The Department disagrees with the comment, as the permit holder and the LMSW are only authorized to provide services under supervision, in a setting that is authorized to provide professional services to a public and this does not include a setting owned by an LMSW permit holder or LMSW.

COMMENT: A commenter applauded the Department's proposal to allow for the submission of a supervision plan by an LCSW seeking the psychotherapy privilege and for qualified individuals seeking to provide clinical social work services under supervision.

RESPONSE: The Department appreciates the comment.

COMMENT: Is the new form for supervisors different than the current log and can it be used for permit and non-permit holders?

RESPONSE: The Office of the Professions is revising existing applications. In the meantime, an applicant may use the existing forms and the supervisor may use the log that is part of Form 4B to maintain a record of the client contact and supervision hours.

COMMENT: Comments about the manner and effectiveness of clinical group supervision for LCSW licensure included a suggestion that the regulation require more individual supervision and the possibility of waivers from stricter requirements in the event of hardship.

RESPONSE: There is no evidence that individual supervision provides a more qualified or competent entry level practitioner than does group supervision. The regulation provides appropriate flexibility and no change is needed.

COMMENT: A supervisor should be responsible for no more than four individuals or four members of a group to ensure appropriate supervision.

RESPONSE: This level of specificity is not required in the regulation, as the supervisor is responsible for accepting no more supervisees than he or she can supervise appropriately.

COMMENT: Sections 74.6(c)(1) and 74.6(d)(1) should be amended, similar to amendments in section 74.4, to clarify the supervisor's responsibility for appropriate oversight of all services provided under his or her supervision.

RESPONSE: A change is not required as the supervisor is responsible under Part 29 of the Regents Rules for appropriate oversight of an individual who is only authorized to practice under his/her supervision.

COMMENT: Is Child Welfare Services authorized under law or regulation to provide services that are within the scope of licensed clinical social work?

RESPONSE: An entity must be authorized by law to provide professional services. The entity should discuss any questions about its authority to provide professional services with its attorney to ensure compliance with applicable laws.

COMMENT: Commenters suggested that 74.5(c)(1)(v) and 74.6(a)(v) should be amended to “specify a program or facility authorized under articles 16, 31 or 32 of the mental hygiene law...”, an OCFs program exempt until July 1, 2013, or a psychotherapy institute granted a waiver under section 6503-a be defined as acceptable settings.

RESPONSE: The regulations clearly provide that if the facility or program is authorized under the Mental Hygiene Law, it is an acceptable setting. A program that is exempt or issued a waiver is considered “otherwise authorized” under the regulations. Therefore, this level of specificity is not needed in the regulations.

COMMENT: Social workers perform many tasks that are not included in diagnosis, psychotherapy, and assessment based treatment planning and this makes it difficult to ensure enough time in those areas and counting hours becomes a challenge.

RESPONSE: The amendments are intended to provide flexibility to supervisors in assuring that applicants complete appropriate experience in diagnosis, psychotherapy and assessment-based treatment planning, even if these are not provided in 60-minute sessions.

COMMENT: “Diagnosis” and “assessment-based treatment planning” involve work that does not happen ‘face-to-face’ with the client; does this count toward experience hours for these tasks?”

RESPONSE: It depends on the situation. Generally, to count toward experience hours, these tasks should happen ‘face-to-face’ with the client. However, a minimal amount of time that does not happen ‘face-to-face’ may be counted towards this experience. For example, a 50 minute face-to-face client session followed by 10 minutes of non-face-to-face documentation and recordkeeping, including treatment planning, would be acceptable by the Department for this experience.

COMMENT: It would be helpful to have some more clarity regarding assessment based treatment planning and if this is the same as a treatment plan or behavior plan?

RESPONSE: Assessment-based treatment planning is defined in subparagraph (d) of paragraph (2) of section 7701 of the Education Law, in the context of LCSW practice. It depends on the plan and whether or not a treatment plan or behavior plan meets the definition of assessment based treatment planning.

COMMENT: What does the supervised plan for the ‘R’ psychotherapy privilege look like and what happens when there are changes over time?

RESPONSE: The LCSW will submit a plan for prior review by the State Board, to ensure the supervisor and setting are legally authorized and acceptable toward the privilege. If there are changes in the supervisor or setting, a new plan may be submitted for review.

COMMENT: The client contact hours required in 74.5(c) for the privilege should be reduced from 2,400 to 2,000, consistent with the changes for licensure as a LCSW.

RESPONSE: The Department disagrees with the recommendation. The psychotherapy privilege is intended to recognize those LCSWs who provide psychotherapy and therefore, the required hours are appropriate for the privilege.

COMMENT: Several commenters object to requirements in 74.5(c)(2) that an LCSW submit the proposed plan for meeting the privilege requirement prior to starting such experience, as this may prevent the LCSW from providing psychotherapy services that he/she can legally provide and the regulation suggests the privilege is required to provide psychotherapy services.

RESPONSE: The Department disagrees with the comments. The law does not restrict an LCSW from providing psychotherapy, if competent, nor require the LCSW to apply for or receive the privilege. A requirement for prior approval ensures public protection as well as providing assurances to the LCSW that the plan for meeting the privilege is consistent with the laws and regulations.

COMMENT: The amendment to 74.5(c)(2)(ii)(a) eliminates the possibility of peer supervision for the privilege, although this was allowed under the previous regulations. Several commenters believe that the Department’s reading of the Insurance Law, requiring the supervisor to hold the privilege, does not apply for experience in certain settings and the regulations should be amended to allow peer supervision.

RESPONSE: The Department disagrees with the comment and believes that there should not be different standards for oversight of psychotherapy practice in facilities than for practice in other settings. The supervising LCSW who holds the privilege has demonstrated competence in psychotherapy, consistent with the Insurance Law and therefore a regulatory change is not warranted.

COMMENT: What exactly counts as acceptable experience in clinical social work for endorsement of a license issued in another state.

RESPONSE: The new section 74.9 allows the Department to endorse a license issued to an LCSW in another jurisdiction if the applicant met appropriate clinical requirements for licensure, although these may vary among states, and has at least 10 years of licensed practice in the 15 years prior to application for endorsement in New York. The State Board should not need to review experience or education, if acceptable in other states.

COMMENT: I support the new 74.9 to allow the Department to endorse for licensure as an LCSW in New York, certain individuals who are licensed as an LCSW in other states.

RESPONSE: No response is required.

COMMENT: I support the proposed amendments to 74.7 relating to the supervised practice of a person with a BSW degree.

RESPONSE: No response is required.

## Department of Environmental Conservation

### EMERGENCY RULE MAKING

#### Hemlock- Canadice State Forest

**I.D. No.** ENV-41-10-00006-E

**Filing No.** 1006

**Filing Date:** 2010-09-28

**Effective Date:** 2010-09-28

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

**Action taken:** Addition of section 190.26 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-101(1), (3)(b), 3-0301(1)(b), (2)(m), (v), 9-0105(1) and (3)

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

**Specific reasons underlying the finding of necessity:** This emergency regulation is necessary for the preservation of public health, safety and general welfare because it will protect water quality and allow responsible public use of Hemlock and Canadice Lakes and the lands surrounding the lakes. The emergency regulation will take effect immediately upon filing. The regulation is critical to protecting the City of Rochester’s public water supply by continuing to regulate public use of the lakes and surrounding land consistent with the City’s longstanding regulations and by adopting such additional necessary protective measures to control public use.

This new section, 190.26 of 6 NYCRR will allow for an enforceable State regulation that will enable the State to be responsible for care, custody and control of the lakes and surrounding land as well as public recreation management. Restrictions on motorized use, camping, swimming and other activities will be in place to protect the water supply.

**Subject:** Hemlock- Canadice State Forest.

**Purpose:** To control public use to protect watershed values, natural resources and public safety.

**Text of emergency rule:** A new section 190.26 is added to 6 NYCRR to read as follows:

*190.26 Hemlock-Canadice State Forest (Livingston-Ontario State Re-forestation Area #1)*

*In addition to other applicable general provisions of this Part, the following requirements apply to the Hemlock-Canadice State Forest. In the event of a conflict, these specific provisions shall control.*

*(a) Description. For the purposes of this section, Hemlock-Canadice State Forest refers to the Phelps and Gorham Purchase in Townships 7, 8 and 9, Ranges 5 and 6, located in the Finger Lakes Region, approximately 30 miles south of the city of Rochester. The property includes two large undeveloped parcels surrounding Hemlock and Canadice Lakes, totaling 6,684 acres in the towns of Canadice, Conesus, Livonia, Richmond and Springwater in Ontario and Livingston counties, being the same lands as more particularly described in deeds conveying such lands to the People of the State of New York, on file in the Department of Environmental Conservation, Albany, NY, and duly recorded in the offices of the county clerks of Ontario and Livingston counties. Said Hemlock-Canadice State Forest shall be hereinafter referred to in this section as “state forest”.*

*(b) In or on the state forest, it is unlawful for any person to:*

*(1) possess or operate a boat, ice fish, traverse the ice or water, or fish from shore on:*

*(i) Hemlock Lake: north of the northerly boat launch, and between Boat Launch Road and Hemlock Lake; and*

*(ii) Canadice Lake: northernmost 500 feet of the lake;*

*(2) operate: a mechanically propelled vessel over 17 feet in length, a mechanically propelled vessel with a motor exceeding ten horsepower, or a non-mechanically propelled vessel over 24 feet in length;*

- (3) flush motors, bilges, bait buckets, livewells, or wash boats, except more than 100 feet from lakes and streams;
- (4) swim, bathe, water ski, tube;
- (5) set, light or use a campfire, charcoal fire;
- (6) camp;
- (7) operate an all-terrain vehicle;
- (8) operate a snowmobile, except on designated trails when there is sufficient snow cover;
- (9) discharge a firearm, except for legally taking game species;
- (10) transport or introduce any aquatic plant or animal into the water;
- (11) introduce, use or maintain any horses, work animals or other animals;
- (12) possess a domesticated pet unless it is leashed or controlled at all times;
- (13) deposit any feces or animal entrails within 100 feet of any water body or water course;
- (14) commit any act that may result in contamination of any portion of the lakes or streams.

**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 December 26, 2010.

**Text of rule and any required statements and analyses may be obtained from:** John Gibbs, Regional Forester, NYS DEC, 7291 Coon Road, Bath, New York 14810, (607) 776-2165, email: jagibbs@gw.dec.state.ny.us

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

The Department of Environmental Conservation (Department) acquired 6,684 acres of watershed lands, including Hemlock and Canadice Lakes, Livingston-Ontario State Reforestation Area #1 (Hemlock-Canadice State Forest), pristine Finger Lakes located approximately 28 miles south of, and formerly owned by, the City of Rochester (City), in June 2010. Hemlock and Canadice Lakes are the primary source of drinking water for the City and several other communities. City stewardship of the Hemlock and Canadice Lakes watershed has resulted in both a superior water supply and a unique environmental setting. Under the City's management, the public had been welcome to pursue licensed sporting activities such as fishing and hunting as well as boating, hiking and nature study. The Department's emergency regulations will continue management of this important property in order to continue to maintain exceptional water quality and foster the remote atmosphere of the area.

Under the Environmental Conservation Law (ECL), the State has the authority to use the Environmental Protection Fund to acquire lands that are included as priorities in the State's Open Space Conservation program. (See ECL Article 49, Title 2) State acquisition of the 6,684 acre Hemlock-Canadice State Forest is a listed priority in the State's current (2009) Open Space Plan (priority project # 113, Conesus, Hemlock, Canadice & Honeoye), and has been listed as a priority since the beginning of the formal State Open Space Conservation program in 1992.

ECL section 1-0101(1) provides that it is "...the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and general welfare of the people of the State and their overall economic and social well being. ECL section 1-0101(3)(b) provides that "It shall further be the policy of the State to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other..." by "...guaranteeing that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 3-0301(1) provides that "It shall be the responsibility of the Department... by and through the Commissioner to carry out the environmental policy of the State..." ECL section 3-0301(1)(b) gives the Commissioner the power to "promote and coordinate management of water, land...resources to assure their protection...and take into account the cumulative impact upon all such resources in...promulgating any rule or regulation..." ECL section 9-0105(1) gives the Department the "power, duty and authority" to "exercise care, custody and control" of State lands.

ECL section 3-0301(2)(m) authorizes the Department to "Adopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of..." ECL section 3-0301(2)(v) empowers the Department to "...administer and manage the real property under the jurisdiction of the Department for the purpose of preserving, protecting and enhancing the natural resource value for which the property was acquired or to which it is dedicated, employing all appropriate manage-

ment activities." ECL section 9-0105(3) authorizes the Department to "make necessary rules and regulations to secure proper enforcement of..." ECL Article 9.

##### 2. Legislative objectives:

The Department has as one of its core missions, the acquisition of environmentally important lands and waters, funding for which has been provided by various acts of the State Legislature since the 19th century. The Department also has been provided authority by the Legislature to manage State owned lands (see ECL section 9-0105(1), and to promulgate rules and regulations for the use of such lands (see ECL sections 3-0301(2)(m) and ECL 9-0105(3)).

In adopting various articles of the ECL, the legislature has established forest, fish, and wildlife conservation to be policies of the State and has empowered the Department to exercise "care, custody and control" over certain State lands and other real property. Consistent with these statutory interests, the emergency regulations will protect natural resources and the safety and welfare of those who engage in recreational activities on the Hemlock-Canadice State Forest. Natural resources will be protected by continuing to: minimize personal contact with the water; prohibit horses and other animals, other than domesticated pets while leashed or controlled; prohibit camping, fires, all terrain vehicles; prohibit any boating or fishing on certain areas of the lakes near water supply facilities; and prohibit any act which would result in the contamination of the lakes or streams. These activities are either not covered or differently covered in the existing 6 NYCRR Part 190 regulations.

##### 3. Needs and benefits:

In June of 2010, the Department took title to the Hemlock-Canadice State Forest. The City retains the right to use the lakes for its water supply. The Department is responsible for the care, custody and control of the lakes and surrounding land as well as public recreation management. The Department manages the Hemlock-Canadice State Forest in substantially the same manner as the City has for more than a century, as a passive recreational property with restrictions on motorized use, camping, swimming and other activities, until such time as the Department is able to develop permanent long term regulations for this specific area following the development of a Unit Management Plan (UMP). Because the lakes continue as the City's water supply and the surrounding land continues as the watershed for the City's water supply, the Department will be promulgating permanent regulations to control public use under State enforceable regulations. The City's management of these unique Finger Lake properties has resulted in a magnificent public outdoor recreational opportunity and a well protected water supply. The State's acquisition of the Hemlock-Canadice State Forest has enjoyed overwhelming public support and a desire to continue the management of the property for watershed protection and passive public recreation.

State lands are managed under regulations promulgated under 6 NYCRR, Part 190 et al. While many existing public uses of these watershed lands will follow existing State land regulations, several regulations, unique to the needs of this property, are required to continue the management of the property as closely as possible to that of the City in order to protect the water supply and the watershed. The need exists to promulgate these emergency regulations so that appropriate mechanisms continue to ensure the protection of the water supply, the property and continued public recreational use.

##### 4. Costs:

The costs of promulgating these regulations will be minimal, involving signage and public brochures.

##### 5. Local government mandates:

The regulations will not impose any additional burdens on local governments within the area.

##### 6. Paperwork:

The regulations will not impose any reporting requirements or other paperwork on any private or public entity.

##### 7. Duplication:

There is no duplication, conflict or overlap with State or Federal regulations. The proposed regulations are designed to avoid duplication with existing State and Federal rules and regulations, and are proposed for activities where existing State land regulations are insufficient to meet the requirements to protect this specific area.

##### 8. Alternatives:

Since the City's jurisdiction, and its existing regulatory scheme, ended upon the State's acquisition of the Hemlock-Canadice State Forest, the "no action" alternative would result in only the application of the Department's existing State land regulations, 6 NYCRR Part 190. While these existing regulations provide some protection for the Hemlock-Canadice State Forest, in the absence of specific area regulations, the resources of the area, particularly the water supply, would not be protected. While the Department could attempt to apply the proposed regulations solely through signage on the property, the experience of the Department's enforcement staff is that this is generally not effective and often successfully challenged in judicial proceedings when not supported by regulations.

## 9. Federal standard:

The regulations do not exceed any minimum standards of the Federal government.

## 10. Compliance schedule:

This emergency rulemaking will provide continued protection to the Hemlock-Canadice State Forest now that the current emergency regulation has expired. The Department has previously submitted a proposed rulemaking package to put these regulations in place on a permanent basis. A UMP for the property will be completed, which will include a public comment period, a process that could take two or more years to complete. The proposed regulations will then be reviewed and may be revised as necessary to be consistent with the UMP and public comments received. The emergency regulations will be effective the date they are filed with the Department of State for a period of ninety days.

**Regulatory Flexibility Analysis**

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

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

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, recordkeeping or other compliance requirements on rural areas. The proposed regulation relates solely to protecting public safety and natural resources on the Hemlock-Canadice State Forest.

**Job Impact Statement**

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs and employment opportunities. The proposed regulation relates solely to protecting public safety and natural resources on the Hemlock-Canadice State Forest.

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

**Sanitary Condition of Shellfish Lands**

I.D. No. ENV-41-10-00003-EP

Filing No. 979

Filing Date: 2010-09-22

Effective Date: 2010-09-22

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

**Proposed Action:** Amendment of Part 41 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0307 and 13-0319

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

**Specific reasons underlying the finding of necessity:** Shellfish harvested from areas that do not meet the bacteriological standards for certified shellfish lands have an increased potential to cause illness in shellfish consumers.

**Subject:** Sanitary Condition of Shellfish Lands.

**Purpose:** To reclassify underwater lands to prohibit the harvest of shellfish.

**Text of emergency/proposed rule:** 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through clause 41.2(b) (1)(ii)(*'f'*) remain unchanged.

New Clauses 41.2(b)(1)(ii)(*'g'*) and 41.2(b)(1)(ii)(*'h'*) are adopted to read as follows:

(*'g'*) During the period May 15 - September 30, both dates inclusive, all that area of East Bay, Hempstead Bay, and all other bays creeks and tributaries south of a line running southeasterly of the easternmost point of land at Fighting Island (west side of Merrick Bay) to the northernmost point of land at False Channel Meadow; continuing southeasterly to the northernmost point of land at Ned's Meadow; continuing southeasterly to the northernmost point of land

at Ball Island; continuing southeasterly across Broad Creek Channel to the northernmost point of land at Cuba Island; continuing southeasterly the northwesternmost point of land at East Island; west of a line running south from the northwesternmost point of East Island along the western shoreline of Middle Island to the northwestern most point of Deep Creek Meadow; and north of a line from the northwestern most point of Deep Creek Meadow over Sloop Channel running along the northern shoreline of East Crow Island to the Northern Shoreline of Middle Crow Island; and along the northern shoreline of West Crow Island to the southwestern end of the Fundy Channel Bridge of the Meadowbrook State Parkway; and East of a line running north from the southwestern tip of the Fundy Channel Bridge along the eastern shoreline of Pettit Marsh (Pettit Island) and Great Sand Creek; and along the Eastern Shoreline of False Channel to the easternmost point of land at Fighting Island.

(*'h'*) During the period December 1 - February 31, both dates inclusive, all that area of East Bay, Hempstead Bay, and all other bays creeks and tributaries south of a line running southeasterly from the northwestern most point of East Island along the northern shoreline of East Island; to the northeasternmost point of land at East Island; continuing southeasterly to the southernmost point of land at Low Island at the northwestern base of the Goose Creek Bascule Bridge; continuing southerly across Goose Creek along the western side of said bascule bridge (Wantagh State Parkway-Jones Beach Causeway); to Green Island and running southerly along the western coast of Green Island to the southeasternmost point of the Sloop Channel Bridge; to the Eastern Shore of Sripe Island; running north along the northern coast of Sripe Island over the channel to the northern coast of Deep Creek Meadow to the northwesternmost point and; east of a line running northerly from the northwesternmost point at Deep Creek Meadow to the southern tip of Middle Island; and north along the western coast of Middle Island to the northwestern most tip of East Island.

Subparagraph 41.2(b)(1)(iii) through clause 41.3(b)(2)(i)(*'c'*) remains unchanged.

Existing clauses 41.3 (b)(2)(i)(*'d'*) through 41.3(b)(2)(i)(*'m'*) are renumbered to 41.3(b)(2)(i)(*'e'*) through 41.3(b)(2)(i)(*'n'*).

New clause 41.3(b)(2)(i)(*'d'*) is adopted to read as follows:

(*'d'*) All that area of Nicoll Bay lying within a 500 foot radius of the southernmost tip of the pier on the western side of Ho-man Creek at the Town of Islip's Bayport Beach.

Renumbered clauses 41.3(b)(2)(i)(*'e'*) through 41.3(b)(2)(i)(*'n'*) remain unchanged.

Subparagraphs 41.3(b)(2)(ii) through 41.3(b)(5)(iii) remain unchanged.

Existing clauses 41.3(b)(5)(iv)(*'a'*) and (*'b'*) are repealed.

New clauses 41.3(b)(5)(iv)(*'a'*) and (*'b'*) are adopted to read as follows:

(*'a'*) During the period May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor within a 500 foot radius in all directions of the entrance to the East Hampton Point Marina (located on the eastern shoreline at 295 Three Mile Harbor Road) and extending across the entrance into the Maidstone Harbor/Maidstone Marina Boat Basin, locally known as Duck Creek, located approximately 50 feet north of the East Hampton Point Marina.

(*'b'*) All that area of the Maidstone Harbor/Maidstone Marina Boat Basin, locally known as Duck Creek, lying east of a line extending northerly from the landward end of the northern wave break wall of the East Hampton Point Marina, including the entrance leading into the harbor.

Existing clauses 41.3(b)(5)(iv)(*'c'*) and (*'d'*) are renumbered 41.3(b)(5)(iv)(*'g'*) and (*'h'*).

New clauses 41.3(b)(5)(iv)(*'c'*), (*'d'*), (*'e'*), and (*'f'*) are adopted to read as follows:

(*'c'*) During the period from May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor within a 500 foot radius in all directions of the entrance to Shagwong Marina (local name), located on the eastern shoreline of Three Mile Harbor Road.

(‘d’) During the period from May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor and tributaries lying southeast of a line extending northeasterly from the northeasternmost point of land on the peninsula located at the western side of the entrance into “Head of the Harbor” (local name), at the southern end of Three Mile Harbor and continuing to the western terminus of Breeze Hill Road, lying north of a line extending northeasterly from the northernmost corner of the residence located at 5 South Pond Road on the western shoreline, to the northern side of the entrance of an unnamed creek on the opposite eastern shoreline (the entrance to this creek is located approximately 350 feet northwest of the entrance to Gardiner’s Marina).

(‘e’) All that area of “Head of the Harbor” (local name) at the southern end of Three Mile Harbor, lying south of a line extending northeasterly from the northernmost corner of the residence located at 5 South Pond road on the western shoreline, to the northern side of entrance of an unnamed creek on the opposite eastern shoreline (the entrance to this creek is located approximately 350 feet northwest of the entrance to Gardiner’s Marina).

(‘f’) During the period May 1st through November 30th (both dates inclusive), all that area of Hands Creek, including tributaries and all that area within a 500 foot radial closure in all directions of the entrance to Hands Creek.

Renumbered clauses 41.3(b)(5)(iv)(‘g’) and (‘h’) remain unchanged.

Existing clause 41.3(b)(5)(v)(‘a’) is amended to read as follows:

(‘a’) During the period [April 1st through December 14th] May 1st through November 30th (both dates inclusive), all that area of Hog Creek, including tributaries, lying easterly of a line extending southeasterly from the flagpole (located near the east side of the entrance to Hog Creek) on the property of the Clearwater Beach Property Owners Association, Inc. (local landmarks, local name) to the western end of the dock serving the residence at No. 152 Water Hole Road (local landmark, local name).

Existing clause 41.3(b)(5)(v)(‘b’) remains unchanged.

New clauses 41.3(b)(5)(v)(‘c’) and (‘d’) are adopted to read as follows:

(‘c’) All that area of Hog Creek lying south of a line extending easterly from the highest point of the white center peak of the residence located at 59 Isle of Wight Road to the red brick chimney on the north facing side of the residence located at 50 Fenmarsh Road on the opposite shoreline.

(‘d’) During the period May 1st through November 30th (both dates inclusive), all that area of Hog Creek lying north of a line extending easterly from the highest point of the white center peak of the residence located at 59 Isle of Wight Road to the red brick chimney on the north facing side of the residence located at 50 Fenmarsh Road on the opposite shoreline, and lying south of a line extending easterly from the highest point of the center peak of the grey residence located at 99 Isle of Wight Road to the northerly corner of the whitish-grey, hexagon shaped residence located at 120 Fenmarsh Road on the opposite shoreline.

Existing subparagraphs 41.3 (b)(5)(‘vi’) through 41.3(b)(7)(xi)(‘d’) remain unchanged.

New clause 41.3(b)(7)(xi)(‘e’) is adopted to read as follows:

(‘e’) West Creek. During the period of May 1 through November 30 (both dates inclusive), all that area of West Creek including all that area of Great Peconic Bay within 750 feet in all directions of the southernmost point of the jetty on the east side of the mouth of West Creek.

Existing subparagraph 41.3(b)(7)(xii) through section 41.5 remain unchanged.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 20, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Gina Fanelli, Department of Environmental Conservation, 205 N Belle Meade Rd, Suite 1, East Setauket, NY 11733, (631) 444-0482, email: gmfanell@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:** Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) section 13 0307. Subdivision 1 of section 13 0307 of the ECL requires the department to periodically conduct examinations of shellfish lands within the marine district to ascertain the sanitary condition of said lands. Subdivision 2 of this section requires that the department certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is section 13 0319 of the ECL.

##### 2. Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in Part 47 of Title 6 NYCRR, promulgated pursuant to section 13 0319 of the ECL. Shellfish lands which meet these criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

##### 3. Needs and benefits:

To protect public health and to comply with ECL 13 0307, the Bureau of Marine Resources’ shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas and shoreline surveys to document actual and potential pollution sources.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6 NYCRR Part 47. These reports are on file at the NYSDEC Bureau of Marine Resources office in East Setauket, NY.

The most recent Annual Review of Great Peconic Bay, dated June 2010, indicates that water quality in West Creek no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47, during the period May 1 through November 30. It recommends that all of West Creek, including a radial closure at the mouth, within Peconic Bay, be designated as seasonally certified.

The most recent Triennial Review of Three Mile Harbor, dated May 2010, indicates that water quality at the following locations no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47: The area outside the mouth of Hands Creek no longer meets its certified classification; Maidstone Harbor (known locally as Duck Creek) and the southernmost portion of Head of the Harbor no longer meet their seasonal classifications. The report recommends that a radial closure outside the mouth of Hands Creek be reclassified and seasonally uncertified from May 1 through November 30, each year and the areas of Maidstone Harbor and Head of the Harbor be reclassified as uncertified throughout the year.

The most recent Triennial Review of Hog Creek, dated August 2009, indicates that water quality in the southern half of the creek,

which is certified throughout the year, no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. The report recommends that the southernmost portion be reclassified as uncertified throughout the year and a portion north of that be reclassified as seasonally uncertified from May 1 through November 30, each year.

The most recent Triennial Review of Great South Bay (Nicoll/Sayville), dated January 2010, indicates that water quality in the area of Nicoll Bay at the mouth of Homan Creek no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47. It recommends that the area at the mouth of Homan Creek be designated as uncertified throughout the year.

The most recent Annual Review of Hempstead Bay, dated March 2010, indicates that water quality in currently certified areas of East Bay, in Hempstead Bay, no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47, throughout the year. The report recommends that the currently certified area of East Bay that is west of the Wantagh Parkway and adjacent to an existing north side seasonal area be designated as seasonally certified from March 1 through November 30. The report also indicates that the currently certified area of East Bay East of the Meadowbrook Parkway and south of the north side uncertified area shall be designated as seasonally certified from October 1 through May 14.

#### 4. Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non capital expenses, in order to comply with these proposed regulations.

The department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of August 1, 2010, the department had issued 1,680 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The department's records do not differentiate between full time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the department's proposed regulatory action. Harvesters can shift their efforts to other certified areas.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the department. Without this information, the department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The department's actions to designate areas as certified or uncertified are not dependent on the resources in a particular area. They are based solely on public health concerns and legal mandates.

There is no cost to the department. Administration and enforcement of the proposed amendment are covered by existing programs.

#### 5. Local government mandates:

The proposed rule does not impose any mandates on local government.

#### 6. Paperwork:

No new paperwork is required.

#### 7. Duplication:

The proposed amendment does not duplicate any state or Federal requirement.

#### 8. Alternatives:

There are no significant alternatives. By law (ECL section 13 0307), when the department has determined that certified shellfish land fails to meet the sanitary criteria for certified shellfish lands, the department shall designate the land as uncertified and close the area to shellfish harvesting.

#### 9. Federal standards:

There are no Federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the Federal government, states and the shellfish industry. Participation in the NSSP is voluntary each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non conforming state's shellfish product from interstate commerce.

#### 10. Compliance schedule:

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance can be readily achieved.

#### *Regulatory Flexibility Analysis*

Effect on small business and local government:

As of August 1, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 14.

Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands are designated as uncertified; there may be some loss of income for a number of diggers who may be harvesting shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, its productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land, and are then designated as certified, there is also an effect on shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income. Again, the effect of the re opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Local governments on Long Island exercise management authority and share law enforcement responsibility for shellfish with the state and the counties of Nassau and Suffolk. These are the Towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the Towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above what level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

#### Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

**Professional services:**

Small businesses and local governments will not require any professional services to comply with proposed rules.

**Compliance costs:**

There are no capital costs which will be incurred by small businesses or local governments.

**Minimizing adverse impact:**

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified, prior to the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specified times of the year will be designated as uncertified only during those times. At other times, shellfish may be harvested from those lands (seasonally certified). To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Under appropriate conditions, shellfish may be harvested from uncertified lands and microbiologically cleansed in a shellfish depuration plant. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands.

**Small business and local government participation:**

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, State legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rule making prior to filing with the Department of State.

**Economic and technological feasibility:**

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with rules of this type.

**Rural Area Flexibility Analysis**

Amendments to Part 41 will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory initiatives to open or close shellfish lands. The Department of Environmental Conservation (DEC) has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the State. The proposed regulations will not impose reporting, record keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments of 6 NYCRR 41 "Sanitary Condition of Shellfish Lands", the DEC has determined that a Rural Area Flexibility Analysis is not required.

**Job Impact Statement****Nature of impact:**

Environmental Conservation Law section 13-0307 requires that the department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken therefrom for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rule makings to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

The department does not have specific information regarding the locations in which individual diggers harvest shellfish, and therefore

is unable to assess the specific job impacts on individual shellfish diggers. In general terms, amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area's productivity, and the market value of the shellfish. In general, any negative impacts are small because the department's actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

**Categories and numbers affected:**

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean.

As of August, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 5. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

**Regions of adverse impact:**

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

**Minimizing adverse impact:**

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rule makings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The department also operates Conditional Harvesting Programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the department operates transplant harvesting programs which allow removal of shellfish from closed areas for cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting opportunities by making the resource in a closed area available under controlled conditions.

In this particular rule making, a number of the areas affected have only been closed seasonally. This is intended to minimize the adverse impact on individual shellfish diggers.

**Self-employment opportunities:**

A large majority of shellfish harvesters in New York State are self-employed. Rule makings to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting.

## Department of Health

### NOTICE OF ADOPTION

#### Expedited Partner Therapy to Treat Chlamydia Trachomatis

**I.D. No.** HLT-14-10-00005-A

**Filing No.** 1008

**Filing Date:** 2010-09-28

**Effective Date:** 2010-10-13

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

**Action taken:** Addition of section 23.5 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2312

**Subject:** Expedited Partner Therapy to Treat Chlamydia Trachomatis.

**Purpose:** Use of expedited partner therapy to treat the partner of persons infected with Chlamydia Trachomatis.

**Text of final rule:** Pursuant to the authority vested in the Commissioner of Health by Section 2312 of the Public Health Law, Part 23 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, by adding a new Section 23.5, to read as follows:

*Section 23.5 Expedited Partner Therapy for Chlamydia trachomatis Infection*

(a) *Definitions. As used in this section:*

(1) "Expedited Partner Therapy" or "EPT" means a practice whereby a health care practitioner chooses to provide a patient with either antibiotics intended for the patient's sexual partner or partners or a written prescription for antibiotics for the sexual partner or partners to be delivered by the patient to the sexual partner or partners for treatment of exposure to Chlamydia trachomatis.

(2) "Health care practitioner" means a physician, midwife, nurse practitioner, physician assistant, or other person who is authorized under Title 8 of the Education Law to diagnose and prescribe drugs for Chlamydia trachomatis, acting within his or her lawful scope of practice.

(b) *Liability. A health care practitioner who reasonably and in good faith renders expedited partner therapy in accordance with section 2312 of the Public Health Law and this section, and a pharmacist who reasonably and in good faith dispenses drugs pursuant to a prescription written in accordance with section 2312 of the Public Health Law and this section, shall not be subject to civil or criminal liability or be deemed to have engaged in unprofessional conduct.*

(c) *Eligibility criteria for EPT. EPT shall:*

(1) *be provided only for the partner or partners of a patient diagnosed with Chlamydia trachomatis infection; and*

(2) *not be provided for any partner or partners, when the patient with Chlamydia trachomatis infection seen by the health care practitioner is found to be concurrently infected with gonorrhea or syphilis.*

(d) *Educational material requirements for patients provided with EPT. Each patient provided with antibiotics or a prescription in accordance with this section must be given informational materials for the patient to give to his or her sexual partner or partners. Each patient shall be counseled by his or her health care practitioner to inform his or her partner or partners that it is important to read the information contained in the materials prior to the partner or partners taking the medication.*

*The materials shall:*

(1) *encourage the partner to consult a health care practitioner for a complete sexually transmitted infection evaluation as a preferred alternative to EPT and regardless of whether they take the medication;*

(2) *disclose the risk of potential adverse drug reactions, including allergic reactions, and the possibility of dangerous interactions between the patient-delivered therapy and other medications that the partner may be taking;*

(3) *inform the partner that he or she may be affected by other sexually transmitted infections that may be left untreated by the delivered medicine;*

(4) *inform the partner that if symptoms of a more serious infection are present (such as abdominal, pelvic, or testicular pain, fever, nausea or vomiting) he or she should seek medical care as soon as possible;*

(5) *recommend that a partner who is or could be pregnant should consult a health care practitioner as soon as possible;*

(6) *instruct the patient and the partner to abstain from sexual activity for at least seven days after treatment of both the patient and the partner in order to decrease the risk of recurrent infection;*

(7) *inform a partner who is at high risk of co-morbidity with HIV infection that he or she should consult a health care practitioner for a complete medical evaluation including testing for HIV and other sexually transmitted infections; and*

(8) *inform the patient and the partner how to prevent repeated chlamydia infection.*

(e) *Prescription format. Whenever a health care practitioner provides EPT through the use of a prescription:*

(1) *the designation "EPT" must be written in the body of the prescription form above the name of the medication and dosage for all prescriptions issued;*

(2) *if the name, address, and date of birth of the sexual partner are available, this should be written in the designated area of the prescription form; and*

(3) *if the sexual partner's name, address, and date of birth are not available, the written designation "EPT" shall be sufficient for the pharmacist to fill the prescription.*

(f) *Reporting of cases of Chlamydia trachomatis by health care providers.*

(1) *This section shall not affect the obligation to report individual cases and suspected cases of Chlamydia trachomatis imposed by Part 2 of this Chapter.*

(2) *Reports of cases of Chlamydia trachomatis who are provided with EPT shall include the added designation of "EPT" plus the number of sexual partners for whom a prescription or medication was provided.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 23.5.

**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: regsqa@health.state.ny.us

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

#### Assessment of Public Comment

The NYS Department of Health (NYSDOH) received written comments on the proposed amendment to Part 23 of Title 10 of the New York Code, Rules and Regulations from Stony Brook University Hospital and an anonymous entity. A summary of each comment is provided followed by the DOH response.

##### Comment # 1

Guidance is sought from NYSDOH to assist local health departments in targeting those Chlamydia cases who should receive partner services, including patients diagnosed in public STD clinics, as well as those Chlamydia cases to whom expedited partner therapy should be offered.

##### Response:

The NYSDOH Bureau of STD Prevention and Epidemiology has previously provided the federal Centers for Disease Control and Prevention Program Operations Guidelines as well as its own Field Manual to assist local health departments in establishing partner services policies for Chlamydia but also permits flexibility in developing policies that are consistent with local resources. The regulation for expedited partner therapy provides another option for local health departments to use in Chlamydia partner management. However, the regulations do not require local health departments to use EPT. If they prefer to provide partner services for Chlamydia, they still have that option. NYSDOH will be issuing educational materials to assist providers in using EPT.

##### Comment # 2

The regulation states that Chlamydia case reports must indicate if EPT was provided and the number of partners for whom a prescription or medication was provided. NYSDOH should provide guidance to local health departments on how to utilize EPT data.

##### Response:

It is the responsibility of the local health departments to enter the number of partners for whom expedited partner therapy is provided on the case report form in the Communicable Disease Electronic Surveillance System for Chlamydia cases meeting the federal case definition. Local health departments may use these data to monitor the usage of expedited partner therapy.

##### Comment # 3

The Bureau of Sexually Transmitted Disease Control (BSTDC) has negotiated contracts and work plans with individual local health districts which include deliverables related to partner services for Chlamydia cases. To the extent that expedited partner therapy for Chlamydia cases replaces partner services for Chlamydia cases, local health districts will fail to meet some of their grant deliverables for Chlamydia disease intervention. Guidance regarding the funding consequences of this change in practice would be appreciated.

## Response:

As stated previously, expedited partner therapy is an option for Chlamydia partner management and NYSDOH expects that partner services activities will continue to be performed for Chlamydia. Consequently, the existing county contracts for disease intervention services will still be enforced. As noted in the comment, these contracts and work plans are negotiated between the BSTDC and the county and therefore counties may request to re-negotiate these plans taking into consideration the impact of expedited partner therapy on partner services activities.

## Comment # 4

To the extent that providers adopt expedited partner therapy for Chlamydia, partners will present to local health districts with prescriptions labeled 'E.P.T.' requesting free medication. Some of these partners will not be interested in an STD examination or in an interview by nurses or STD partner services staff. Few, if any, local health districts in NYS have the ability to operate a free retail pharmacy operation.

## Response:

It should be noted that currently, partners exposed to a sexually transmitted infection present to local health department clinics for treatment and may refuse an examination and/or interview. Treatment on the basis of exposure is a critical public health strategy for preventing disease transmission. The cost of treatment with azithromycin is minimal and local health departments may realize additional savings in the cost of purchasing azithromycin through federal programs that provide access to public health pricing, e.g. Office of Pharmacy Affairs 340B program. Finally, New York State Public Health Law, Article 6 funding enables local health departments to recover some of the costs of treatment.

## Comment # 5

NYSDOH should have consulted with more local health districts in drafting this regulation.

## Response:

NYSDOH broadly solicited comments on the proposed regulations. As stated in the regulatory impact statement, NYSDOH consulted with a number of professional organizations, including the New York State Association of County Health Officers, as well as local governments to seek input during the drafting of these regulations.

## Comment # 6

It is recommended that NYSDOH post all comments in real-time in order to permit greater transparency in NYS governmental operations, reduce potential for duplicate comments, and improve the quality of the regulations.

## Response:

NYSDOH consulted widely in the development of these regulations in order to ensure representation of those consumers and stakeholders who would be impacted by the proposed rules. This consultation process promoted transparency, discussion, and quality of the regulations. Finally, this Assessment of Public Comment serves to inform all parties of the comments that were submitted in response to these regulations and the NYSDOH response.

## Comment # 7

Expedited Partner Therapy should apply to Neisseria gonorrhoeae as well as Chlamydia trachomatis infections as has been implemented in other states.

The proposed regulation protects pharmacists who dispense medication for EPT but does not specifically include language that affords the same protection to health department officials who provide EPT. It is recommended that the proposed regulation be amended to include protection for state and local health departments against liability.

## Response:

The legislation does not provide an option to use EPT for gonorrhea.

The regulations state that health care practitioners and pharmacists who comply with the requirements of section 2312 shall not be subject to civil or criminal liability under these regulations. A health care practitioner is defined as a physician, midwife, nurse practitioner, physician assistant or other person authorized under Title 8 of the Education Law to diagnose and treat Chlamydia infections. Such health care practitioners who work in state and local health departments are also protected from civil and criminal liability. Public health officials who are not licensed health care practitioners, such as public health advisors, are not permitted by Title 8 of the State Education law to prescribe or dispense drugs and therefore are not permitted to practice expedited partner therapy.

---



---

## Insurance Department

---



---

### EMERGENCY RULE MAKING

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

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

**Filing No.** 976

**Filing Date:** 2010-09-23

**Effective Date:** 2010-09-23

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

**Action taken:** Amendment of Part 136 (Regulation 85) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 314, 7401(a) and 7402(n)

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

**Specific reasons underlying the finding of necessity:** The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards of behavior with regard to investment of the Common Retirement Fund's assets, conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, and July 29, 2010. A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Regulation No. 85 needs to remain effective for the general welfare.

**Subject:** Standards for the management of the New York State Retirement Systems.

**Purpose:** To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

**Text of emergency rule:** Section 136-2.2 is amended to read as follows:  
§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

[(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

[(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] Fund.

[(d) OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

(c) Family member shall mean any person living in the same household

as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.

(d) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.

[f] (e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] Fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.

(g) OSC shall mean the Office of the State Comptroller.

[(g)] (h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h)] (i) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i)] Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

(i) Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

[(j)] (k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] Fund, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] Fund. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

[(k)] (l) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4 (d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] Fund, to [address] preclude potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] Fund, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] the Fund shall not [engages, hires, invests with, or commits] engage, hire,

invest with or commit to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] Fund. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5 (g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] Retirement System's financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] Fund to investment managers, consultants or advisors, and third party administrators;

[(4)] disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] Fund's investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] Fund every three years by a qualified unaffiliated person.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. INS-11-10-00002-P, Issue of March 17, 2010. The emergency rule will expire November 21, 2010.

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

#### Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 314 vests the Superintendent with the authority to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with sections 310, 311 and 312 of the Insurance Law. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct capacities. The first is as regulator of the insurance industry. The second is as a statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies.

Section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Section 314 of the Insurance Law authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This amendment, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Section 314, which provides the Superintendent with the powers to promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

3. Needs and benefits: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common

Retirement Fund (“the Fund”), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding “pay to play” practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund’s control environment is insufficient to protect the integrity of the state employees’ retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund’s members and beneficiaries, and safeguard the integrity of the Fund’s investments. Further, the amendment defines “placement agent or intermediary” in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. Investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Local government mandates: The amendment imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: No additional paperwork should result from the prohibition imposed by the amendment.

7. Duplication: This amendment will not duplicate any existing state or federal rule.

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining “placement agent” in more general terms.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor’s Office, Comptroller’s Office and Finance Department. These entities agreed with the concerns expressed by the Department and intend to explore remedies most appropriate to the pension funds that they represent.

Initially, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments. The proposed rule was published in the State Register on March 17, 2010. A Public Hearing was held on April 28, 2010. The following comments were received:

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

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

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

The Securities Industry and Financial Markets Association (“SIFMA”), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the

access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining “placement agent” in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments.

9. Federal standards: The Securities and Exchange Commission issued a “Pay-To-Play” regulation for financial advisors on July 1, 2010, which may have an impact on the issues addressed in the proposed rule.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. The ban needs to remain in effect on an emergency basis until such time as the amended regulation can be made permanent.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This amendment strengthens standards for the management of the New York State and Local Employees’ Retirement System and New York State and Local Police and Fire Retirement System (collectively, “the Retirement System”), and the New York State Common Retirement Fund (“the Fund”). The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund (“the Fund”), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding “pay to play” practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund’s control environment is insufficient to protect the integrity of the state employees’ retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund’s members and beneficiaries, and safeguard the integrity of the Fund’s investments. Further, the amendment defines “placement agent or intermediary” in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the amendment. The State Comptroller is not a “small business” as defined in section 102(8) of the State Administrative Procedure Act.

This amendment will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The proposal will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the amendment is also directed to placement agents, who as a result of this proposal, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

The amendment bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who will lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, as a result of recent allegations regarding “pay to play” practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund’s members and beneficiaries and to safeguard the integrity of the Fund’s investments.

This amendment will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this amendment is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

2. Compliance requirements: None.

3. Professional services: Investment managers, consultants and advisors who provide services to the fund, and are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may need to employ other professional services.

4. Compliance costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. However, investment managers, consultants and advisors who provide services to the fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Economic and technological feasibility: The rule does not impose any economic and technological requirements on affected parties, except for placement agents who will lose the opportunity to earn profits in connection with investments by the Fund.

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments.

7. Small business and local government participation: In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor’s Office, Comptroller’s Office and Finance Department.

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

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

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(13) will be affected by this proposal. The amendment bans the use of placement agents in connection with investments by the New York State Common Retirement Fund (“the Fund”), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This amendment will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The amendment does not adversely impact rural areas.

5. Rural area participation: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

#### **Job Impact Statement**

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. The amendment bans investment

managers from using placement agents in connection with investments by the New York State Common Retirement Fund (“the Fund”). The amendment may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund’s members and beneficiaries, and to safeguard the integrity of the Fund’s investments.

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

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

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

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

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

The Securities Industry and Financial Markets Association (“SIFMA”), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining “placement agent” in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments.

The Department met with representatives from SIFMA on June 28th to gain further understanding of some of the issues raised in opposition to the proposed rule. We subsequently requested additional information from SIFMA. SIFMA provided the Department with additional information based upon actions taken and/or contemplated by pension fund regulators in other States. The Department will continue to assess the comments that have been received and any other information that may be submitted.

The Department is also evaluating the extent to which its proposed rule conforms with the Securities and Exchange Commission’s “Pay-To-Play” regulation for financial advisors that was issued on July 1, 2010. This regulation is effective on September 13, 2010, with full compliance by March 14, 2011 for all affected investment advisers.

We are continuing to research best practices in use with large U.S. public pension funds before any further action will be taken with regards to the proposed rule. A number of policies/practices being researched include limits on the amount of business that may be placed through any single

placement agent, and the feasibility of monetary penalties for investment managers/advisors who seek to circumvent procedures that are established to mitigate the risk of undue influence by politically connected persons.

## Long Island Power Authority

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Authority's Tariff for Electric Service

**I.D. No.** LPA-41-10-00007-P

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

**Proposed Action:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service with regard to miscellaneous provisions.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** The Authority's Tariff for Electric Service.

**Purpose:** To modify the Authority's Tariff for Electric Service with regard to miscellaneous provisions.

**Public hearing(s) will be held at:** 10:00 a.m., Dec. 1, 2010 at H. Lee Denison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; 2:00 p.m., Dec. 1, 2010 at Long Island Power Authority, 333 Earle Ovington Blvd., 2nd Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority ("Authority") is considering a proposal to make miscellaneous revisions its Tariff for Electric Service ("Tariff"), including: to modify LIPA's Tariff to update the costs of line extensions, services, and supply lines for new customers, as well as trenching and backfilling for new construction and create a separate "Statement of Distribution Facility Charges" that will be appended to the Tariff; to authorize net metering for farm waste systems using anaerobic digesters with installed capacity up to 1,000 kW; to memorialize LIPA's pole attachment fee for certain attachments to LIPA's poles; and to delete obsolete and expired provisions from the Tariff. The Authority may approve, modify, or reject, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, New York 11553, (516) 222-7700, email: amccabe@lipower.org

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

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

#### 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.

## Office of Parks, Recreation and Historic Preservation

### NOTICE OF ADOPTION

#### Fees and Charges of \$100 or More for Use of State Parks Historic Sites, Parks and Recreational Facilities

**I.D. No.** PKR-31-10-00002-A

**Filing No.** 1007

**Filing Date:** 2010-09-27

**Effective Date:** 2010-10-13

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

**Action taken:** Repeal of Part 381 and addition of new Part 381 to Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, sections 3.09(2)(8) and 13.15

**Subject:** Fees and charges of \$100 or more for use of State Parks historic sites, parks and recreational facilities.

**Purpose:** To update the State Parks fee schedule and increase patron fees and charges that are \$100 or more.

**Text or summary was published in** the August 4, 2010 issue of the Register, I.D. No. PKR-31-10-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

#### Assessment of Public Comment

The Office of Parks, Recreation and Historic Preservation (State Parks) received the following substantive comments on the updated fee rule:

1. Most of the fees should be higher than those set out in the rule.

As noted in the Regulatory Impact Statement, the proposed fees were reviewed by the Division of the Budget and the Governor's Office of Regulatory Reform, and State Parks

... worked with each of the regional offices to make [the fees] comparable where possible throughout the system (e.g., cabin fees and charges). Otherwise, they reflect the local private sector markets within each region (e.g., seasonal lodging fees). Factors such as size, design, location, demand and number of people who could be accommodated at a recreational site were considered in determining appropriate fees. Discounted rates are established across the board for public and non-profit groups.

2. The term "nonprofit" should be clarified.

The term refers to an organization or association that does not distribute its surplus funds to owners or shareholders, but instead uses them to help pursue its lawful goals, including, for example, self-preservation, expansion and future plans. A nonprofit does not have owners and may have members or boards but these entities do not sell shares to others or benefit economically in any taxable way. A nonprofit may or may not be incorporated. Also, for purposes of this rule the term includes government agencies.

3. Some fees are too general in nature, and the fees set in the Regions should be confirmed by the Commissioner.

State Parks' Albany Office reviews the fee schedule set by each Region and establishes the annual comprehensive Master Fee Schedule. State Parks fiscal policies outline procedures for collection and deposit of permit revenues and income derived from donations, sponsorships, special events and special activities. The State Administrative Procedure Act (SAPA) excludes negotiated fees from the definition of a rule. SAPA § 102(2)(b)(xi)(4).

4. The rule should describe employee housing.

This rule only addresses lodging for patrons. Employee housing is

addressed under separate State Parks Guidance and the Division of the Budget's Policy and Reporting Manual.

## Office for People with Developmental Disabilities

### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Amendments to the Supervised Residential Habilitation Efficiency Adjustment for IRAs and CRs

**I.D. No.** PDD-41-10-00025-EP

**Filing No.** 1009

**Filing Date:** 2010-09-28

**Effective Date:** 2010-10-01

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

**Proposed Action:** Amendment of sections 635-10.5 and 671.7 of Title 14 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** Effective October 1, 2010, OPWDD adopted an amendment to regulations that establish an efficiency adjustment for supervised Individualized Residential Alternative (IRA) and supervised Community Residence (CR) facilities. This adjustment will impose a reduction in the reimbursement.

OPWDD is making a safeguard available to providers in this emergency regulation. It will allow the Commissioner discretion to waive all or a portion of two components of the reduction in instances where a provider can demonstrate that the imposition of the reduction(s) would jeopardize the continued operation of the IRA(s) and/or CR(s). OPWDD has become aware that there are a small number of providers who may not be able to sustain operations with the imposition of the reductions. This could potentially translate into facility closings with potentially devastating effects on the health, safety and welfare of individuals who live in the facilities.

OPWDD seeks to avoid compromising essential services by the promulgation of these emergency regulations.

**Subject:** Amendments to the supervised residential habilitation efficiency adjustment for IRAs and CRs.

**Purpose:** To allow OPWDD to waive all or a portion of two components of reductions in reimbursement in specific circumstances.

**Public hearing(s) will be held at:** 10:30 a.m., Nov. 30, 2010 and Dec. 1, 2010 at OPWDD, 44 Holland Ave., Counsel's Office Conference Rm., 3rd Fl., Albany, NY.

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

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

**Text of emergency/proposed rule:** Subparagraph 635-10.5(b)(18)(ii) is amended by the addition of a new clause (d) as follows:

*(d) The commissioner at his or her discretion may waive all or a portion of the NPS reduction as described in subclause (a)(1) of this subparagraph and/or the Administrative reduction as described in subclause (a)(2) of this subparagraph for a provider upon the provider demonstrating that the imposition of the reduction(s) would jeopardize the continued operation of the IRA(s) and/or Community Residence(s).*

Paragraph 671.7(a)(11) is amended by the addition of a new subparagraph (iv) as follows:

*(iv) The commissioner at his or her discretion may waive all or a portion of the NPS reduction as described in clause (i)(a) of this subparagraph and/or the Administrative reduction as described in clause (i)(b) of this subparagraph for a provider upon the provider demonstrating that*

*the imposition the reduction(s) would jeopardize the continued operation of the IRA(s) and/or Community Residence(s).*

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 26, 2010.

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

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

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

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

#### Regulatory Impact Statement

1. Statutory authority:

a. OPWDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OPWDD.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments are necessary to make an adjustment to the reimbursement methodology applicable to Home and Community Based Services (HCBS) waiver residential habilitation services provided in supervised Individualized Residential Alternatives (IRAs) and supervised Community Residences (CRs).

3. Needs and benefits: Effective October 1, 2010, OPWDD finalized regulations to implement an efficiency adjustment for supervised IRAs and supervised CRs. OPWDD has become aware that the implementation of the full efficiency adjustment may cause financial difficulties for a small number of providers. These regulations would address this concern by adding a provision to allow OPWDD to waive all or a portion of two components of the efficiency adjustment. In these cases, the provider would need to demonstrate that the imposition of the reduction or reductions would jeopardize the continued operation of the IRA(s) and/or CRs.

4. Costs:

a. Costs to the Agency and to the State and its local governments. OPWDD does not know exactly how many providers meet the qualifications for the restoration of revenue and the level of restoration. However, OPWDD has information that that a small number of providers may qualify for the waiver of the efficiency adjustments and expects that the cost to the State will be minimal.

There will be no fiscal impact on local governments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs to private regulated parties. Providers that apply for a reduction of the efficiency adjustment may incur administrative expenses in preparing the applications. OPWDD has no way of quantifying these costs, but expects them to be small because providers should already be aware of their financial situation.

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

6. Paperwork: Providers who are seeking a reduction in the efficiency adjustment will need to complete paperwork necessary to demonstrate that continued operation of the IRA(s) and/or CR(s) would be jeopardized.

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

8. Alternatives: OPWDD had considered implementing the original efficiency adjustment without amendment. However, OPWDD realized that a small number of providers could have potentially been severely hampered in continuing to operate the residential facilities with the reduced funding and OPWDD considered this unacceptable.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These emergency amendments are filed to be effective on October 1, 2010 to coincide with the effective date of the original residential habilitation efficiency adjustment regulations. Providers at financial risk can apply to OPWDD as described above.

#### Regulatory Flexibility Analysis

1. Effect on small business: These proposed regulatory amendments will apply to voluntary non-profit agencies that provide HCBS waiver res-

idential habilitation services in supervised Individualized Residential Alternatives (IRAs) and supervised Community Residences (CRs) to persons with developmental disabilities in New York State. As of December 2009, approximately 19,000 individuals received residential habilitation services in supervised IRAs and supervised CRs in New York State. There are 253 voluntary providers which operate supervised IRAs and/or supervised CRs.

The OPWDD has determined, through a review of the certified cost reports, that while most services are provided by non-profit agencies which employ more than 100 people overall, many of the services operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on these small businesses. These amendments allow providers to demonstrate that the imposition of the NPS or Administrative reduction(s) would jeopardize the continued operation of the IRA(s) and/or Community Residence(s), and allow OPWDD to waive all or a portion of the reduction in cases where providers make such a demonstration. This would result in stabilizing funding to providers in that circumstance. These amendments may result in some administrative costs for providers that apply for a waiver of the adjustments, but these costs will be offset by the increased revenue these providers will receive if the waiver is granted.

2. Compliance requirements: Providers that seek to avail themselves of the opportunity to request that OPWDD waive all or a portion of the NPS reduction and/or Administrative reduction will need to submit an application to OPWDD.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports certified by certified accountants. The proposed amendments do not alter this requirement. It will not be necessary for providers to engage the services of certified accountants to apply. Therefore, no additional professional services are required as a result of these amendments.

4. Compliance costs: Providers who choose to apply may incur some minor costs in the preparation of the application materials. If OPWDD agrees to waive all or a portion of the reductions, the provider will receive additional reimbursement from OPWDD as an offset to the reductions.

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and reimbursement issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of the regulations is to minimize adverse economic impact of the supervised residential habilitation efficiency adjustment if the economic impact is significant enough to jeopardize the continued operation of residential facilities. The regulations themselves will result in a positive economic impact for providers that qualify for a waiver of all or a portion of the reductions.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. However, since the regulations result in a positive economic impact for qualified providers this does not apply.

7. Small business participation: OPWDD had extensive input from providers and provider associations in the development of the regulations that implemented the supervised residential habilitation efficiency adjustment. Providers were sent information about the proposed regulations to implement the efficiency adjustment and had the opportunity to comment.

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

A rural area flexibility analysis for these proposed amendments is not being submitted because the amendments will not impose any adverse impact or reporting, record keeping or other compliance requirements on public or private entities in rural areas. There will be no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

The regulations amend the supervised residential habilitation efficiency adjustment for Individualized Residential Alternatives and Community Residences to allow OPWDD to waive all or a portion of two components of reductions in reimbursement in specific circumstances. The amendments will have no adverse impacts on public or private entities in rural areas.

#### **Job Impact Statement**

A Job Impact Statement for these proposed amendments is not being submitted because OPWDD does not anticipate any adverse impact on jobs and employment opportunities.

These regulations amend the supervised residential habilitation efficiency adjustment for Individualized Residential Alternatives and Community Residences to allow OPWDD to waive all or a portion of two components of reductions in reimbursement in specific circumstances. The regulations themselves will result in a positive economic impact for

some providers. Therefore, the amendments should have no adverse effect on jobs and employment opportunities in New York State.

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

### **Reimbursement of Equipment and Property Insurance**

**I.D. No.** PDD-41-10-00024-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 635 and 671 of Title 14 NYCRR.

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

**Subject:** Reimbursement of equipment and property insurance.

**Purpose:** To revise and streamline the methodology for reimbursement of equipment and property insurance.

**Public hearing(s) will be held at:** 10:30 a.m., Nov. 30, 2010 and Dec. 1, 2010 at OPWDD, 44 Holland Ave., Counsel's Office Conference Rm., Albany, NY.

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

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

**Text of proposed rule:** Paragraph 635-6.1(b)(2) is amended to read as follows:

(2) the allowability of costs of *capital* moveable and personal property obtained from related and unrelated parties, *other than capital moveable equipment and personal property of an IRA or group day habilitation program*; and

Subparagraph 635-10.5(b)(8)(iv) is amended and new subparagraph (v) is added to read as follows:

(iv) Newly certified sites. A newly certified site is an IRA whose reimbursable costs are not already included in the monthly price and at which a provider is initially approved to deliver services pursuant to an operating certificate issued by [OMRDD] OPWDD. A newly certified site's annual total reimbursable residential habilitation costs and certified capacity shall be included in the monthly price as calculated in accordance with subparagraph (ii) of this paragraph *except for capital moveable equipment and property insurance components after December 31, 2010*. If two countable...

Note: rest of subparagraph remains unchanged.

(v) Effective January 1, 2011, *capital moveable equipment and property insurance shall become fixed values contained in the cost category Other Than Personal Services.*

(a) *The fixed value amounts for each--capital moveable equipment and property insurance--shall be determined by OPWDD after reviewing the amounts, if any and as available, reported in a provider's annual cost reports for its supervised IRA sites for three successive years. For Region I reporting providers, the three fiscal years ending 6/30/2007, 6/30/2008 and 6/30/2009 shall be reviewed. For Region II and Region III reporting providers, the three calendar years 2007, 2008, and 2009 shall be reviewed. The values for capital moveable equipment and the values for property insurance shall be analyzed in terms of bed capacity and detrended to base year values. The bed capacities shall be those reflected in the prices on the last day of the respective reporting years. The highest value for per bed detrended capital moveable equipment and the highest value for per bed detrended property insurance shall be selected. OPWDD will not select any value that exceeds either of the other two values by more than 20% if that value is determined not to be representative of the provider's costs. The selected values shall then be adjusted on a pro rata basis to correspond to the bed capacities reflected in the January 1, 2011, price. For providers which have not operated any supervised IRAs or supervised CRs, the annual budgeted capital moveable equipment and property insurance amounts approved by OPWDD will be divided by the units of service OPWDD authorized for the current price period.*

(b) *For providers which operate both supervised IRAs and supervised Community Residences, the capital moveable equipment values will be the combined amounts, if any and as available, reported in the annual cost reports for the supervised IRAs and the supervised CRs for each of the years. The property insurance values will be the combined amounts, if any and as available, reported in the annual cost reports for the supervised IRAs and the supervised CRs for each of the years. Associated*

bed capacities for the selected values shall be the combined bed capacities as reflected in the prices of the supervised IRAs and in the fees of the supervised CRs.

(c) As of January 1, 2011, for Region II and Region III reporting providers, or July 1, 2011, for Region I reporting providers, the fixed values for capital moveable equipment and property insurance shall be subject to trend factor increases applied to the operating components of the price.

(d) The residential habilitation efficiency adjustment which was effective October 1, 2010, and any efficiency adjustments effective after December 31, 2010, shall not be applied to the capital moveable equipment and property insurance components of the supervised IRA price.

(e) OPWDD may opt to re-examine the capital moveable equipment and property insurance components of the supervised IRA price for purposes of recalculation after December 31, 2015, for Region II and Region III reporting providers, or after June 30, 2016, for Region I reporting providers.

Subparagraph 635-10.5(b)(9)(iv) is amended and new subparagraph (v) is added to read as follows:

(iv) Newly certified sites. A newly certified site is an IRA whose reimbursable costs are not already included in the monthly price and at which a provider is initially approved to deliver services pursuant to an operating certificate issued by [OMRDD] OPWDD. A newly certified site's annual total reimbursable residential habilitation costs and certified capacity shall be included in the monthly price as calculated in accordance with subparagraph (ii) of this paragraph except for capital moveable equipment and property insurance components after December 31, 2010. If two countable...

Note: rest of subparagraph remains unchanged.

(v) Effective January 1, 2011, capital moveable equipment and property insurance shall become fixed values contained in the cost category *Other Than Personal Services*.

(a) The fixed value amounts for each--capital moveable equipment and property insurance--shall be determined by OPWDD after reviewing the amounts, if any and as available, reported in a provider's annual cost reports for its supportive IRA sites for three successive years. For Region I reporting providers, the three fiscal years ending 6/30/2007, 6/30/2008 and 6/30/2009 shall be reviewed. For Region II and Region III reporting providers, the three calendar years 2007, 2008, and 2009 shall be reviewed. The values for capital moveable equipment and the values for property insurance shall be analyzed in terms of bed capacity as reflected in the price and detrended to base year values. The bed capacities shall be those reflected in the prices on the last day of the respective reporting years. The highest value for per bed detrended capital moveable equipment and the highest value for per bed detrended property insurance shall be selected. OPWDD will not select any value that exceeds either of the other two values by more than 20% if that value is determined not to be representative of the provider's costs. The selected values shall then be adjusted on a pro rata basis to correspond to the bed capacities reflected in the January 1, 2011, price. For providers which have not operated any supportive IRAs or supportive CRs, the annual budgeted capital moveable equipment and property insurance amounts approved by OPWDD will be divided by the units of service OPWDD authorized for the current price period.

(b) For providers which operate both supportive IRAs and supportive CRs, the capital moveable equipment values will be the combined amounts, if any and as available, reported in the annual cost reports for the supportive IRAs and the supportive CRs for each of the years. The property insurance values will be the combined amounts, if any and as available, reported in the annual cost reports for the supportive IRAs and the supportive CRs for each of the years. Associated bed capacities for the selected values shall be the combined bed capacities as reflected in the prices of the supportive IRAs and in the fees of the supportive CRs on the last day of the respective reporting year.

(c) As of January 1, 2011, for Region II and Region III reporting providers, or July 1, 2011, for Region I reporting providers, the fixed values for capital moveable equipment and property insurance shall be subject to trend factor increases applied to the operating components of the price.

(d) Efficiency adjustments effective after December 31, 2010, shall not be applied to the capital moveable equipment and property insurance components of the supportive IRA price.

(e) OPWDD may opt to re-examine the capital moveable equipment and property insurance components of the supportive IRA price for purposes of recalculation after December 31, 2015, for Region II and Region III reporting providers, and after June 30, 2016, for Region I reporting providers.

Clause 635-10.5(c)(4)(vi)(b) is replaced as follows:

(b) Effective January 1, 2011, capital moveable equipment and property insurance shall become fixed values contained in the cost category *Other Than Personal Services*.

(1) The fixed value amounts for each--capital moveable equipment and property insurance--shall be determined by OPWDD after reviewing the amounts, if any and as available, reported in a provider's annual cost reports for its group day habilitation sites for three successive years. For Region I reporting providers, the three fiscal years ending 6/30/2007, 6/30/2008 and 6/30/2009 shall be reviewed. For Region II and Region III reporting providers, the three calendar years 2007, 2008, and 2009 shall be reviewed. The values for capital moveable equipment and the values for property insurance shall be analyzed in terms of the greater of annual cost report reported units of services or units billed for the respective period and detrended to base year values. The highest value for per unit detrended capital moveable equipment and the highest value for per unit detrended property insurance shall be selected. OPWDD will not select any value that exceeds either of the other two values by more than 20% if that value is determined not to be representative of the provider's costs. The selected values shall then be adjusted on a pro rata basis to correspond to the units of service as reflected in the January 1, 2011, price. For providers which have not operated any group day habilitation services, the annual budgeted capital moveable equipment and property insurance amounts approved by OPWDD will be divided by the units of service OPWDD authorized for the current price period.

(2) As of January 1, 2011, for Region II and Region III reporting providers or July 1, 2011, for Region I reporting providers, the fixed value for capital moveable equipment and property insurance shall be subject to trend factor increases applied to the operating components of the price.

(3) Efficiency adjustments effective after December 31, 2010, shall not be applied to the capital moveable equipment and property insurance components of the group day habilitation price.

(4) OPWDD may opt to re-examine the capital moveable equipment and property insurance components of the group day habilitation price for purposes of recalculation after December 31, 2015, for Region II and Region III reporting providers, and after June 30, 2016, for Region I reporting providers.

Note: rest of subparagraph remains unchanged.

Paragraph 671.7(a)(7) is amended as follows:

(7) The capital component of the community residence price shall be equal to the amount of total allowable annual property, fixed equipment, and start-up costs pursuant to section 686.13(b)(3) and Subpart 635-6 of this Title divided by 12 and then divided by the total certified capacities of these sites less any certified temporary use bed(s). At the onset of each price period, [OMRDD] OPWDD shall review the capital component for allowable material changes and if said changes conform to the requirements of section 686.13(b)(3) and Subpart 635-6 of this Title, the capital component shall be revised to reflect said changes.

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

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

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

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

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

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

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

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

2. Legislative objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law by streamlining the reimbursement of capital equipment and property insurance costs. Considered as "other than personal service" expenses (OTPS), they will then be eligible for trend factor adjustments normally applied to operating costs in order to reflect annual increases.

3. Needs and benefits: Historically, capital equipment and property insurance have been grouped with capital expenditures and have been

subject to an annual review. Price sheets have been updated annually to reflect the actual costs incurred by providers or depreciation expense recognized. The document utilized for the review was the Consolidated Fiscal Report (CFR) for the prior two year period. Accordingly, reimbursement incorporates a two year lag. This process will change with these regulations. Provider capital equipment and property insurance will be regarded as fixed costs and categorized as "other than personal service" expenses (OTPS). When trend factors are approved for operating costs, these components will be trended by virtue of the OTPS classification.

This measure is one of many streamlining efforts being undertaken by OPWDD. After the initial conversion, the annual updating process for reimbursing these components will be eliminated; however, there will be an OPWDD review of funding levels for the 2016 and 2016/17 price periods. This streamlining initiative has the effect of providing predictability to providers in the reimbursement of provider equipment and property insurance costs.

4. Costs:

a. Costs to the Agency and to the State and its local governments: OPWDD expects that the amendments will not materially change either the costs or the amounts in reimbursement of these equipment expenses or property insurance.

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

b. Costs to private regulated parties: As stated, amounts reimbursed to providers for these equipment expenses and property insurance once re-characterized as fixed costs are expected to remain generally constant. In addition, because the amount included in the price will be based on the highest representative costs from a three year period, providers should not be adversely affected by this change.

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

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

6. Paperwork: There is no new paperwork required.

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

8. Alternatives: Currently provider-paid capital equipment and property insurance have been grouped with capital expenditures and have been subject to an annual review. Price sheets have been updated annually to reflect the actual costs incurred by providers or depreciation expense recognized. There is no alternative that would streamline this process without the changes implemented by the proposal and adoption of this rulemaking.

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

10. Compliance schedule: The regulation is expected to become effective January 1, 2011.

#### **Regulatory Flexibility Analysis**

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which operate Individualized Residential Alternatives (IRAs), Community Residences (CRs) or Day Habilitation services for persons with developmental disabilities. While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities and services operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. As of September 2010, OPWDD estimates that approximately 543 provider agencies operate these types of facilities or services.

The proposed amendments have been reviewed by OPWDD in light of their impact on these small businesses and on local governments. OPWDD has determined that these amendments will not have any negative effects on these small business providers of IRAs, CRs or Day Habilitation services, and that they will continue to provide appropriate funding for the delivery of such services.

Historically, capital equipment and property insurance for these services have been grouped with capital expenditures and have been subject to an annual review. Price sheets have been updated annually to reflect the actual costs incurred by providers or depreciation expense recognized. The document utilized for the review was the Consolidated Fiscal Report (CFR) for the prior two year period. Accordingly, reimbursement incorporates a two year lag. This process will change with these regulations. Provider capital equipment and property insurance will be regarded as fixed costs and categorized as "other than personal service" expenses (OTPS). When trend factors are approved for operating costs, these components will be trended by virtue of the OTPS classification.

This measure is one of many streamlining efforts being undertaken by OPWDD. After the initial conversion, the annual updating process for reimbursing these components will be eliminated; however, there will be an OPWDD review of funding levels for the 2016 and 2016/17 price periods. This streamlining initiative has the effect of providing predictability to providers in the reimbursement of provider equipment and property insurance costs. In addition, because the amount included in the price will be based on the highest representative costs from a three year period, providers should not be adversely affected by this change.

2. Compliance requirements: There will be no compliance requirements as a result of these proposed amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The proposed amendments do not alter this requirement. Therefore, no additional professional services are required as a result of these amendments. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: As discussed in the Regulatory Impact Statement, there are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments.

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: OPWDD expects that the amendments will not result in any adverse economic impacts. As stated in the Regulatory Impact Statement, amounts reimbursed to providers for these equipment expenses and property insurance once re-characterized as fixed costs are expected to remain generally constant. The amendments will have no impact on local governments. In addition, because the amount included in the price will be based on the highest representative costs from a three year period, providers should not be adversely affected by this change.

7. Small business and local government participation: The changes implemented by these proposed regulations have been discussed with providers of the affected services. Presentations were made to providers and their representatives at meetings of the Provider Associations (most recently on September 20, 2010) and in various meetings of providers. In particular, providers have had input on the method used to translate current expenses for capital equipment and insurance into fixed costs for each provider. Small business providers have therefore been consulted, and have had opportunity for input in the development of the proposed rule making.

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

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The proposed amendments will revise the reimbursement methodologies for the referenced facilities in order to streamline the way capital equipment and property costs are reimbursed. They are not expected to result in any economic impacts, either for the state or for providers of the affected services, including providers with operations in rural areas.

Further, the amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because the amount included in each provider's price will be based on that particular provider's costs.

OPWDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OPWDD's reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services in order to streamline the way capital equipment and property costs are reimbursed. The changes are not expected to have any economic impacts and should therefore not result in any changes to current staffing levels nor have any effect on the numbers of jobs and employment opportunities in New York State.

---



---

## Public Service Commission

---



---

### NOTICE OF ADOPTION

#### Major Gas Rate Filing

**I.D. No.** PSC-16-10-00025-A

**Filing Date:** 2010-09-22

**Effective Date:** 2010-09-22

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

**Action taken:** On 9/16/10, the PSC adopted an order approving Consolidated Edison Company of New York Inc.'s three year gas rate plan.

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

**Subject:** Major gas rate filing.

**Purpose:** To approve Consolidated Edison Company of New York Inc.'s three year gas rate plan.

**Substance of final rule:** The Commission, on September 16, 2010, adopted an order approving Consolidated Edison Company of New York Inc.'s three year gas rate plan, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(09-G-0795SA1)

### NOTICE OF ADOPTION

#### Major Steam Rate Filing

**I.D. No.** PSC-16-10-00026-A

**Filing Date:** 2010-09-22

**Effective Date:** 2010-09-22

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

**Action taken:** On 9/16/10, the PSC adopted an order approving Consolidated Edison Company of New York Inc.'s three year steam rate plan.

**Statutory authority:** Public Service Law, section 80(10)

**Subject:** Major steam rate filing.

**Purpose:** To approve Consolidated Edison Company of New York Inc.'s three year steam rate plan.

**Substance of final rule:** The Commission, on September 16, 2010, adopted an order approving Consolidated Edison Company of New York Inc.'s three year steam rate plan, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(09-S-0794SA1)

### NOTICE OF ADOPTION

#### Cost Allocation for Consolidated Edison's East River Repowering Project

**I.D. No.** PSC-22-10-00005-A

**Filing Date:** 2010-09-22

**Effective Date:** 2010-09-22

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

**Action taken:** On 9/16/10, the PSC adopted an order determining Consolidated Edison Company of New York Inc.'s cost allocations for the East River Repowering Project.

**Statutory authority:** Public Service Law, sections 65, 66, 79, 80 and 81

**Subject:** Cost allocation for Consolidated Edison's East River Repowering Project.

**Purpose:** To determine cost allocations for the East River Repowering Project.

**Substance of final rule:** The Commission, on September 16, 2010, adopted an order determining Consolidated Edison Company of New York Inc.'s cost allocations for the East River Repowering Project, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(09-S-0794SA2)

### NOTICE OF ADOPTION

#### Direct Load Control Program

**I.D. No.** PSC-23-10-00007-A

**Filing Date:** 2010-09-22

**Effective Date:** 2010-09-22

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

**Action taken:** On 9/16/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to expand and make permanent its residential and small business central air conditioning direct load control programs.

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

**Subject:** Direct Load Control Program.

**Purpose:** To make permanent the residential and small business central air conditioning direct load control program.

**Substance of final rule:** The Commission, on September 16, 2010, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to expand and make permanent its residential and small business central air conditioning direct load control programs, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(10-E-0229SA1)

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

**Consolidated Edison Company of New York, Proposes to Retain 100% of the Excess Dividend Refund and a Portion of the GRT Refund**

**I.D. No.** PSC-41-10-00017-P

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

**Proposed Action:** The Commission is considering the petition of Consolidated Edison Company of New York, Inc. for permission to retain \$25.5 million the Excess Dividend Tax refund, and to retain 14%, net of cost to achieve, of a \$10.6 million Gross Receipts Tax (GRT) refund.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** Consolidated Edison Company of New York, proposes to retain 100% of the Excess Dividend refund and a portion of the GRT refund.

**Purpose:** To allow Consolidated Edison Company of New York, Inc. to retain a portion of tax refunds.

**Public hearing(s) will be held at:** 10:00 a.m., Dec. 1, 2010 at Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case No. 10-E-0308.

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

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

**Substance of proposed rule:** The Commission is considering a filing by Consolidated Edison Company of New York, Inc. (Company) for permission to retain 100% of the Excess Dividend Tax refund related to the sale of certain generating assets. The Company further proposes to retain 14%, net of cost to achieve a \$10.6 million Gross Receipts Tax refund and distribute the remaining 86% to the Company's consumers. The Commission may approve, reject, or modify, in whole or in part, the request of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(10-E-0308SP1)

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

**Require Prior Notice of Any Transaction Which Would Impair the Financial Strength of New York Affiliates**

**I.D. No.** PSC-41-10-00008-P

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

**Proposed Action:** The Commission instituted a proceeding ordering Entergy Corporation, or any of its New York operating affiliates, to show cause why they should not be required to provide satisfactory notice of certain transactions to the Department of Public Service.

**Statutory authority:** Public Service Law, sections 2(13), 5(1)(b), 11, 19, 66, 67, 68, 69, 69-a, 70, 72, 72-a, 75, 76, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118 and 119

**Subject:** To require prior notice of any transaction which would impair the financial strength of New York affiliates.

**Purpose:** To provide prior notice of any transaction which would impair the financial strength of New York affiliates.

**Substance of proposed rule:** The Commission instituted a proceeding ordering Entergy Corporation, or any of its New York operating affiliates (together referred to Entergy Owners), to show cause why they should not be required to provide satisfactory notice to the Department of Public Service at least sixty days prior to any contemplated transactions, which would impair or jeopardize the financial strength of any or all New York operating affiliate[s]. Entergy Owners filed a response opposing such notice requirements. The Commission may require Entergy Owners to show cause as proposed in the order or may take other action related to this matter.

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

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

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

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

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

(10-E-0402SP1)

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

**Demand Response Programs: Rider S, Rider T, Rider U, Residential Smart Appliance Program and Network Relief Program**

**I.D. No.** PSC-41-10-00009-P

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

**Proposed Action:** The Commission is considering whether to approve, reject, in whole or in part, or modify a petition filed by Consolidated Edison Company of New York, Inc. regarding revisions to its demand response programs.

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

**Subject:** Demand Response Programs: Rider S, Rider T, Rider U, Residential Smart Appliance Program and Network Relief Program.

**Purpose:** To revise the demand response programs.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a petition filing by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) to revise its demand-response programs, Rider S - Commercial System Relief Program (Rider S), and Rider T - Critical Peak Rebate Program (Rider T), Rider U - Distributed Load Relief Program, Residential Smart Appliance Program and Network Relief Program. Under the demand response programs, customers provide load relief when events are called by the Company. The Company proposes substantial changes intended to increase enrollment, improve response to events, leverage New York Independent System Operator enrollment, make it easier for customers to participate in the programs, and to streamline and make the programs more consistent. The Commission may make changes to other utilities' demand response programs in its order in this case.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0115SP8)

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

**Demand Response Programs: Rider S - Commercial System Relief Program and Rider T - Critical Peak Rebate Program**

I.D. No. PSC-41-10-00010-P

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

**Proposed Action:** The PSC is considering a proposed tariff filing by Consolidated Edison Company of New York, Inc. to make various changes in rates, charges, rules and regulations contained in its Schedules for Electric Service, PSC No. 9, PASNY No. 4 and EDDS No. 2.

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

**Subject:** Demand Response Programs: Rider S - Commercial System Relief Program and Rider T - Critical Peak Rebate Program.

**Purpose:** To revise the Monthly Adjustment Clause in PSC No. 9 and Charge for Demand Management Programs in PASNY No. 4 and EDDS No. 2.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) to revise two of its demand-response programs, Rider S - Commercial System Relief Program (Rider S), and Rider T - Critical Peak Rebate Program (Rider T), in PSC No. 9 - Electricity. The Company also proposes a change to the Monthly Adjustment Clause in PSC No. 9 - Electricity and to the Charge for Demand Management Programs in PASNY No. 4 and EDDS No. 2 regarding total net program costs. Under Rider S and Rider T, customers provide load relief when events are called by the Company. To increase enrollment, leverage New York Independent System Operator programs, and improve participants' response to requests for load relief under the Riders, the Company proposes substantial changes to both programs such as changes to eligibility criteria, application deadlines, call windows, advance notice, the trigger for calling events, payments and the basis for determining performance. The filing has an effective date of December 22, 2010. The Commission may make changes to other utilities' demand response programs in its order in this case.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0115SP7)

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

**Whether to Permit the Use of the Yokogawa Flow Computer to Monitor Steam Flow to Customers in Consolidated Edison Territory**

I.D. No. PSC-41-10-00011-P

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

**Proposed Action:** The Commission is considering whether to approve or

reject, in whole or in part, a petition filed by the Consolidated Edison Company of New York, Inc. for the approval of the Yokogawa Flow Computer Model MW 100.

**Statutory authority:** Public Service Law, section 80

**Subject:** Whether to permit the use of the Yokogawa Flow Computer to monitor steam flow to customers in Consolidated Edison territory.

**Purpose:** Commission approval, is necessary to permit steam utilities in New York State to use the Yokogawa Flow Computer.

**Substance of proposed rule:** The Commission is considering whether to approve, reject or modify, in whole or in part, a petition filed by Consolidated Edison to approve the Yokogawa Flow Computer Model MW100, to monitor steam usage.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (10-S-0455SP1)

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

**Request for Lightened Regulation of the Petitioners As Gas Corporations Subject to the Public Service Law**

I.D. No. PSC-41-10-00012-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, the petition of DMP New York, Inc. and Laser Northeast Gathering Company, LLC. for lightened regulation under Public Service Law Section 68.

**Statutory authority:** Public Service Law, section 4(1)

**Subject:** A request for lightened regulation of the petitioners as gas corporations subject to the Public Service Law.

**Purpose:** To consider the petition of DMP New York, Inc. and Laser Northeast Gathering Company, LLC.

**Substance of proposed rule:** In a petition filed September 21, 2010 (and supplemented on September 23, 2010) in Case 10-G-0462, DMP New York, Inc. and Laser Northeast Gathering Company, LLC (petitioners) seek an order providing for lightened regulation of the petitioners as gas corporations subject to the Public Service Law. This request is related to the petitioners' requests for licenses involving approval of the exercise of municipal consents granted by the Town of Windsor (Town), Broome County, and authorization of the construction and operation of a gas transmission line in the Town. The Commission may approve, reject or modify the petition, in whole or in part.

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

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

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

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

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

(10-G-0462SP1)

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

**Petition for Rehearing of an Order Granting Certificate, with Conditions, Issued August 20, 2010 in Case 09-E-0299**

I.D. No. PSC-41-10-00013-P

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

**Proposed Action:** The Commission is considering whether to approve, reject or modify, in whole or in part, a petition for rehearing of its Order Granting Certificate, with Conditions, issued August 20, 2010 in Case 09-E-0299.

**Statutory authority:** Public Service Law, sections 4, 22, 65, 66 and 68

**Subject:** Petition for rehearing of an Order Granting Certificate, with Conditions, issued August 20, 2010 in Case 09-E-0299.

**Purpose:** To consider the rehearing petition filed in Case 09-E-0299.

**Substance of proposed rule:** Niagara Mohawk Power Corporation d/b/a National Grid has filed a petition for rehearing and clarification of the Commission's Order Granting Certificate, With Conditions, issued August 20, 2010, in Case 09-E-0299. National Grid asks that the Commission (1) clarify that, as a result of findings made in the August 20, 2010 Order, National Grid is the only electric supplier authorized to serve the two Herkimer County Industrial Development Association (IDA) pumping stations; (2) withdraw its August 20th approval of the Village of Frankfort's (Village) franchise to serve the area known as the "Pumpkin Patch" because, to the extent National Grid constructs three-phase facilities to serve the IDA pumping stations, the August 20th approval of the Village's franchise will result in wasteful duplication of facilities; and (3) order the Village to (a) identify the Town of Frankfort (Town) customers it serves that are outside of its franchised service areas, (b) obtain Commission approval to serve such customers and (c) refrain from serving any other Town customers that are outside of the Village's franchised service areas.

The Commission may approve, reject or modify the petition, in whole or in part.

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

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

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

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

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

(09-E-0299SP2)

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

**Water Rates and Charges**

I.D. No. PSC-41-10-00014-P

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

**Proposed Action:** The Public Service Commission is considering a request from Fairway Water Corp. to increase its annual revenue by \$8,832 or about 32% effective January 1, 2011.

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

**Subject:** Water rates and charges.

**Purpose:** For approval to increase Fairway Water Corp. annual revenue by \$8,832 or about 32%.

**Substance of proposed rule:** On September 21, 2010, Fairway Water Corp. (Fairway or the Company) filed a tariff amendment (Rate Leaf No.

12 Revision 2) to become effective January 1, 2011. The company requests to be allowed to increase its quarterly service charge from \$104 to \$150 and continue the current usage charge of \$5.00 per thousand gallons. This will produce an increase in annual revenue of \$8,832 or about 32%.

The company provides water service to 48 metered customers, in the Fairways at Red Hook, a real estate subdivision in the Town of Red Hook, Dutchess County. No fire service protection is provided.

The company's tariff and pending rate increase request is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Commission Documents - Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's rates.

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

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

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

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

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

(10-W-0461SP1)

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

**IUSA's Modifications to the Competitive Procurement Procedures Provided for in a Code of Conduct**

I.D. No. PSC-41-10-00015-P

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

**Proposed Action:** The Commission is considering a petition from Iberdrola USA, Inc. (IUSA) and others proposing to modify the competitive procurement procedures provided for in a code of conduct.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65 (1), (2), (3), 66(1), (3), (5) and (10)

**Subject:** IUSA's modifications to the competitive procurement procedures provided for in a code of conduct.

**Purpose:** Consideration of IUSA's modifications to the competitive procurement procedures provided for in a code of conduct.

**Substance of proposed rule:** The Commission is considering a filing dated September 24, 2010 from Iberdrola USA, Inc. (IUSA), New York State Electric & Gas Corporation (NYSEG), and Rochester Gas and Electric Corporation (RG&E) proposing to modify the competitive procurement procedures provided for in the Code of Conduct that became effective on June 24, 2009, governing affiliate relationships between IUSA and NYSEG and RG&E. The modifications would open certain competitive procurement processes to participation by an affiliate of IUSA. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**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-0906SP5)

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

**Cost Recovery of Wireless Access to Central Hudson Gas & Electric's Hourly Pricing Meters**

**I.D. No.** PSC-41-10-00016-P

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

**Proposed Action:** The Commission is considering whether to approve, deny or modify, in whole or in part, a proposal by Central Hudson to recover the cost of telecommunications access to Hourly Meters from the competitive metering fund.

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

**Subject:** Cost recovery of wireless access to Central Hudson Gas & Electric's hourly pricing meters.

**Purpose:** Allows Central Hudson to recover cost of wireless access to HPP meters from competitive metering fund during initial year.

**Substance of proposed rule:** The Commission is considering whether to approve, deny or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation to recover the cost of wireless access to Hourly Meters from the Competitive Metering Fund (established in Case 00-E-1273), during the initial year of service, before the hourly pricing program is effective. The Commission may make this change or other related changes to Central Hudson's or other utilities tariffs related to this issue.

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

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

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

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

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

(09-E-0887SP4)

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

**Amount of Hourly Interval Data Provided to Hourly Pricing Customers Who Have Not Installed a Phone Line to Read Meter**

**I.D. No.** PSC-41-10-00018-P

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

**Proposed Action:** The Commission is considering whether to approve, deny or modify, in whole or in part, a proposal by Central Hudson to modify its Hourly Pricing implementation plan.

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

**Subject:** Amount of hourly interval data provided to Hourly Pricing customers who have not installed a phone line to read meter.

**Purpose:** Allow Central Hudson to provide less than a years worth of interval data and charge for manual meter reading for some customers.

**Substance of proposed rule:** The Commission is considering whether to approve, deny or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation (Central Hudson) to modify its implementation plan for Hourly Pricing customers. For customers who have not met the October 1, 2010 deadline to install a functional phone line, Central Hudson would provide those customers less than one year's worth of interval data prior to the October 1, 2011 implementation of the Hourly Pricing Provision (HPP) tariff and charge customers for manually reading their meter. The Commission may make this change or related changes for Central Hudson or other utilities.

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

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

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

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

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

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

(08-E-0887SP5)

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

**Petition for the Submetering of Electricity**

**I.D. No.** PSC-41-10-00019-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(10-E-0460SP1)

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

**Annual Reconciliation of Gas Expenses and Gas Cost Recoveries**

**I.D. No.** PSC-41-10-00020-P

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

**Proposed Action:** The PSC is considering whether to approve, modify, or reject, in whole or in part, the filings made by various local gas distribution companies (LDCs) and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

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

**Subject:** Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

**Purpose:** The filings of various LDCs and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

**Substance of proposed rule:** The Public Service Commission is consider-

ing whether to approve, modify, or reject, in whole or in part, the filings made by 16 local distribution companies and two municipalities reconciling purchased gas costs and gas cost adjustment recoveries for the 12-month period ended August 31, 2010.

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

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

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

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

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

(10-G-0467SP1)

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

**Cash-Out Provisions**

**I.D. No.** PSC-41-10-00021-P

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

**Proposed Action:** The Commission is considering a proposed tariff filing by National Fuel Gas Distribution Corporation to make various changes in its rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 8—Gas.

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

**Subject:** Cash-out provisions.

**Purpose:** To revise the cash-out provisions for gas transportation service.

**Substance of proposed rule:** The Commission is considering a tariff filing by National Fuel Gas Distribution Corporation (National Fuel) to amend its tariff to revise its cash-out provisions for gas transportation service. The proposed filing has an effective date of January 1, 2011. The Commission may adopt, reject, or modify, in whole or in part, National Fuel's proposal.

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

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

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

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

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

(10-G-0474SP1)

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

**Request for Waiver of the Individual Living Unit Metering Requirements at 5742 Route 5, Vernon, NY**

**I.D. No.** PSC-41-10-00022-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Seneca

Hillcrest Apts., at 5743 Route 5, Vernon, New York, for waiver of the individual living unit metering requirements.

**Statutory authority:** Public Service Law, sections 2, 4, 65 and 66

**Subject:** Request for waiver of the individual living unit metering requirements at 5742 Route 5, Vernon, NY.

**Purpose:** Request for waiver of the individual living unit metering requirements at 5742 Route 5, Vernon, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Seneca Hillcrest Apartments for waiver of the individual living unit metering requirements at 5743 Route 5, Vernon, New York, located in the territory of National Grid Corporation.

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

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

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

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

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

(10-E-0432SP1)

---



---

## Racing and Wagering Board

---



---

### NOTICE OF ADOPTION

#### Types of Harness Races to be Offered

**I.D. No.** RWB-25-10-00009-A

**Filing No.** 977

**Filing Date:** 2010-09-22

**Effective Date:** 2010-10-13

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

**Action taken:** Amendment of section 4108.8 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 301 and 307

**Subject:** Types of harness races to be offered.

**Purpose:** To permit restriction of entries in races to horses that have competed in New York for the majority of their most recent starts.

**Text or summary was published** in the June 23, 2010 issue of the Register, I.D. No. RWB-25-10-00009-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Specifications for Thoroughbred Whip

**I.D. No.** RWB-25-10-00010-A

**Filing No.** 978

**Filing Date:** 2010-09-22

**Effective Date:** 2010-10-13

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

**Action taken:** Amendment of section 4035.9 of Title 9 NYCRR.  
**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 205 and 218  
**Subject:** Specifications for thoroughbred whip.  
**Purpose:** Replace the whip with a padded riding crop, similar to English use, which is more humane to the horse.  
**Text or summary was published** in the June 23, 2010 issue of the Register, I.D. No. RWB-25-10-00010-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** John J. Googas, Racing and Wagering Board, 1 Broadway Center, Suite 600 Schenectady, New York 12305, (518) 395-5400, email: info@racing.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

## State University of New York

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

**Proposed Amendments to the Traffic and Parking Regulations of the University at Albany, State University of New York**

**I.D. No.** SUN-41-10-00002-P

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

**Proposed Action:** Amendment of section 561.2 of Title 8 NYCRR.  
**Statutory authority:** Education Law, section 360(1)  
**Subject:** Proposed amendments to the traffic and parking regulations of the University at Albany, State University of New York.

**Purpose:** To reflect changes in traffic patterns, signs, and signals on campus due to construction of new buildings and green spaces.

**Text of proposed rule:** Section 561.2 is amended to read as follows:

**Section 561.2 Traffic Control**

(a) Pursuant to authority conferred by the New York State Education Law, the following traffic regulations are established on the grounds of the State University of New York at Albany, in the City of Albany and in the Town of Guilderland, Albany County.

(1) 15 MPH is the maximum speed limit at which vehicles may proceed on or along all roadways, except on the following roadway:

(i) [Perimeter Road] *University Drive East and West, formerly known as Perimeter Road.*

(2) 25 [30] MPH is the maximum speed limit at which vehicles may proceed on or along the following roadway:

(ii) [Perimeter Road] *University Drive East and West, formerly known as Perimeter Road.*

(b) Parking is prohibited on or along both sides of all roadways, except as noted by parking control signs.

(c) [Campus Perimeter Road] *University Drive East and West, formerly known as Perimeter Road,* shall not be used as a thruway thoroughfare for motor vehicles traveling between Washington Avenue, Fuller Road or Western Avenue unless the driver or occupants of the vehicle have campus-related business. [STOP signs are erected on all entrances thereto except those listed below on which YIELD signs are erected:

(1) Easterly spur of Access Road A.

(2) Easterly spur of Access Road B.

(d) Traffic is directed as indication on the following campus roadways to stop and yield the right-of-way traffic on the noncampus highway before entering said highway.

Non-campus highway	with STOP sign on campus roadway	Traffic from
(1) Washington Avenue	Easterly Access Road from Traffic Circle	South
(2) Fuller Road	Access Road F	East
(3) Fuller Road	Driveway for Service Area	East
(4) Fuller Road	Access Road E	East

(5) Washington Avenue	Access Road C	South
-----------------------	---------------	-------

(e) The following intersections are designated as STOP/YIELD intersections as indicated below:

Intersection of	with STOP sign on	Entrance from
(1) Access Road D	Driveway from Infirmary	North
(2) Access Road E	Easterly driveway from Motor Pool	South
(3) Motor Pool Yard-Bldg A	Entrance from Motor Pool Yard-Bldg. A	North & South
(4) Access Road F	East & West Driveway for Parking Lot south of Bldg. C	North
(5) Traffic Circle	Driveway for North Plaza	South
(6) Perimeter Road	Access Road F	West
(7) West Spur of Access Road C	East Spur of Access Road C	Southeast
(8) Access Road F	Access Road G	North

(f) Roadways for one-way traffic are designated as follows:

(1) Access road K from its intersection with the Perimeter Road to its intersection with Western Avenue for traffic proceeding in a southerly direction.

(2) Access road J from its intersection with the Western Avenue to its intersection with the Perimeter Road for traffic proceeding in a northerly direction.

(3) Westerly access road from its intersection with Washington Avenue for traffic proceeding in a northerly direction.

(4) Easterly access road from the traffic circle to its intersection with Washington Avenue fro traffic proceeding in a northerly direction.

(5) Access road B from its intersection with the Perimeter Road to the traffic circle for traffic proceeding in a southerly direction.

(6) Access road A from the traffic circle to its intersection with the Perimeter Road fro traffic proceeding in a northeasterly direction.

(7) The main roadway of the traffic circle from its intersection with the Perimeter Road on the west to its intersection with the Perimeter Road on the east for the traffic proceeding in a counter-clockwise direction.

(8) Easterly driveway, parking lot, and westerly driveway for the health and physical education building for traffic proceeding in a counter-clockwise direction.]

(d) *All persons shall observe and obey any slow, stop, yield, and caution signs or any other posted signs regulating traffic and parking.*

(e) *The directions and requests of university police officers shall be followed at all times.*

*Resolved* that the amendments to the Regulations for Vehicular Traffic and Parking at the State University of New York at Albany, section 516.2 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York, be and hereby are, adopted and approved as follows (brackets denote old material to be deleted; underlining denotes new material to be added):

**Text of proposed rule and any required statements and analyses may be obtained from:** Janet M. Thayer, Associate University Counsel, University at Albany, State University of New York, 1400 Washington Avenue, Albany, NY 12222, (518) 956-8050, email: jthayer@uamail.albany.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 Section 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 will bring the current regulations up to date with changes in traffic patterns, signs and signals on the campus due to construction of new buildings and green spaces, and it will allow for immediate changes in traffic patterns, signs and signals as construction projects are completed and new ones are planned. It will also allow the campus to address immediately any campus traffic issues resulting from the NYS DOT work on Fuller Road, Washington Avenue and Washington Avenue Extension, and it will allow for immediate changes in traffic patterns, signs and signals to address immediate safety concerns on the campus regarding traffic and the control thereof.

3. Needs and benefits: The University at Albany campus has experienced significant growth in buildings and grounds to meet student academic and residential needs since the original regulations were promul-

gated in 1972 and most recently amended in 1987. The present measure will bring the current regulations up to date with changes in traffic patterns, signs and signals on the campus due to construction of new buildings and green spaces, and it will allow for immediate changes in traffic patterns, signs and signals as construction projects are completed and new ones are planned. It will also allow the campus to address immediately any campus traffic issues resulting from the NYS DOT work on Fuller Road, Washington Avenue and Washington Avenue Extension, and it will allow for immediate changes in traffic patterns, signs and signals to address immediate safety concerns on the campus regarding traffic and the control thereof.

The proposed effective date of the amendments is January 1, 2011.

4. Costs: No costs will be incurred except for new traffic control signs and signals as needed.

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: The University at Albany will notify those affected as soon as the rule is effective, with the effective date as proposed of January 1, 2011. 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 traffic regulations on the campus of the University at Albany.

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

No rural flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas. The proposal addresses internal traffic regulations on the campus of the University at Albany.

#### **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 traffic regulations on the campus of the University at Albany.

## Office of Temporary and Disability Assistance

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

#### **Public Assistance**

**I.D. No.** TDA-41-10-00005-P

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

**Proposed Action:** Amendment of sections 351.1(b)(2)(iv), 352.17(d), 352.19(b)(3), 366.3 and 366.4(g); repeal of section 351.24; and addition of section 366.11 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 131(1), 131-t, 131-z(9) and 355(3)

**Subject:** Public Assistance.

**Purpose:** Quarterly reporting is being eliminated as a district optional requirement for the majority of public assistance recipients, but it remains a mandatory requirement for child assistance program participants.

**Text of proposed rule:** Subparagraph (iv) of paragraph (2) of subdivision (b) of section 351.1 is amended to read as follows:

(iv) make a timely report to the district of any changes in his or her needs and resources. A report will be considered timely if made within 10 days of the changes except as provided in section 352.30(d)(4) of this Title. A report to a social services district concerning changes in income *must be made timely*. Such a report will be considered timely if made within the time frames specified in section [351.24(d)] 352.19(b) of this [Part] Title;

Section 351.24 is repealed and reserved.

Subdivision (d) of section 352.17 is amended to read as follows:

(d) Average monthly earned income is applied against need to determine the grant amount for each calendar month of [a payment quarter] *an authorization period*. The amount of average earned income applied must be recalculated at recertification [and when a quarterly report is received by the agency]. No other adjustments will be made, except as provided in section 352.31(c) of this Part, unless one of the following occurs:

Paragraph (3) of subdivision (b) of section 352.19 is amended to read as follows:

(3) failed without good cause to make a timely report of new or increased income. *A report of income is considered timely if a recipient reports the receipt of new or increased income no later than 10 days after the receipt of the income. A report of such income made more than 10 days after receipt is not timely, but a report made more than 10 days prior to the end of the month is timely with respect to the next month and any succeeding month.*

Section 366.3 is amended to read as follows:

(a) The following general provisions apply:

[a] (1) Families eligible for benefits under CAP are not eligible to receive assistance through Refugee Cash Assistance (RCA), FA, or SNA, unless otherwise specified in this Part.

[b] (2) Within the same household, family members must either all receive CAP or all receive non-CAP public assistance (RCA, FA, or SNA).

[c] (3) Non-CAP public assistance recipients can only be transferred from the non-CAP PA program to CAP on the first day of a month.

[d] (4) CAP participants will be eligible for medical assistance under Part 360 of this Title only to the extent that the participants meet the financial and categorical requirements for medical assistance.

[e] (5) When used in this Part, the phrase "poverty level" will refer to the poverty guidelines issued by the United States Bureau of the Census.

(b) The following definitions are used in this Part:

(1) "Authorization period" means the twelve-month period for which CAP benefits are authorized following a recertification pursuant to section 366.4(f) of this Part. Each authorization period is divided into four payment quarters.

(2) "Payment quarter" means the three-month period after the process month.

(3) "Process month" means the month in which information contained in a quarterly report or obtained during a recertification is reviewed. With respect to information obtained from a quarterly report, process months are the third, sixth and ninth month of an authorization period. With respect to information obtained at recertification, the process month is the last month of the authorization period.

(4) "Quarterly report" means a form upon which a participant reports income and household circumstances for that three-month period.

(5) "Quarterly reporting" refers to a procedure for obtaining information concerning the incomes and circumstances of certain CAP participants through annual recertifications and mailed reports sent in the second, fifth and eighth month of a CAP participant's authorization period. Quarterly reporting is a modified system of monthly reporting in which written reports are made at three-month intervals between annual recertification interviews and CAP grants are calculated prospectively.

(6) "Report quarter" means the three-month period covered by a quarterly report.

(7) "Timely Report" means a report made no later than 10 days after a change affecting eligibility occurs.

Subdivision (g) of section 366.4 is amended to read as follows:

(g) The quarterly reporting requirements of section [351.24] 366.11 of this [Title] Part will apply to CAP participants [, except that each family participating in CAP will receive and be required to complete three quarterly reports between each annual recertification].

A new section 366.11 is added to read as follows:

§ 366.11 Quarterly Reporting.

(a) All CAP households must submit a quarterly report form to the social services district in the three process months of an authorization period.

(b) The quarterly report form must contain the following information:

(1) periodic income and dates received, household composition and other circumstances relevant in determining the amount of assistance; and

(2) any changes in income, household composition or other relevant circumstances affecting eligibility for or the amount of benefits which the household expects to occur in the current or future months.

(c) The quarterly reporting process does not relieve participants of their responsibility to report changes that impact eligibility in a timely manner. Participants must submit timely reports of all changes affecting eligibility, with the exception of changes in income, no later than 10 days after each change occurs. Participants will not be required to report changes in income more frequently than quarterly.

(d)(1) *Quarterly report forms must be provided to participants in sufficient time for participants to return completed reports to the social services districts by the tenth day of the process month.*

(2) *A quarterly report is considered complete when the participant has:*

- (i) *answered all questions;*
- (ii) *provided verification of all reported income; and*
- (iii) *signed and dated the report on or after, but not before, the last day of the report quarter.*

(e) *Failure to submit a completed report. If a participant fails, without good cause, to return a completed quarterly report by the tenth day of the process month, the social services district must send a timely and adequate notice of discontinuance along with a copy of any quarterly report which was returned incomplete or along with a second quarterly report if no report has been returned.*

(f) *If the participant responds to the discontinuance notice and submits a completed report before the effective date of the discontinuance, the social services district must accept the completed quarterly report and void the notice of discontinuance.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Kathryn Mazzeo, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 473-3271, email: Kathryn.Mazzeo@OTDA.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:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Department of Social Services to promulgate regulations to carry out its powers and duties. Section 122 of Part B of Chapter 436 of the Laws of 1997 reorganized the Department of Social Services into the Department of Family Assistance with two distinct offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance (OTDA). The functions of the former Department of Social Services concerning the public assistance programs were transferred by Chapter 436 to OTDA.

Section 34(3)(f) of the SSL requires the Commissioner of the Department of Social Services to establish regulations for the administration of public assistance and care within the State. Section 122 of Part B of Chapter 436 of the Laws of 1997 provided that the Commissioner of the Department of Social Services would serve as the Commissioner of OTDA.

Section 131(1) of the SSL requires social services districts (districts), insofar as funds are available, to provide adequately for those unable to maintain themselves, in accordance with the provisions of the SSL.

Section 131-t of the SSL requires each public assistance or food stamp (FS) household which currently is receiving or received earned income to submit periodic reports relating to factors affecting eligibility, to the extent and in the manner required by State regulations.

Section 131-z(9) of the SSL requires that for eligibility determinations, child assistance program (CAP) participants must not be required to report changes in income more frequently than on a quarterly basis. The section provides that OTDA must promulgate regulations for the operation of CAP including, but not limited to, regulations concerning eligibility determinations, determinations of available income, and loss of eligibility.

Section 355(3) of the SSL requires OTDA to promulgate regulations to carry out the provisions of the SSL concerning the family assistance program.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that adequate provision is made for those persons unable to provide for themselves so that, whenever possible, such persons can be restored to a condition of self-support and self-care.

##### 3. Needs and benefits:

Quarterly reporting is being eliminated as a district optional requirement for the majority of public assistance (PA) recipients but remains a mandatory requirement for CAP participants. There are seven regulatory changes being made as part of this packet. These are addressed individually below as A through G:

A. The first change underscores the obligation to report income timely.

B. The second change repeals and reserves section 351.24.

The PA quarterly reporting process was established in 1993 as a mandatory replacement for monthly reporting of earned income. At that time, both PA and FS policy adhered to the same process. With the advent of periodic reporting for FS, substantive changes were made in how the process worked for PA and FS. In addition, in 2002, section 351.24 was amended making the PA quarterly report process district optional, except for CAP.

By late 2006, all 58 districts had decided whenever possible to no longer require PA recipients with earned income to quarterly report. Some of the different reasons for eliminating this requirement are outlined below:

- Simplify reporting requirements for both districts and clients - When PA and FS periodic/quarterly reporting procedures began to markedly diverge, the initial advantages of program compatibility and simplicity in reporting were lost. Since both programs still used the same form, but required it to be returned to the districts at different times for PA and FS purposes, there was an element of confusion involved in the reporting process.
- Reduce administrative requirements - Districts have argued that the increased contact resulting from quarterly reporting is not cost effective. Under prospective budgeting procedures, recipients are required to report changes in income when the change occurs, and the increased contact resulting from quarterly reporting was not justifying the additional administrative work that went along with rebudgeting cases every three months. Essentially, districts contend that when using a prospective budgeting system, the financial cost to them in terms of benefits provided is the same regardless of whether contact is made four times a year (two recertifications and two quarterly reports) or twice a year (two recertifications).
- Compatibility with Welfare-to-Work (WTW) reporting requirements - The quarterly reporting process is not as compatible with WTW reporting requirements which anticipate immediate reporting of changes in hours worked. In addition, many districts strive to reduce reporting requirements for employed recipients rather than have requirements become more onerous. In short, their goal is to make it easier to work rather than more difficult.
- Cost - With all of the districts having opted to eliminate PA quarterly reporting whenever possible, it is not cost effective to retain this option on the State's Welfare Management System for a few PA cases, not involving CAP, should a district decide to return to the process.

C. The amendments to section 352.17 (d) delete references to quarterly reporting in the prospective budgeting section of the regulations.

D. The amendments to section 352.19(b)(3) add the definition of timely reporting that was contained in section 351.24 (e). The definition of timely reporting is still required for PA reporting purposes.

E. The amendments to section 366.3 provide definitions concerning quarterly reporting for CAP purposes. These amendments are based upon the definitions that were contained in section 351.24; however, these new definitions located in section 366.3 address the CAP requirements only, and not PA. It is noted that quarterly reporting is a cornerstone of CAP, and thus it is not being eliminated pursuant to these regulations.

F. The amendments to section 366.4(g) remove the reference to section 351.24, which is now being repealed, and replace it with a reference to the new section 366.11. The amendments also remove the general information regarding quarterly reports from section 366.4 and instead rely upon the specifics set forth in the new section 366.11. It is noted that the new section is being added since the text from section 351.24 was too extensive to be added to section 366.4.

G. The last amendment adds a new section 366.11 to reflect CAP quarterly reporting requirements. This new section is based upon the requirements that were contained in section 351.24; however, since the new quarterly reporting provisions are specific to CAP only, all references to general PA provisions that do not apply to CAP have been eliminated.

##### 4. Costs:

There will be minimal fiscal impact as a result of these changes, as all districts have now elected to eliminate quarterly reporting whenever possible, and all PA recipients, except CAP recipients, will still be required to report changes in income or employment in a timely manner. There may be some small administrative savings associated with simplification and efficiency.

##### 5. Local government mandates:

These amendments will not impose any programs, services, duties or responsibilities upon the districts since all 58 districts have already opted out of the quarterly reporting process for PA generally and no changes are being made to the CAP process.

##### 6. Paperwork:

There will be no additional forms required to support this process. However, the periodic/quarterly reporting form (DSS-4310) will be amended to remove any language related to the former PA quarterly reporting requirement. This will help simplify the reporting process for clients and districts. This change will have no impact on CAP.

##### 7. Duplication:

These proposed amendments do not duplicate, overlap or conflict with any existing State or federal regulations.

##### 8. Alternatives:

The alternative is not to repeal section 351.24. However, this would continue to allow districts an option to require recipients to comply with quarterly reporting as a condition for all PA eligibility. This is problematic

if only a few of the 58 districts find value in and opt for the quarterly reporting process. This would require that two PA reporting processes be maintained and that forms, system support and informational material be developed and maintained for a small number of impacted clients. This would be inefficient and confusing. It would be inefficient because it monopolizes administrative effort for a small percentage of the PA population. In the last several years of the PA quarterly reporting process, less than 5 % of the State's earned income caseload was subject to this process since all the large districts had opted to withdraw from the process. It would be confusing to clients since explaining two processes in the same publications is by its very nature prone to misinterpretation. Since all 58 districts already have opted whenever possible to withdraw from the quarterly reporting process for PA purposes, a reasonable conclusion is that the process is no longer necessary or efficient for PA programs generally.

9. Federal standards:

These proposed amendments do not conflict with federal standards for PA.

10. Compliance schedule:

There is no compliance schedule since all districts already have opted to withdraw from quarterly reporting for general PA purposes. The last 16 districts converted to non-quarterly reporting status in April 2007. Necessary systems changes, client notification procedures and an administrative directive were provided to assist in this process. An administrative directive was released by the Office of Temporary and Disability Assistance in March 2007 and addressed the elimination of quarterly reporting system requirements for all PA programs, except CAP.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The proposed amendments will have an effect on local governments, but not on small businesses.

2. Compliance requirements:

At the present time, all 58 social services districts (districts) already have opted not to require quarterly reporting as a condition of general public assistance (PA) eligibility. The last 16 districts opted to eliminate this requirement under existing regulatory authority (the rule is district optional) and converted to non-quarterly reporting status in April 2007. Necessary systems changes, client notification procedures and an administrative directive were provided to assist in this process. An administrative directive was released by the Office of Temporary and Disability Assistance one month prior to the conversion and addressed the elimination of quarterly reporting system requirements for all PA programs, except CAP. Thus there will be no compliance requirements when this rule is filed as the necessary changes have already been completed.

3. Professional services:

The proposed amendments will not require small businesses or local governments to hire additional professional services.

4. Compliance costs:

The proposed amendments will not require additional compliance costs for small businesses or local governments.

5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with these proposed regulations.

6. Minimizing adverse impact:

There will be no adverse economic impact on local governments and small businesses.

7. Small business and local government participation:

Several local districts were informed of the proposed amendments, and no objections to the proposed amendments were expressed. All 58 districts already have opted to eliminate quarterly reporting as a condition of PA eligibility whenever possible.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

The proposed amendments will affect the 44 rural social services districts (districts) in the State.

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

The rural districts will no longer have the option of requiring all public assistance (PA) recipients to quarterly report as a condition of eligibility. However, no rural districts currently would like to exercise this option of requiring all PA recipients to quarterly report. As of April 2007, all districts have withdrawn from the quarterly reporting process under the district optional authority which exists in the current regulations. As a result, these proposed amendments will not require any further action by the rural districts.

3. Costs:

The proposed amendments will not impose initial capital costs or any annual costs upon the rural districts to comply with the rule.

4. Minimizing adverse impact:

The proposed amendments will not have an adverse impact on the rural districts.

5. Rural area participation:

The rural districts that were informed of the proposed rule had no objections to the proposed changes.

**Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they will not have a substantial adverse impact on jobs and employment opportunities. The proposed amendments will not affect in any real way the jobs of the workers in the social services districts. The proposed amendments will reduce reporting responsibilities for employed public assistance (PA) recipients; however, this is expected to make it easier for employed PA recipients to remain employed and comply with PA eligibility requirements. Thus the changes will not have any adverse impact on jobs and employment opportunities in the State.