

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

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

I.D. No. AAM-42-10-00007-E

Filing No. 1020

Filing Date: 2010-10-04

Effective Date: 2010-10-04

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

Action taken: Repeal of Part 141 and addition of new Part 141 to Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The repeal of sections 141.1(j) and 141.2 and the addition of Part 141 of 1 NYCRR is being adopted as an emergency measure because of the threat that the Emerald Ash Borer (EAB) will spread outside the areas it now infests in New York State.

EAB, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. The average adult Emerald Ash Borer is $\frac{3}{4}$ of an inch long and $\frac{1}{6}$ of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately

1 to $\frac{1}{4}$ inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem tissue, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree. A tree infested by EAB will die within two years. Ash trees, as well as ash nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are all subject to infestation.

The pest was first discovered in Michigan in 2002, and has since spread to at least 12 other states as well as to two provinces in Canada. In 2009, EAB was detected in New York in Cattaraugus County. This prompted the establishment of a quarantine in Cattaraugus County and adjacent Chautauqua County. In 2010, the pest was detected in Monroe, Livingston, Genesee, Steuben, Greene and Ulster Counties. As a result of these latest findings, this regulation will include in the quarantine area the following counties: Monroe, Livingston, Genesee, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties will serve as a buffer between counties with known or suspected infestations and those which have no known infestations.

The quarantine will help ensure that as control measures are undertaken, EAB does not spread beyond those areas via the movement of infested trees and materials. Since the EAB is not considered established in the State, the risk of moving infested materials poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State. The immediate adoption of this amendment is necessary to preserve the general welfare and compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The failure to immediately establish a quarantine in these additional counties could result in the further spread of this pest, thereby threatening the State's forest, yard and park trees while potentially subjecting New York to a federal quarantine and quarantines by other states which would affect the entire State. The spread of EAB would cause economic hardship to the nursery and forest products industry as well as cause reductions in private property values and recreation revenues. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this amendment is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The amendments establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the artificial movement of infested trees and materials.

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

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

Text of emergency rule: Part 141

Control of the Emerald Ash Borer

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

Section 141.1. Definitions.

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

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

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

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

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

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

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

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

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

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

(j) *Quarantine area.* This term applies to Niagara, Erie, Orleans, Genessee, Wyoming, Allegany, Monroe, Livingston, Steuben, Wayne, Ontario, Yates, Schuyler, Chemung, Greene, Ulster, Chautauqua and Cattaraugus Counties.

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

Section 141.2. Quarantine area.

Regulated articles as described in section 141.3 of this Part shall not be shipped, transported or otherwise moved from any point within Niagara, Erie, Orleans, Genessee, Wyoming, Allegany, Monroe, Livingston, Steuben, Wayne, Ontario, Yates, Schuyler, Chemung, Greene, Ulster, Chautauqua and Cattaraugus Counties to any point outside of said counties, except in accordance with this Part.

Section 141.3. Regulated articles.

(a) Prohibited movement.

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

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

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

(b) Regulated movement.

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

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

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

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

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

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

(a) *Movement from quarantine area.* Unless exempted by administrative instructions of the Commissioner of Agriculture and Markets of the State of New York, regulated articles shall not be moved intrastate from

the quarantine area to or through any point outside thereof unless accompanied by a valid certificate or limited permit issued by an inspector, authorizing such movement.

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

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

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

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

(b) *Limited permits.* Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization.

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

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

Section 141.6. Inspection and disposition of shipments.

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

Section 141.7. Assembly of regulated articles for inspection.

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

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

Section 141.8. Marking requirements.

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

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 1, 2011.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

The rule will repeal sections 141.1(j) and 142 of 1 NYCRR and add Part 141 which will establish an EAB quarantine to the seven counties where EAB has been detected (i.e. Cattaraugus, Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties), as well as to the following 11 counties: Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties. Each of these additional 11 counties will serve as a buffer between counties with known infestations and those which have no known infestations.

On August 9, 2010, the Pennsylvania Department of Agriculture expanded the Commonwealth's Emerald Ash Borer quarantine by adding 31 counties to the 12 counties currently under quarantine. The quarantine in Pennsylvania now includes the 42 western counties of the commonwealth. This is significant since movement of wood products occurs frequently across the New York - Pennsylvania border and although Pennsylvania's action is not coordinated with New York's, it strongly correlates with the Department's proposed quarantine.

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to at least twelve other states as well as to two provinces in Canada. The initial detection of this pest in New York occurred on June 16, 2009 in the Town of Randolph, which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County. More recently, additional detections have been confirmed in six other counties (Monroe, Genesee, Livingston, Steuben, Greene and Ulster) during July and August, 2010.

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

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

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to

infestation. Materials at risk of attack and infestation by the EAB include the following species of North American ash trees: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*).

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

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

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

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

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

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

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

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

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

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

4. Costs:

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

Additional work will be required of Department staff to inspect regulated parties and implement compliance agreements. The Department is working with USDA-APHIS to develop a cooperative agreement to fund and support the additional regulatory activity necessitated by the rule.

(b) Costs to local government: None, as a result of the quarantine. Some local governments may face expenses in tree maintenance since ash trees have become popular trees to use to line streets. However, the rule does not require local governments to remove the trees from the quarantine area. Accordingly, local governments within the quarantine area will not incur any additional expenses due to the quarantine.

(c) Costs to private regulated parties: There are 2,768 licensed nursery growers and/or nursery dealers in the quarantined counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated

articles. There is no approved protocol for ash nursery stock. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the proposed regulations, other than pursuant to compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

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

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

(d) Costs to the regulatory agency:

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

(ii) Additional work will be required of Department staff to inspect regulated parties and implement compliance agreements. The Department is working with USDA-APHIS to develop a cooperative agreement to fund and support the additional regulatory activity required under the rule.

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

The alternative of no action was considered. However, that option was not feasible, given the threat EAB poses to the State's forests and forest-based industries. Additionally, the option of establishing a quarantine throughout the entire state was also considered, but rejected as too onerous on regulated parties in counties near or where there has been no finding of the pest. However, the failure of the State to establish the quarantine in and near the counties where EAB has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of EAB that could result from the unrestricted movement of White Ash, Green Ash, Black Ash and Blue Ash from the quarantine areas. In light of these factors, there does not appear to be any viable alternative to the quarantine set forth in this proposal.

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business.

The small businesses affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Cattaraugus, Chautauqua, Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,768 licensed nursery growers and/or dealers within these counties. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

2. Compliance requirements.

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

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

3. Professional services.

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

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

4. Compliance costs:

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

(b) Annual cost for continuing compliance with the rule: There are 2,768 licensed growers and/or dealers which would be affected by the quarantine set forth in the regulations. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants.

According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting other types of host materials (e.g. firewood and forest products) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

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

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

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

5. Minimizing adverse impact.

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

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

6. Small business and local government participation.

With the discovery of EAB in Cattaraugus County in 2009, The Department had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

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

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to

control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

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

These discussions ultimately resulted in the establishment of an EAB quarantine in Cattaraugus and Chautauqua Counties.

With the discovery of EAB in Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties in 2010, the Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of extending the EAB quarantine.

On August 4, 2010, the Department held an information meeting for regulated and interested parties to share information about EAB detections during July 2010. The meeting involved about 35 individuals representing environmental groups, forest products manufacturers, nursery and landscape businesses, local government, forest landowners and maple producers.

The group heard presentations about current survey, detections and infestation levels discovered during July and early August. A national perspective was provided by USDA- APHIS regarding survey, regulatory, and other control measures being implemented nationally and by other states. The attendees were asked to provide their views regarding what State government should be doing and specifically asked to identify issues related to where to draw lines for quarantine purposes.

There was significant agreement and support for quarantining large blocks of counties. There was strong feelings about the need to avoid gaps in the quarantine area and the resulting economic hardship that might ensue if this were done. Several individuals specifically identified the lines that NSYDAM has determined as appropriate for the quarantine region.

These discussions ultimately resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

Outreach efforts will continue.

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The regulated parties affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Cattaraugus, Chautauqua, Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,768 licensed nursery growers and/or dealers within these counties. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

Most of these businesses are in rural areas as defined by section 481(7) of the Executive Law.

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

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

In order to comply with the regulations, all regulated parties shipping

regulated articles from the quarantine area would require professional inspection services, which would be provided by the Department, the Department of Environmental Conservation (DEC) and the United States Department of Agriculture (USDA).

3. Costs:

There are 2,768 licensed nursery growers and/or dealers in the 18 counties which would be affected by the quarantine. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

With the discovery of EAB in Cattaraugus County in 2009, The Department had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

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

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

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

These discussions ultimately resulted in the establishment of an EAB quarantine in Cattaraugus and Chautauqua Counties.

With the discovery of EAB in Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties in 2010, the Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of extending the EAB quarantine.

On August 4, 2010, the Department held an information meeting for regulated and interested parties to share information about EAB detections during July 2010. The meeting involved about 35 individuals representing environmental groups, forest products manufacturers, nursery and landscape businesses, local government, forest landowners and maple producers.

The group heard presentations about current survey, detections and infestation levels discovered during July and early August. A national perspective was provided by USDA-APHIS regarding survey, regulatory, and other control measures being implemented nationally and by other states. The attendees were asked to provide their views regarding what State government should be doing and specifically asked to identify issues related to where to draw lines for quarantine purposes.

There was significant agreement and support for quarantining large blocks of counties. There was strong feelings about the need to avoid gaps in the quarantine area and the resulting economic hardship that might ensue if this were done. Several individuals specifically identified the lines that NSYDAM has determined as appropriate for the quarantine region.

These discussions ultimately resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

Outreach efforts will continue.

Job Impact Statement

The repeal of Part 141 of 1 NYCRR and the addition of a new Part 141 will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

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

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

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-42-10-00013-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To delete a subheading and positions from and classify positions in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department, by deleting therefrom the subheading "Division of Probation and Correctional Alternatives," and the positions of Counsel and Executive Deputy Director and, in the Executive Department under the subheading "Division of Criminal Justice Services," by adding thereto the positions of Counsel and Executive Deputy Director.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-42-10-00014-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Thruway Authority, by increasing the number of positions of Assistant Counsel from 2 to 3.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00015-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: Substitute a subheading in the exempt and non-competitive classes; classify and delete positions in the non-competitive class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene, by deleting therefrom the subheading "Office of Mental Retardation and Developmental Disabilities," and by adding thereto the subheading "Office for People with Developmental Disabilities"; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene, by deleting therefrom the subheading "Office of Mental Retardation and Developmental Disabilities," and the positions of Mental Retardation Special Employment Program Assistant Coordinator (1) and Mental Retardation Special Employment Program Coordinator (1) and, by adding thereto the subheading "Office for People with Developmental Disabilities," and the positions of Developmental Disabilities Special Employment Program Assistant Coordinator (1) and Developmental Disabilities Special Employment Program Coordinator (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00016-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Thruway Authority, by increasing the number of positions of Compliance Specialist 1 from 2 to 3.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00017-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor, by adding thereto the position of Customer Service Program Specialist 3 (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00018-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by increasing the number of positions of Advocacy Specialist 2 from 3 to 4.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00019-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Agriculture and Markets, by adding thereto the positions of Audio Visual Equipment Technician (1), Building Services Assistant 2 (2) and Sales and Sponsorships Manager (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00020-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in Westchester County under the subheading "Department of Law," by increasing the number of positions of Associate County Attorney from 8 to 10; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in Westchester County under the subheading "Department of Correction," by adding thereto the position of Special Assistant to the Commissioner of Corrections and under the subheading "Department of Emergency Services," by adding thereto the position of Director - Office of Emergency Management.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-42-10-00021-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: Delete a subheading, delete positions and classify positions in the exempt and non-competitive classes.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department, by deleting therefrom the subheading "Office of Real Property Services," and the positions of Assistant Public Information Officer, Counsel, Director of Public Information, Executive Deputy Director and Special Assistant (2) and, in the Department of Taxation and Finance, by increasing the number of positions of Director of Public Information from 1 to 2 and by adding thereto the positions of Counsel and Executive Deputy Director; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department, by deleting therefrom the subheading "Office of Real Property Services," and the positions of Director, Real Property Tax Research (1) and Director of Real Property Tax Research and Complex Appraisal (1) and, in the Department of Taxation and Finance, by adding thereto the positions of Director, Real Property Tax Research (1) and Director of Real Property Tax Research and Complex Appraisal (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

**Department of Environmental
Conservation**

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

Variances to Effluent Limitations

I.D. No. ENV-42-10-00006-P

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

Proposed Action: This is a consensus rule making to amend section 702.17 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 15-0313, 17-0301, 17-0303, and 17-0809

Subject: Variances to effluent limitations.

Purpose: To correct an inaccurate reference in Section 702.17.

Text of proposed rule: 6 NYCRR Section 702.17 is amended follows:

Paragraph 4 of subdivision (a) of Section 702.17 is amended to read as follows:

(a) The department may grant, to an applicant for a SPDES permit or to a SPDES permittee, a variance to a water quality-based effluent limitation or groundwater effluent limitation included in a SPDES permit.

(4) A variance shall not be granted if standards or guidance values will be attained by implementing effluent limits required under section [754.1(a)(1) and (2)] 750-1.11(a) of this Title and by the permittee implementing cost-effective and reasonable best management practices for nonpoint source control.

Paragraph 6 of subdivision (b) of Section 702.17 is amended to read as follows:

(b) A variance may be granted if the requester demonstrates that achieving the effluent limitation is not feasible because:

(6) controls more stringent than those required by section [754.1(a)(1) and (2)] 750-1.11(a) of this Title would result in substantial and widespread economic and social impact.

Section 702.17 remains otherwise unchanged.

Text of proposed rule and any required statements and analyses may be obtained from: Robert Simson, New York State Department of Environmental Conservation, 625 Broadway, 4th Floor, Albany, NY 12233-3500, (518) 402-8271, email: rjsimson@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.

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

Consensus Rule Making Determination

The Department of Environmental Conservation (DEC) is proposing revisions to 6 NYCRR Part 702, "Derivation and Use Standards and Guidance Values." The revisions will correct a long-standing technical error in Section 702.17, "Variances to effluent limitations based on standards and guidance values."

In 2003, DEC repealed Part 754, "Provisions of SPDES Permits." However, due to an oversight, two references to Part 754 in Section 702.17 were left in place. Rulemaking is necessary to remove the references to Part 754 and replace them with the appropriate citation.

The proposed revisions to section 702.17 will correct this problem. DEC has determined that no person is likely to object to the adoption of the rule as written.

Job Impact Statement

The Department of Environmental Conservation (DEC) is proposing revisions to 6 NYCRR Part 702, "Derivation and Use Standards and Guidance Values." The revisions will correct a long-standing technical error in Section 702.17, "Variances to effluent limitations based on standards and guidance values."

In 2003, DEC repealed Part 754, "Provisions of SPDES Permits." However, due to an oversight, two references to Part 754 in Section 702.17 were left in place. Rulemaking is necessary to remove the references to Part 754 and replace them with the appropriate citation.

The proposed revisions to section 702.17 will correct this problem. The changes will not affect the substance of the regulatory requirements. DEC has therefore determined that this rulemaking will not have an impact on jobs and employment opportunities. Accordingly, a job impact statement is not required for this rulemaking.

Department of Health

EMERGENCY RULE MAKING

Potentially Preventable Readmissions

I.D. No. HLT-42-10-00003-E

Filing No. 1010

Filing Date: 2010-09-29

Effective Date: 2010-09-29

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

Action taken: Addition of section 86-1.37 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)(b)(v)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 109 of the Laws of 2010 related to implementing a new hospital inpatient rate adjustment to address potentially preventable readmissions (PPRs). PPRs address the inadequacies of the current system by using certain quality benchmarks to incentivize hospitals to provide better care upfront; thereby reducing or averting costly care during a readmission. Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute hospital inpatient rates, including adjustments related to PPRs.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of this new policy related to readmissions, which is a continuation to the historic health care reform previously enacted in the State.

Subject: Potentially Preventable Readmissions.

Purpose: Implements a revised reimbursement policy related to hospital readmissions that are determined to be potentially preventable.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35) of the Public Health Law, section 86-1.37 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is added, effective Sept. 29, 2010, to read as follows:

Part 86-1.37 Readmissions

(a) For discharges occurring on and after July 1, 2010, Medicaid rates of payment to hospitals that have an excess number of readmissions as defined in accordance with the criteria set forth in subdivision (c), as determined by a risk adjusted comparison of the actual and expected number of readmissions in a hospital as described by subdivision (d), shall be reduced in accordance with subdivision (e).

(b) Definitions. For purposes applicable to this section the following terms shall be defined as follows:

(1) Potentially Preventable Readmission (PPR) shall mean a readmission to a hospital that follows a prior discharge from a hospital within 14 days, and that is clinically-related to the prior hospital admission.

(2) Hospital shall mean a general hospital as defined pursuant to section 2801 of the Public Health Law.

(3) Observed Rate of Readmission shall mean the number of admissions in each hospital that were actually followed by at least one PPR divided by the total number of admissions.

(4) Expected Rate of Readmission shall mean a risk adjusted rate for each hospital that accounts for the severity of illness, APR-DRG, and age of patients at the time of discharge preceding the readmission.

(5) Excess Rate of Readmission shall mean the difference between the observed rates of potentially preventable readmissions and the expected rate of potentially preventable readmissions for each hospital.

(6) Behavioral Health shall mean an admission that includes a primary or secondary diagnosis of a major mental health related condition, including, but not limited to, chemical dependency and substance abuse.

(7) Managed Care Encounter Data shall mean claims-like data that describes services provided by managed care plans to their enrollees.

(c) Readmission Criteria.

(1) A readmission is a return hospitalization following a prior discharge that meets all of the following criteria:

(i) The readmission could reasonably have been prevented by the provision of appropriate care consistent with accepted standards in the prior discharge or during the post discharge follow-up period.

(ii) The readmission is for a condition or procedure related to the care during the prior discharge or the care during the period immediately following the prior discharge and including, but not limited to:

(a) The same or closely related condition or procedure as the prior discharge.

(b) An infection or other complication of care.

(c) A condition or procedure indicative of a failed surgical intervention.

(d) An acute decompensation of a coexisting chronic disease.

(iii) The readmission is back to the same or to any other hospital.

(2) Readmissions, for the purposes of determining PPRs, excludes the following circumstances:

(i) The original discharge was a patient initiated discharge and was Against Medical Advice (AMA) and the circumstances of such discharge and readmission are documented in the patient's medical record.

(ii) The original discharge was for the purpose of securing treatment of a major or metastatic malignancy, multiple trauma, burns, neonatal and obstetrical admissions.

(iii) The readmission was a planned readmission that occurred on or after 15 days following an initial admission.

(iv) For readmissions occurring during the period up through March 31, 2012, the readmission involves an original discharge determined to be behavioral health related.

(d) Methodology.

(1) Rate adjustments for each hospital shall be based on such hospital's 2007 Medicaid paid claims data and managed care encounter data for discharges that occurred between January 1, 2007 and December 31, 2007.

(2) The expected rate of admissions shall be reduced by 24% for each hospital for periods prior to September 30, 2010, and 38.5% for the periods on and after October 1, 2010.

(3) Excess readmission rates are calculated based on the difference between the observed rate of PPRs and the expected rate of PPRs for each hospital.

(4) In the event the observed rate of PPRs for a hospital is lower than the expected rate of PPRs, the excess number of readmissions shall be set at zero.

(e) Payment Calculation.

(1) For the excess readmissions identified in paragraph (3) of subdivision (d) of this section, each hospital's projected payment rate for the 2010 rate period, as otherwise computed in accordance with this subpart, will be used to compute the relative aggregate payments, excluding behavioral health, associated with the risk adjusted excess readmissions in each hospital.

(2) For each hospital, a hospital specific readmission adjustment factor shall be computed as one minus the ratio of the hospital's relative aggregate payments associated with the excess readmissions from

paragraph (3) of subdivision (d) of this section and the hospital's relative aggregate payments for all non-behavioral health Medicaid discharges as determined pursuant to this subdivision.

(3) Non-behavioral health related payments to hospitals shall be reduced by applying the hospital readmission adjustment factor from paragraph (2) of this subdivision to the applicable case payment or per-diem payment amount for all non-behavioral health related Medicaid discharges to the hospital.

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 27, 2010.

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

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a rate adjustment to hospitals to address potentially preventable readmissions (PPRs) using a methodology that is based on a comparison of the actual and the expected number of PPRs in a given hospital pursuant to regulations is set forth in section 2807-c(35)(b)(v) of the Public Health Law.

Legislative Objectives:

Pursuant to statute, the PPR methodology was chosen as the vehicle to address the issue of high rates of readmissions that could have been avoided through a rate adjustment that would reduce reimbursement to hospitals that had a historically (based on 2007 data) high rate of clinically related readmissions.

Needs and Benefits:

The proposed regulations implement the provisions of Public Health Law section 2807-c(35)(b)(v) which requires a rate adjustment related to PPRs. Hospital readmissions are increasingly viewed as indicative of quality of care issues, ranging from complications during the hospital stay or immediately afterward, incomplete treatment of the underlying medical problem during the hospitalization, or poor or no outpatient care. Readmissions are also costly; thereby fueling the interest in linking payment to quality of care, especially when these readmissions might have been avoided.

This regulation, in concert with enacted statute, implements an adjustment to hospital rates to incentivize these providers to become more accountable to the individuals that they are discharging. Better quality of care upfront will likely reduce the rate of readmissions thereby saving funds that would have otherwise been expended simultaneously resulting in better patient outcomes. It is anticipated that this payment adjustment is the first step in addressing the policy issue of readmission rates in hospitals and will likely be refined in future regulation amendments to address a broader Medicaid population and more recent data sources.

COSTS:

Costs to State Government:

Section 2807-c(35)(b)(v) of the Public Health Law requires that the rates of payment for hospital inpatient services be reduced to result in a net statewide decrease in aggregate Medicaid payments of no less than \$35 million for the period July 1, 2010 through March 31, 2011 and no less than \$47 million for the period April 1, 2011 through March 31, 2012.

Costs of Local Government:

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

Costs to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(35)(b)(v) to promulgate implementing regulations.

Federal Standards:

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

Compliance Schedule:

The proposed amendment establishes a new rate adjustment to address potentially preventable readmissions (PPRs) in hospitals for discharges on or after July 1, 2010; there is no period of time necessary for regulated parties to achieve compliance.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

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

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

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.37 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services.

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for addressing hospital readmissions that are determined to be clinically related to an initial discharge; however, the enacted budget adopted the risk adjusted PPR methodology.

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for addressing hospital readmissions that are determined to be clinically related to an initial discharge; however, the enacted budget adopted the risk adjusted PPR methodology.

Rural Area Participation:

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

Job Impact Statement

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

**EMERGENCY
RULE MAKING**

Ambulatory Patient Groups (APGs) Payment Methodology

I.D. No. HLT-42-10-00004-E

Filing No. 1011

Filing Date: 2010-09-29

Effective Date: 2010-09-29

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

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

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

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulation on an emergency basis in order to meet the regulatory requirement found within the regulation itself to update the Ambulatory Patient Group (APG) weights at least once a year. To meet that requirement, the weights needed to be revised and published in the regulation for January 2010 and updated thereafter. Additionally, the regulation needs to reflect the many software changes made to the APG payment software, known as the APG grouper-pricer, which is a sub-component of the eMedNY Medicaid payment system. These changes include revised lists of payable and non-payable APGs, a new list of APGs that are not eligible for a capital add-on, and a list of APGs that are not subject to having their payment “blended” with provider-specific historical payment amounts. Finally, a brand new payment software enhancement, which allows payment on a procedure code-specific basis rather than an APG basis, needs to be reflected in the regulation.

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

Subject: Ambulatory Patient Groups (APGs) Payment Methodology.

Purpose: To refine the APG payment methodology.

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

86-8.1 - Scope

The proposed amendments to section 86-8.1 of Title 10 (Health) NYCRR add a new subdivision (a) paragraph (6) to establish new rates of payment for ambulatory care services for hospital -based mental hygiene services for the following categories of facilities: mental retardation clinics, mental health clinics, alcoholism and drug abuse clinics, and methadone clinics.

86-8.2 - Definitions

The proposed amendments to section 86-8.2 of Title 10 (Health) NYCRR amend subdivision (q) to revise the definition of peer group so that it may include facility licensure and add a new subdivision (v) that defines a patient-specific peer group consisting of those persons designated as mentally retarded, developmentally disabled, or suffering from traumatic brain injury.

86-8.7 - APGs and relative weights

The proposed revision to section 86-8.7 of Title 10 (Health) NYCRR repeals all of section 86-8.7 effective July 1, 2010 and replaces it with a new section 86-8.7 that includes revised APG weights and procedure-based weights, adds two new procedures and procedure-based weights for D9248 Sedation (non-iv) and T1013 Sign Lang/Oral Interpretation.

86-8.8 - Base rates

The proposed revision to section 86-8.8 of Title 10 (Health) NYCRR amends subdivision (a) and subdivision (b) to establish base rates for a new MR/DD/TBI peer group effective July 1, 2010. Additionally, the proposed revision adds a new subdivision (f) that establishes a licensure-specific, provider-specific methodology for calculating blend rates for hospitals operating under the Mental Hygiene Law and establishes a schedule for implementation of the new blend rates.

86-8.9 - Diagnostic coding and rate computation

The proposed revision to section 86-8.9 of Title 10 (Health) NYCRR amends subdivision (e) to remove APG 322 Medication Administration and Observation from the list of no blend APGs.

86-8.10 - Exclusions from payment

The proposed revision to section 86-8.10 of Title 10 (Health) NYCRR amends subdivisions (h) and (i) to remove APG 312 Full Day Partial Hospitalization for mental illness, APG 320 Case Management - Treatment Plan Development - Mental Health or Substance

Abuse, and 427 Biofeedback and Other Training from the never pay APG list and removes APG 414 Level I Immunization and Allergy Immunotherapy, APG 415 Level II Immunization and APG 416 Level III Immunization, and APG 280 Vascular Radiology Except Venography of Extremity from the if stand alone do not pay list and adds APG 448 After Hours Services to the if stand alone do not pay list.

86-8.13 - Out of state providers

The proposed revision to section 86-8.13 of Title 10 (Health) NYCRR amends subdivision (a) paragraph (1) to correct the spelling of Middlesex.

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 27, 2010.

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

Regulatory Impact Statement

Statutory Authority:

Authority for the promulgation of these regulations is contained in section 2807(2-a)(e) of the Public Health Law, section 79(u) of part C of chapter 58 of the laws of 2008 and section 129(1) of part C of chapter 58 of the laws of 2009, which authorize the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

Legislative Objective:

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

Needs and Benefits:

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

COSTS:

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

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

Costs to Local Governments:

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

Costs to State Governments:

There will be no additional costs to NYS as a result of these amendments. All expenditures under this regulation are fully budgeted in the SFY 2009-10 and 2010-11 enacted budgets.

Costs to the Department of Health:

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

Local Government Mandates:

There are no local government mandates.

Paperwork:

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

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

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

Compliance Requirements:

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

Professional Services:

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

Economic and Technological Feasibility:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department’s issuance in the State Register of federal public notices on February 25, 2009, June 10, 2009 and January 20, 2010.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga

Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Opportunity for Rural Area Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, June 10, 2009 and January 20, 2010.

Job Impact Statement

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

Division of Housing and Community Renewal

NOTICE OF ADOPTION

Public Access to Records of the Division of Housing and Community Renewal (DHCR) Under the Freedom of Information Law (FOIL)

I.D. No. HCR-19-10-00002-A

Filing No. 1022

Filing Date: 2010-10-05

Effective Date: 2010-10-20

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

Action taken: Repeal of Part 2650 and addition of new Part 2650 to Title 9 NYCRR.

Statutory authority: Public Housing Law, section 19 and Public Officers Law, section 87, et seq.

Subject: Public access to records of the Division of Housing and Community Renewal (DHCR) under the Freedom of Information Law (FOIL).
Purpose: To clarify DHCR's procedures for public access to records and to ensure that DHCR's regulations are consistent with FOIL.

Text of final rule: Section 1: Part 2650 is repealed and a new Part 2650 is added to read as follows:

PART 2650
PUBLIC ACCESS TO DIVISION RECORDS

Section 2650.1: Purpose

(a) *These regulations provide information concerning the procedures by which records of the Division of Housing and Community Renewal (hereinafter "Division") may be obtained. These procedures are in compliance with Article 6 of the Public Officers Law, entitled "Freedom of Information Law."*

(b) *Division personnel shall furnish to the public the information and records required by the Freedom of Information Law, as well as records otherwise available by law.*

(c) *Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.*

Section 2650.2: Records Access Officer

(a) *The Division's Records Access Officer is responsible for ensuring appropriate responses to public requests for access to records. All references herein to Records Access Officer shall include his or her designees and shall not be construed to prohibit other Division employees, who are also authorized to make records available to the public, from doing so.*

(b) *The Division shall maintain a current list by subject matter of records and assist persons seeking records to identify the records sought, if necessary. This list shall be sufficiently detailed to permit identification of the category of the records sought and shall be posted on the Division's website. Additionally, the list shall be updated annually and the date of the most recent update shall be conspicuously indicated on the list.*

Section 2650.3: Locations and hours for public access

(a) *Records maintained by the Division's Office of Rent Administration are available for public inspection and copying, upon request and appointment, at the Division office located in Jamaica, New York. Requests for information and records can be made to that office by writing to:*

*Records Access Officer
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, New York 11433
e-mail: ORAFOIL@nysdher.gov*

(b) *Records maintained by the Division's Office of Community Development and the Office of Community Renewal are available for public inspection and copying, upon request and appointment, at the Division office located in Albany, New York. Requests for information and records can be made to that office by writing to:*

*Records Access Officer
Division of Housing and Community Renewal
Hampton Plaza
38-40 State Street
Albany, New York 12207
e-mail: CDFOIL@nysdher.gov*

(c) *All other records maintained by the Division, including housing operation records, are available for public inspection and copying, upon request and appointment, at the Division office located at 25 Beaver Street, New York, New York. Requests for information and records can be made to that office by writing to:*

*Records Access Officer
Division of Housing and Community Renewal
25 Beaver Street - 7th Floor*

New York, New York 10004
 e-mail: FOIL@nysdhr.gov

(d) The Records Access Officer may designate another location in which a requestor may review records.

(e) Requests for public access to records shall be accepted and records produced during all hours the Division is regularly open for business.

Section 2650.4: Requests for public access to records

(a) All requests shall be made in writing. Requests for records may be submitted by electronic mail.

(b) Requests shall reasonably describe the record sought. To the extent possible, the requestor shall supply identifying information that will assist the Division in locating the records sought. In the absence of such identification, the Division may seek clarification from the requestor, in order for the request to be considered.

(c) The Division shall be required to produce only records maintained by or for the Division at the time of the request, with the exception of documents that are exempt from disclosure pursuant to the Public Officers Law, or any other applicable law, regulation or order of a court of competent jurisdiction. The Records Access Officer shall provide, in writing, the reason for any such withholding.

(d) If records are maintained on the internet, the requestor shall be informed that the records are accessible via the internet and in printed form either on paper or other information storage medium.

Section 2650.5: Responses to requests

(a) The Records Access Officer shall within five business days of receiving a request for documents:

1. grant access to the records, in whole or in part; or
2. deny the request, in whole or in part, and state the reason therefore; or
3. if the request does not clearly identify the records sought, seek additional information from the requestor; or
4. acknowledge receipt of the request and provide a statement of the reasonable approximate date when the request will be granted or denied. If the circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the Division shall state, in writing, the reason for the delay and provide a date certain when the request will be granted in whole or in part.

(b) The Division shall respond by electronic mail to requests submitted by such mail, to the extent practicable, unless a response in some other form is requested. The Division shall respond to all other written requests by electronic mail, if possible, upon request.

Section 2650.6: Fees

(a) No charge will be made to inspect a record, certify a record or to certify a denial of a request for a record and the reason therefore.

(b) A charge will be made of \$0.25 cents per page for photocopying of pages that are not larger than 9 inches by 14 inches. There will no charge for the first five pages.

(c) Charges for materials or services other than paper shall be based on the actual cost to the Division.

(d) Payments for copy charges or charges for other materials or services shall be made by check or money order payable to "New York State Division of Housing and Community Renewal."

(e) The requestor shall be notified of the amount of the fee.

Section 2650.7: Denial of access to records

(a) Denial of access to records maintained by the Division's Office of Rent Administration shall be in writing, stating the reason therefore and advising the requestor of the right to appeal to:

Records Appeals Officer
 Division of Housing and Community Renewal
 Office of Rent Administration
 Gertz Plaza
 92-31 Union Hall Street
 Jamaica, New York 11433

(b) Denial of access to all other records maintained by the Division

shall be in writing, stating the reason therefore and advising the requestor of the right to appeal to:

Records Appeals Officer
 Office of the General Counsel
 Division of Housing and Community Renewal
 25 Beaver Street - 7th Floor
 New York, New York 10004

(c) When the Records Access Officer has denied a request for records in whole or in part, the requestor may, within thirty days of the date of such denial, appeal the denial to the Records Appeals Officer.

(d) The Division's failure to comply with the time limitations provided in section 2650.5 of this Part shall constitute a denial of access to records that may be appealed.

(e) The Records Appeals Officer will forward to the Committee on Open Government copies of all appeals upon receipt.

(f) The Records Appeals Officer will determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing.

(g) The decision by the Records Appeals Officer will constitute a final determination of the Division, with respect to the request for records and a copy will be sent to the Committee on Open Government.

(h) A proceeding to review an adverse determination on appeal may be commenced, pursuant to Article 78 of the Civil Practice Laws and Rules.

Section 2650.8: Posted notice

The Division shall cause to be conspicuously displayed at each location where records are kept, a notice clearly indicating:

- (a) the title and business address of the records access officers and appeals officers; and
- (b) the location where records can be seen.

Section 2650.9: Trade Secret and Commercial Information Exceptions

(a) The Records Access Officer shall, pursuant to Article 6 of the Public Officers Law, deny a request for records or portions thereof that are trade secrets or are submitted to the Division by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

(b) Any party submitting records to the Division that seeks an exemption from disclosure on the ground stated in paragraph (a) shall:

1. submit a written request for an exemption from disclosure to the Records Access Officer;
2. submit the request at the time the records purportedly containing trade secret information or confidential commercial information are submitted to the Division; and
3. the party who seeks an exemption from disclosure shall:
 - (i) clearly identify the trade secret information or the confidential commercial information likely to cause substantial competitive injury;
 - (ii) include the name and title of an individual who may be contacted concerning the request; and
 - (iii) state reasons why the information is either a trade secret or confidential commercial information likely to cause substantial competitive injury if disclosed.

(c) With respect to information submitted as provided for in subdivision 5 of section 89 of the Public Officers Law, such information shall be exempted from disclosure and maintained by the Division apart from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction. The Records Access Officer shall be responsible for the custody of such information. Each Division employee who has custody of such information shall take appropriate measures to safeguard such records and to protect against their unauthorized disclosure.

(d) Within seven business days of receipt of a request pursuant to paragraph (b) of this section, the Division shall issue a written deter-

mination granting or denying such exception and stating the reasons therefore. Copies of such determinations shall be served upon the person, if any, requesting the record, the person who requested the exception and the Committee on Open Government.

(e) A denial of an exception from disclosure may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record.

(f) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the Division's determination with the Records Appeals Officer.

(g) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination of such appeal shall be served upon the person, if any, requesting the record, the person who requested the exception and the Committee on Open Government. The notice shall contain a statement of the reasons for the determination.

(h) A proceeding to review a determination adverse to a person requesting an exception from disclosure pursuant to this subdivision may be commenced pursuant to Article 78 of the Civil Practice Law and Rules. Such proceeding must be commenced within fifteen days of the service of the written notice containing the adverse determination.

Section 2650.10: Severability

If any provision of these regulations or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of these regulations or the application thereof to other persons and circumstances.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 2650.2(b), 2650.4(c), 2650.9(i) and (j).

Text of rule and any required statements and analyses may be obtained from: Gary R. Connor, General Counsel, New York State Division of Housing and Community Renewal, 25 Beaver Street, 7th Floor, New York, New York 10004, (212) 480-6707, email: GConnor@nysdchr.gov

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement is not required because the minor nonsubstantial changes that were made to the proposed regulations did not change the accuracy of the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is still not required because only minor nonsubstantial changes were made to the previously published proposed regulations, and it is readily apparent that they will not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small business or local governments.

Revised Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is still not required because only minor nonsubstantial changes were made to the previously published proposed regulations, and it is readily apparent that they will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Revised Job Impact Statement

A revised Job Impact Statement is still not required because only minor nonsubstantial changes were made to the rule as previously published, and it is readily apparent that they will have no impact on jobs and employment opportunities.

Assessment of Public Comment

The only comments received by the Division were from the New York State Committee on Open Government. The Committee suggested that a provision be added to section 2650.2(b) indicating that the Division's subject matter list will be listed on the Division's website. The Committee also recommended that section 2650.4(c) be revised to clarify that it is consistent with the definition of the term "record" provided in section 86(4) of the Freedom of Information Law. Additionally, the Committee pointed out that the provisions of sections 2650.9(i) and (j) may be unnecessary and recommended they be omitted. The Division found these three comments to be valid and revised the proposed regulations to reflect them.

NOTICE OF ADOPTION

Collection, Maintenance, Use and Disclosure of Personal Information by DHCR, Pursuant to the Personal Privacy Protection Law

I.D. No. HCR-19-10-00003-A

Filing No. 1021

Filing Date: 2010-10-04

Effective Date: 2010-10-20

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

Action taken: Addition of Part 2657 to Title 9 NYCRR.

Statutory authority: Public Housing Law, section 19; and Public Officers Law, section 94, *et seq.*

Subject: Collection, maintenance, use and disclosure of personal information by DHCR, pursuant to the Personal Privacy Protection Law.

Purpose: To clarify procedures relating to personal information collected and maintained by DHCR.

Text or summary was published in the May 12, 2010 issue of the Register, I.D. No. HCR-19-10-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Gary R. Connor, General Counsel, New York State Division of Housing and Community Renewal, 25 Beaver Street, 7th Floor, New York, New York 10004, (212) 480-6707, email: GConnor@nysdchr.gov

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY RULE MAKING

Licensing of Blasters, Crane Operators, Laser Operators and Pyrotechnicians

I.D. No. LAB-31-10-00003-E

Filing No. 1012

Filing Date: 2010-09-30

Effective Date: 2010-09-30

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

Action taken: Addition of Part 61 to Title 12 NYCRR.

Statutory authority: General Business Law, section 483

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

Specific reasons underlying the finding of necessity: These regulations provide that no individual shall use lasers, operate a crane or act as a blaster or a pyrotechnician without holding a valid certificate of competence issued by the Commissioner of Labor. These regulations provide procedures to regulate these four occupations that have been designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property.

A new part 61 was added to 12 NYCRR to create a single part (12 NYCRR 61) for the licensing and certification requirements for pyrotechnicians, blasters, crane operators and laser operators.

All provisions regarding pyrotechnicians are new because the licensing and certification requirements for pyrotechnicians were only recently added to statute by Chapter 57 of the Laws of 2009.

Subject: Licensing of blasters, crane operators, laser operators and pyrotechnicians.

Purpose: To clarify and standardize the licensing of blasters, crane operators, laser operators, and pyrotechnicians.

Substance of emergency rule: These regulations provide that no individual shall use lasers, operate a crane or act as a blaster or a pyrotechnician without holding a valid certificate of competence issued by the Commis-

sioner of Labor. These regulations provide procedures to regulate these four occupations that have been designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property.

A new part 61 was added to 12 NYCRR to create a single part (12 NYCRR 61) for the licensing and certification requirements for pyrotechnicians, blasters, crane operators and laser operators.

All provisions regarding pyrotechnicians are new because the licensing and certification requirements for pyrotechnicians were only recently added to statute by Chapter 57 of the Laws of 2009.

The licensing and certification requirements regarding crane operators were moved from 12 NYCRR Section 23-8.5 to new Part 61 and amended to establish a smaller number of Crane Board members who need to be present at either examinations or hearings. This will make it easier to schedule examinations, thereby making certain that there will be no delays in the process. The amendments will make it easier to schedule administrative hearings.

The licensing and certification requirements for blasters were moved from 12 NYCRR Section Subparts 39-5 and 39-7 to new Part 61, and revised to conform New York state regulations to nationally recognized safety standards. The proposed amendments require each certified blaster to preserve a comprehensive and accurate record for each blast site. Additionally, the categories of certificates of competence were increased from three to six. These new categories decrease the level of risk to the blaster and the public by ensuring that a blaster is not operating outside of his level of expertise.

The provisions regarding the licensing of laser operators are being moved from 12 NYCRR Subpart 50-9 and have been incorporated into Part 61.

Additionally, under new part 61 all certified individuals will be required to report unusual incidents or events. The Department will accept notification by phone calls, fax, email, in person or any other means acceptable to the Commissioner.

The proposed sections of Part 61 are summarized as follows:

- Subpart 61-1 General Provisions
- Subpart 61-2 Special Provisions for Pyrotechnicians
- Subpart 61-3 Special Provisions for Crane Operators
- Subpart 61-4 Special Provisions for Blasters
- Subpart 61-5 Special Provisions for Laser Operators.

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. LAB-31-10-00003-EP, Issue of August 4, 2010. The emergency rule will expire October 20, 2010.

Text of rule and any required statements and analyses may be obtained from: Victor M. DeBonis, New York State Department of Labor, Harri-man State Office Campus, Building 12, Room 509, (518) 457-4380

Regulatory Impact Statement

1. Statutory authority:

General Business Law Section 482(1) provides that no individual shall use lasers, operate a crane or act as a blaster or a pyrotechnician without holding a valid certificate of competence issued by the Commissioner. General Business Law Section 483(1)(a) provides that the Commissioner of Labor is authorized and directed to prescribe rules and regulations with respect to lasers, crane operators, blasters and pyrotechnicians. Penal Law Sections 405.00 405.003 and 405.002 provide that firework displays must be conducted by certified operators in accordance with permits issued by local jurisdictions in which the firework displays are conducted.

2. Legislative objectives:

General Business Law Section 480 states that the use of lasers, the operation of cranes, the detonation of explosives, and the preparation and firing of pyrotechnics involves such elements of potential danger to the lives, health and safety of the citizens of this state and to their property that special regulations are necessary to insure that only persons of proper ability and experience shall engage in such operations. Section 483 of the General Business Law provides that such regulations may provide for examinations, categories of certificates, licenses, or registrations, age and experience requirements, payments of fees, and may also provide for such limitations and exemptions that the Commissioner of Labor finds necessary and proper.

3. Needs and benefits:

The Commissioner of Labor recognizes the need for procedures to regulate the four occupations which have been designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property. This proposal creates new Occupational licensing and Certification Code 12 NYCRR Part 61, to establish a new certification process for pyrotechnicians and to unify and standardize existing licensing and certification requirements for blasters, crane operators and laser operators. The issuance of a restricted use certificate for all

categories is new. The Commissioner addressed the need for restricted use certificates to take into account an individual's physical limitations or to allow for unique circumstances.

There are two changes in the administrative review procedures for these occupations. An initial applicant can no longer request a hearing for an application denial. There was a need to change this review process as the initial application is based on factual, objective criteria as to whether or not the applicant has the requisite education and/or training. As such, there is no need for a hearing. In denying an initial application, the Commissioner shall provide reason(s) for such denial so that the applicant can decide whether to seek additional education, training and/or experience; and reapply in the future. A hearing shall be granted when an applicant's renewal is denied, or when a certificate is revoked or suspended. After the hearing, and upon notice to the certificate holder, the Commissioner may suspend, revoke, restrict or refuse to renew a certificate. Prior to the new Part 61, a certificate holder first had to appeal the Commissioner's order to the Industrial Board of Appeals. Under the General Business Law, the certificate holder may appeal the Commissioner's order pursuant to Article 78 of the Civil Practice Law and Rules. This new change affords the certificate holder an opportunity for judicial review without first having to present a case before an administrative tribunal.

Pyrotechnicians: All provisions regarding pyrotechnicians are new because the licensing and certification requirements for pyrotechnicians were only recently added to statute by Chapter 57 of the Laws of 2009. There have been several incidents where individuals have been or could have been seriously injured during pyrotechnic displays. The most recent incident occurred during the summer of 2008 when a member of the public was struck by a pyrotechnic shell in the Village of Ticonderoga during an aerial display.

Requiring certification will insure that only individuals who have demonstrated adequate training and experience in the field will be allowed to be in charge of these displays.

These regulations clarify that firework displays subject to the permitting requirements of Penal Law Section 405.00 may be conducted by a single certified operator, who shall ensure that a sufficient number of authorized assistants are available for the safe conduct of the fireworks display. Penal Law Section 405.00(3) requires two operators; but makes no provision regarding certification of these individuals. These regulations clarify that at least one certified operator (as defined in the regulation) must conduct the fireworks display with the assistance of a sufficient number of authorized assistants (as defined in the regulation) to ensure the safe conduct of the fireworks display. Penal Law Section 405.00(2) provides that the permit application for a fireworks display must contain a verified statement from the applicant identifying the individuals who are authorized to fire the display. Since firing the display is undefined in the statute, these regulations clarify that the firing of the display refers to the actions of the certified operator in issuing a signal to start, or halt, the ignition of fireworks, but does not include the actions of authorized assistants, such as shooters, who ignite fireworks in response to a certified operator's signal.

Cranes: The licensing and certification requirements regarding crane operators was moved from 12 NYCRR Section 23-8.5 to new Part 61. Certification levels were added in accordance with the recommendations of the Board and industry practice. The rule establishes a smaller number of Board members who need to be present at the practical examinations to allow one Board member to review the practical crane operator examination via video rather than requiring all examiners to be physically present at the examination site for all certification levels. This rule also reduces administrative review of initial application denials and clarifies that the Commissioner's final written determination regarding certifications properly exhausts administrative review. These changes will make it easier to schedule the exams and provide timely administrative hearings for denial of renewals, or revocation or suspension of certification, without infringing on the licensees due process rights. The members of the Crane Board serve without salary or other compensation (General Business Law, Section 483(3)). The time estimated to conduct the exams and hearings is approximately 40 days per year. While Board members have been extremely generous in making themselves available for their duties, it is increasingly difficult to find testing and hearing dates when sufficient numbers of the board members are available for tests or hearings given other professional and personal demands on their time. This creates many scheduling difficulties and can create delays for crane operators seeking certification or renewal. The heavy work load and lack of reimbursement incentive has made it difficult to recruit enough Board members. Increasing the required number of members would exacerbate the problem.

Blasters: The licensing and certification requirements regarding blasters was moved from 12 NYCRR Sections [Subparts] 39-5 and 39-7 to new Part 61. These provisions require reasonable and proper guarding against personal injuries to employees and the public in the use and the operation of explosives This regulation is being revised to conform New York state

regulations with national safety standards outlined in the National Fire Protection Association, Institute of Makers of Explosives and International Society of Explosive Engineers (hereinafter referred to as the Standards). In developing the proposed amendments, the Department received assistance from industry representatives from throughout the state, which represented both large and small businesses most affected by parts of the code under review. As a result of these meetings, both the Department and industry representatives concluded that these recommendations will improve accountability and actually reduce the risks associated with explosives to blasters and the general public.

The absence of consistency between current New York state regulations and the Standards resulted in a lack of accountability within the industry and also to the general public. The proposed amendments require the certified blaster to maintain records regarding: the blast site; the type of explosives used; the amount, if any, of explosives that were returned to the magazine and the individuals who were present at the site. Additionally, the certified blaster will be responsible for informing the Department of any unusual incidents or events that occur at a blast. Not only are these enhanced measures in line with current industry practices, but they ensure that each certified blaster will be responsible for preserving a comprehensive and accurate record for each blast site. The duty to report and to maintain records will also facilitate the gathering of evidence at an explosive incident which will expedite the investigation conducted by the Department.

The categories of certificate of competence have been increased from three to six. Prior to the creation of these new categories, blasters were required to be competent in all areas of blasting. These new tiers allow blasters to attain levels of expertise and certification that match the type of blasting they will be performing, rather than requiring them to become certified in all categories. These new categories decrease the level of risk to the blaster and the public by ensuring that a blaster is not operating outside his level of expertise. Additionally, certified blasters will be required to complete two continuing education courses during the three year certification period.

Lasers: The licensing and certification requirements for mobile lasers were moved from 12 NYCRR Subpart 50-9 to new Part 61. Minimal revisions to Mobile Laser Operator certifications include:

- Addition of reporting and recordkeeping requirements similar to the other occupations.
- Exemption from investigations of criminal and mental health histories, and limiting physical health history to eye exams.
- Alignment of the regulation with statute, by clarifying that a Laser Examining Board will not be constituted.

4. Costs:

Section 483 of the General Business Law authorizes the Commissioner to determine the costs of the application fees. This amendment imposes no compliance costs upon state or local governments. Since there are no changes to the substantive training hours and certification requirements, there will be no additional costs to crane operators, or laser operators.

Blasters will have an additional cost as they are required to complete two continuing education courses during the three year certification period.

Since the pyrotechnician certification was only recently added to the statute, these provisions establish the fees. The cost to applicants for pyrotechnician certification will be a one hundred and fifty dollar (\$150) non-refundable application fee which will entitle them to be certified for three years. They will also be required to submit and agree to a criminal background check as part of the application process which will cost ninety four dollars and twenty five cents (\$94.25). The total cost will be two hundred and forty four dollars and twenty five cents (\$244.25) initially and upon renewal every three years.

Additionally, applicants will be required to demonstrate that they had training in safe handling and firing of pyrotechnic displays. Most employers currently provide this training to their staff on an annual basis. The examining board appointed by the commissioner, will develop the requisite criteria and training standards.

The other requirement for certification is experience. Applicants will have to be able to demonstrate that they have three years of practical experience by having worked on displays.

The final requirement will be that the applicant passes a written examination, conducted by an examining board, demonstrating that they do have the knowledge necessary to properly carry out their duties as a pyrotechnician. There will be no additional fee for taking the written examination.

5. Local government mandates:

This rule imposes no additional requirements on local governments; all occupational certifications are the sole responsibility of the Department. Pyrotechnicians must still comply with local laws and obtain applicable permits and variances for shows. For example, the City of New York requires Certificates of Fitness for firework displays (see 3 RCNY Section 113-01(e)(2)(B)).

6. Paperwork:

The paperwork requirements contained in the proposed rule include submission of applications for certification to be submitted to the Department along with consent to criminal background checks and fingerprint cards, medical history waivers, employment histories and proof of training and experience.

The Department will have to develop and complete new documents including application forms and letters to address certification determinations. The Department will also need to develop a data base to process the certificates of compliance. Regarding the duty to report unusual incidents or events, the Department will accept notification by phone calls, fax, email, in person or any other means acceptable to the Commissioner.

7. Duplication:

No duplication of rules was identified. Rather, the general provisions of this regulation provide uniformity for the four occupations, yet does not supersede the specific certification criteria for each of the occupations.

8. Alternatives:

Pyrotechnicians: During rule development the Department conducted two years of policy dialogue with the pyrotechnics industry, including a public forum in Syracuse which resulted in selection by the industry of representatives to work with the Department. The resulting three different classifications of pyrotechnicians depending on the applicants training and certification, rather than the alternative single unrestricted certification was presented to and accepted by the Department. The regulation also reflects various other certification provisions recommended by various stakeholders.

Cranes: The primary alternative is to leave the regulation unchanged. The Department considered the alternative of adding new Board members, to increase the pool of available members for testing and/or hearing panels. The current regulations provide for the Commissioner of Labor to appoint the Board members and that the Board be comprised of at least three members. The heavy work load and lack of reimbursement incentive has made it difficult to recruit enough Board members. Increasing the required number of members would exacerbate the problem. The Department developed and incorporated into the text the use of a video camera to tape the person taking the examination as an alternative to one board member having to physically be present at the examination. This saves the Board member travel costs and time that can be applied to increase the efficiency of conducting practical examinations and hearings while maintaining the same safety standards.

Blasters: The Department conducted two years of policy dialogue with the explosive industry, including a public forum in Syracuse which resulted in selection of industry representatives to work with the Department. The resulting additional classifications for blasters, rather than leaving it unchanged, is one alternative presented to and accepted by the Department. The regulation also reflects various record keeping and monitoring provisions recommended by various stakeholders.

Lasers: No substantive alternatives to this category were presented or explored.

The proposal also clarifies that the Commissioner may issue restricted use certificates which takes into account an individual's physical limitations or allows for unique circumstances.

9. Federal standards:

There are no federal standards for pyrotechnic displays. There are no federal standards regulating the testing and licensing of crane operators, blasters or laser operators, or administrative hearings relating thereto.

10. Compliance schedule:

The provisions of this amendment will take effect permanently upon notice of adoption to be published in the State Register. The statute for pyrotechnicians became effective on October 4, 2009. The regulation contains provisions to allow individuals, who can otherwise demonstrate compliance with the age, training and experience requirements for certification, to be certified without having to sit for the exam. These individuals will have until the Commissioner determines a schedule for conducting written examinations. After that date, all applicants, except those holding licenses issued by another regulatory entity in accordance with standards comparable to New York State's standards, will be required to pass a written exam. Current blaster certificate holders will have two years to complete the required continuing education courses.

Regulatory Flexibility Analysis

1. Effect of rule:

These regulations accomplish two purposes. One is to standardize the certification process for the various occupations (crane operators, blasters, laser operators, and now, pyrotechnicians) that the Department is charged with regulating. The second is to adopt specific requirements that relate to the issuance of a Pyrotechnician's Certificate of Competence. The requirement for a Pyrotechnician's Certificate of Competence was enacted by Chapter 57 of the Laws of 2009, and amended General Business Law Section 482. These regulations do not impose any new burdens on local

governments. All of the requirements for review and issuance of certificates rests with the Department of Labor. Pyrotechnicians who own or work for a pyrotechnic business in New York State will be impacted by the rule, in that the person in charge of each display will have to be certified by the Department. Currently there are approximately 79 businesses outside of New York City that are involved in pyrotechnic displays. Pyrotechnicians, Crane Operators, Blasters and Laser Operators who own or work for businesses in New York State will be impacted by the rule, in that the each of those people in the four specified occupations will have to be certified by the Department. Currently there are approximately 79 Pyrotechnician businesses, 3,500 Crane Operators, 5,000 Laser Operators and 675 Blasters outside of New York City. Most of these would qualify as small businesses. Therefore, the rule may have some economic impact on small businesses.

Chapter 57 amended the General Business Law, the Penal Law and the Labor Law. The amendments to the Penal Law now make it possible for pyrotechnic companies to put on displays for "private" events such as weddings etc. Prior to this change, only public displays of fireworks were allowed. It is expected that this change will increase the number of shows being done on an annual basis thereby having a positive economic impact on these small businesses.

The Crane Operator provisions in this proposal relate to the administration of a crane operator's practical examination and the conduct of hearings regarding a suspension, revocation, and refusal to renew a crane operator's certificate. Currently, regulations already require that a crane operator pass a practical examination before being given a certificate to operate a crane. The Crane Examining Board has established different classifications for a crane operator's certificate of competence. The regulation adds these existing classifications to the crane regulations. The regulations have also been amended to provide that an individual, who is denied a certificate of competence for failing the practical examination, may request a review of the reasons for the denial and will be given a written response. The regulations currently require a hearing under these circumstances which is rather an unusual process for someone failing a practical examination.

The proposed amendments require the certified blaster to maintain records regarding: the blast site; the type of explosives used; the amount, if any, of explosives that were returned to the magazine; and the individuals present at each site. Not only are these enhanced measures in line with current industry practices, but they ensure that each certified blaster will be responsible for preserving a comprehensive and accurate record for each blast site. Additionally, three categories of competence will be added for blasters. These new tiers allow the individual's level of expertise to match the type of blasting they will be performing. It is possible that this will have an advantage to the individual blaster because they only need to be certified in their area of expertise.

The licensing and certification requirements regarding crane operators were moved from 12 NYCRR Section 23-8.5 to new Part 61. The licensing and certification requirements for blasters were moved from 12 NYCRR Sections [Subparts 39-5 and 39-7] 39.5 and 39.7 to new Part 61. The licensing and certification requirements for mobile lasers were moved from 12 NYCRR [Subpart] Section 50.9 [50-9] to new Part 61.

2. Compliance requirements:

There are no requirements for local governments associated with this rule. In order to receive a certificate, an individual is required to prove that they are competent in their area of expertise. For example, small businesses will now be required to hire at least one certified pyrotechnician to be in overall charge of each display. Each pyrotechnician must comply with the rule by obtaining Certification from the Department of Labor. They will also be required to submit to a criminal background check as part of the application process, demonstrate that they have had training in safe handling and firing of pyrotechnic displays, practical experience by having worked on displays and must pass a written examination.

The Crane Examining Board has established different classifications for a crane operator's certificate of competence. The regulation merely adds these existing classifications to the crane regulations. These regulations are intended to facilitate the testing of individuals seeking crane operator certificates.

Additionally, three categories of competence will be added for blasters. These new categories allow the individual's level of expertise to match the type of blasting they will be performing. It is possible that this will have an advantage to the individual blaster because they only need to be certified in their area of expertise.

There are no substantive changes for laser operators except the addition of reporting and recordkeeping requirements similar to that of the other certified occupations; exemption from investigations of criminal and mental health histories, and limiting physical health history to eye exams; and changing some language to conform the regulation with statute by clarifying that a Laser Examining Board will not be constituted.

3. Professional services:

The only required professional services associated with this regulation are those of the pyrotechnician created by the regulation.

4. Compliance costs:

This amendment imposes no compliance costs on the state[s] or local governments. There will be no additional costs to crane operators, blasters or laser operators for certifications. The certifications issued under this regulation are individual occupational certifications. The cost of compliance is borne by the employee not the business or government. Blasters will have an additional cost for completing two education courses prior to renewing their certificates.

Since the pyrotechnician certification was only recently added to the statute, these provisions establish the fees. The application fee to obtain a three year certification is one hundred and fifty dollars (\$150). An individual will also be required to submit and agree to a criminal background check as part of the application process which will cost ninety four dollars and twenty five cents (\$94.25). The total cost will be two hundred and forty four dollars and twenty five cents (\$244.25) [224.25] initially and upon renewal every three years. It is possible that there may be some positive impact on wages for these licensed individuals but that will remain to be determined by the marketplace.

5. Economic and technological feasibility:

No undue economic or technological requirements are imposed by this rule.

6. Minimizing adverse impact:

This rule will have no adverse impact on local governments because the certification is an individual licensing requirement. These regulations provide a procedure for obtaining certification and the requirements for licensing. The cost of the license is borne by the employee not the business or the government. The review and issuance of certificates for these various occupations is the sole responsibility of the Department. All certificate holders must still comply with local laws and obtain applicable permits and variances.

Pyrotechnicians who own or work for a pyrotechnic business in New York State will be impacted by the rule, in that the person in charge of each display will have to be certified by the Department. The Department was able to minimize adverse impacts on individuals applying for a pyrotechnician's certification by allowing a certificate to be issued to any individual who files an application prior to the Commissioner's determination of a schedule for conducting written examinations, providing that each applicant can establish proof of at least three years of actual experience as an operator on the types of shows covered by the particular classification for which the applicant applies. These applicants may be required to take and successfully pass an appropriate written examination before renewing their certificates. Additionally, the three classifications of certificates of competence may minimize training and experience for pyrotechnicians who choose to specialize in one category, rather seek certification in all categories. The proposal also reflects the statutory change allowing private pyrotechnic shows, which provides increased flexibility to the industry, and is expected to increase the number of shows being done.

For Blasters, three categories of competence will be added, providing flexibility for blasters who specialize in different levels of blasting. Furthermore, the new classifications of certificates of competence will minimize training and experience for blasters who choose to specialize in one category. In addition, blasters are required to take two educational courses for initial certification, and, under this proposal, they also need to take two training courses prior to each renewal. The Department notes that some certified blasters are too close to the certification renewal date to have enough time to take these courses. Instead of denying the renewal, the Department intends to offer flexibility to those blasters by issuing the renewed certification under a temporary variance. The variance will allow certified blasters to continue working while they complete the required courses within two years, prior to the next renewal date.

The Crane Examining Board is responsible for witnessing practical tests for Crane Operators. Since the members of the Board are not always readily available for this duty, the proposal offers flexibility to them by allowing a review of a video taped test rather than requiring all reviewers to be physically present at the practical exam. That change will also make scheduling exams more efficient thereby minimizing delays. The regulations have also been amended to provide that an individual, who is denied a certificate of competence for failing the practical examination, may request a review of the reasons for the denial and will be given a written response.

There are no substantive compliance changes for laser operators except for the addition of reporting and record keeping requirements similar to the other three certified occupations.

7. Small businesses and local government participation:

The Department has done extensive outreach with respect to blasters and pyrotechnicians while developing this regulation. It began two years ago with a public forum in Syracuse where members of the explosives

industry were invited to discuss reforms to the Department's existing regulations regarding pyrotechnicians and blasters. As a result of these meetings, it became apparent that there was a need to certify pyrotechnicians and that new categories were required for blasters. At the conclusion of the meeting the Department requested that individuals be selected to act as industry representatives. These individuals worked with the Department in developing and revising the existing statutes and regulations. These proposals are a result of the recommendations developed by that workgroup.

Rural Area Flexibility Analysis

1. Types and estimated numbers.

It is expected that the requirement to certify pyrotechnicians may have some economic impact on rural areas. The person in charge of each display will have to be certified by the Department. Currently there are approximately 79 businesses outside of New York City that are involved in pyrotechnic displays. Most of these would qualify as small businesses, some of which may be located in rural areas.

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

The only additional reporting, recordkeeping or other compliance requirements on public or private entities in this rule making will be that all certified individuals will be required to report unusual incidents or events. The Department will accept notification by phone calls, fax, email, in person or any other means acceptable to the Commissioner. Additionally, the proposed amendments require certified blasters to maintain records regarding: each blast site; the type of explosives used; the amount, if any, of explosives that were returned to the magazine; and the individuals present.

There are no requirements for rural local governments associated with this rule. Small businesses located in rural areas will be required to hire or contract with at least one certified pyrotechnician in charge of each display.

3. Costs.

The certifications issued under this regulation are individual occupational certifications. This amendment imposes no compliance costs upon state or local governments. There are no additional costs to crane operators or laser operators. Blasters will have an additional cost as they are required to complete two continuing education courses during the three year certification period. Since the pyrotechnician certification was only recently added to the statute, these provisions establish the fees. Pyrotechnicians located in rural areas will need to become certified. The application fee to obtain a three year certification is one hundred and fifty dollar (\$150). An individual will also be required to submit and agree to a criminal background check as part of the application process which will cost ninety four dollars and twenty five cents (\$94.25). The total cost will be two hundred and forty four dollars and twenty five cents (\$224.25) initially and upon renewal every three years. It is possible that there may be some positive impact on wages for these licensed individuals but that will remain to be determined by the marketplace.

4. Minimize adverse impact.

This rule should have no adverse economic impact on rural areas.

5. Rural area participation.

In developing the proposed regulation with respect to pyrotechnicians and blasters, the Department sought assistance from the explosives industry, which included rural areas. It began two years ago with a public forum in Syracuse where members of the industry were invited to discuss reforms to the Department's existing regulations. At the conclusion of the meeting, the Department requested that individuals be selected to act as industry representatives. These individuals worked with the Department in developing and revising the existing statutes and regulations.

Job Impact Statement

1. Nature of impact:

It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment opportunities, therefore no Job Impact Analysis is required. The certifications issued under this regulation are individual occupational certificates. It is possible that there may be some positive impact on wages for these licensed individuals. The regulation requires that the person in charge of a pyrotechnic display be certified to ensure that they have the necessary training and experience to properly set up and carry out pyrotechnic displays. This certification requirement was enacted into law by Chapter 57 of the Laws of 2009 and is effective on October 4, 2009.

2. Categories and numbers of jobs or self-employment opportunities affected:

Currently, approximately 79 businesses in New York State are involved in pyrotechnic displays. Some are manufacturers, some are display companies and some are a combination of both. Pyrotechnicians who own or work for a pyrotechnic business in New York State will be affected by the rule, in that the person in charge of each pyrotechnic display will have to be certified by the Department.

3. Regions of the state where there would be a disproportionate adverse impact:

None.

NOTICE OF ADOPTION

Licensing of Blasters, Crane Operators, Pyrotechnicians and Laser Operators

I.D. No. LAB-31-10-00003-A

Filing No. 1013

Filing Date: 2010-09-30

Effective Date: 2010-10-20

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

Action taken: Addition of Part 61 to Title 12 NYCRR.

Statutory authority: General Business Law, section 483

Subject: Licensing of blasters, crane operators, pyrotechnicians and laser operators.

Purpose: To clarify and standardize the licensing of blasters, crane operators, pyrotechnicians and laser operators.

Substance of final rule: These regulations provide that no individual shall use lasers, operate a crane or act as a blaster or a pyrotechnician without holding a valid certificate of competence issued by the Commissioner of Labor. These regulations provide procedures to regulate these four occupations that have been designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property.

A new part 61 was added to 12 NYCRR to create a single part (12 NYCRR 61) for the licensing and certification requirements for pyrotechnicians, blasters, crane operators and laser operators.

All provisions regarding pyrotechnicians are new because the licensing and certification requirements for pyrotechnicians were only recently added to statute by Chapter 57 of the Laws of 2009.

The licensing and certification requirements regarding crane operators were moved from 12 NYCRR Section 23-8.5 to new Part 61 and amended to establish a smaller number of Crane Board members who need to be present at either examinations or hearings. This will make it easier to schedule examinations, thereby making certain that there will be no delays in the process. The amendments will make it easier to schedule administrative hearings.

The licensing and certification requirements for blasters were moved from 12 NYCRR Section Subparts 39-5 and 39-7 to new Part 61, and revised to conform New York state regulations to nationally recognized safety standards. The proposed amendments require each certified blaster to preserve a comprehensive and accurate record for each blast site. Additionally, the categories of certificates of competence were increased from three to six. These new categories decrease the level of risk to the blaster and the public by ensuring that a blaster is not operating outside of his level of expertise.

The provisions regarding the licensing of laser operators are being moved from 12 NYCRR Subpart 50-9 and have been incorporated into Part 61.

Additionally, under new part 61 all certified individuals will be required to report unusual incidents or events. The Department will accept notification by phone calls, fax, email, in person or any other means acceptable to the Commissioner.

The proposed sections of Part 61 are summarized as follows:

Subpart 61-1 General Provisions

Subpart 61-2 Special Provisions for Pyrotechnicians

Subpart 61-3 Special Provisions for Crane Operators

Subpart 61-4 Special Provisions for Blasters

Subpart 61-5 Special Provisions for Laser Operators.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 61-1.2(j), 61-1.8(a)(4) and 61-2.2(f).

Text of rule and any required statements and analyses may be obtained from: Victor M. DeBonis, New York State Department of Labor, Harri-man State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: Joan.Connell@labor.ny.gov

Additional matter required by statute: National Fire Protection Association, 1123 and 1126 Standards on Fireworks Displays and Use of Pyrotechnics Before a Proximate Audience, and IME Safety Library Publications #3 and #20.

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

There have been no substantial revisions or changes in the text of the Proposed Rule necessitating a modification in the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement as published in the State Register on August 4, 2010. The Rule is adopted as proposed.

Assessment of Public Comment

The agency received no public comment.

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

Hotel and Restaurant Wage Orders

I.D. No. LAB-42-10-00005-P

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

Proposed Action: Repeal of Parts 137 and 138; and addition of Part 146 to Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11), 199, 653 and 656

Subject: Hotel and Restaurant Wage Orders.

Purpose: Combine the Hotel and Restaurant Wage Orders into one Wage Order titled Hospitality Wage Order.

Substance of proposed rule (Full text is posted at the following State website: www.labor.ny.gov): The proposed new rule will combine the wage orders for the restaurant and hotel industries (12 NYCRR 137 and 138) into a single new Minimum Wage Order for the Hospitality Industry (12 NYCRR 146). Regarding tips, the proposed regulations replace departmental policies and case law with new regulations to provide clarity and uniformity throughout the hospitality industry. They simplify by consolidating the current two-tiered tip credits, which depend on the amount of tips received, into a single tier for most employees. They eliminate a separate tip credit for housekeeping employees in resort hotels, consolidating them with other tipped service employees. (However, the proposed regulations do retain several special provisions for resort hotels only, namely a higher tip credit for non-food service employees and higher meal and lodging credits for all employees.) They consolidate two-tiered meal credits into a single tier for most employees. They eliminate unnecessary housing regulations by simply requiring compliance with all state, county and local health and housing codes. They eliminate overtime pay requirements unique to the hotel industry, leaving only time-and-a-half after 40 hours as the common rule for all covered workers in the hospitality industry. They extend extra payments that currently apply only to employees at or near the minimum hourly rate (call-in pay, excessive spread of hours pay, uniform maintenance pay) to all covered employees, thus eliminating a phase-out as wage rates rise that is poorly understood and cumbersome to calculate. Extending these extra payments from a limited class to all covered employees will help to make these requirements less obscure and more widely known.

Subpart 146-1 entitled "Minimum Wage Rates" sets forth the basic minimum hourly wage rate for employees in the hospitality industry, allows for tips credits toward the minimum wage, requires that employers in the hospitality industry pay an increased hourly rate for hours worked over forty per week, provides for payment of wages in "call-in" situations and requires spread of hours pay for employees in restaurants and non-resort hotels. Further, this section provides for uniform maintenance pay, the cost of purchasing required uniforms and allows for credits toward the minimum wage for meals and lodging.

Subpart 146-2 entitled "Regulations" sets forth the records employers are required to keep, mandates written notice to employees of pay rates, tip credit and pay day, as well as the provision of wage statements to each employee with every payment of wages. Employers must post minimum wage provisions in the place of employment, and must pay employees at an hourly rate, rather than salary, piece rate, or any other non-hourly rate of pay. The minimum wage requirements must be met on a week by week basis, regardless of the frequency of the payment of wages. Employers are prohibited from making deductions from pay for such things as spoilage and breakage. Minimum requirements are set forth for the provision of meals and housing for employers taking those allowances toward the minimum wage. Employees working in both tipped and non-tipped jobs, or occupations covered by both the hospitality wage order and another wage

order, must be paid at whatever rate is applicable to the highest paying job or wage order, depending on the hours worked or percentage of hours worked at each job. Trainees, learners or apprentices must still be paid in accordance with this part. Students obtaining vocational experience to meet curriculum requirements shall not be deemed to have been permitted or suffered to perform work, and participants in rehabilitation programs approved by the commissioner shall be paid in accordance with the requirements of the approved program to satisfy this part. Definition of the terms "tip pooling" and "tip sharing" are provided, as well as the circumstances under which each is permissible, the degree to which the employer may require tip pooling and sharing, and the records the employer is required to keep when operating tip pooling or tip sharing. A rebuttable presumption is created that any charge in addition to the bill for such things as food, beverage and lodging is to be considered a gratuity. Employers are permitted to run the employees' tips through the employer's credit card machine without incurring the extra cost of associated with the same.

Subpart 146-3 entitled "Definitions" provides definitions for the terms "hospitality industry", "hotel", "all year hotel" and "resort hotel". This subpart specifies which types of employees are covered, and provides definitions of individuals employed in a bona fide executive, administrative or professional capacity, as an outside sales person, golf caddy, camper worker and staff counselor. This subpart further defines "service employee", "non-service employee" and "food service worker". Definitions of the terms "regular rate of pay", "working time", "meal", "lodging", "split shift", "required uniform", "ordinary wardrobe" and "week of work" are all contained in the this subpart, as applicable to the entire part.

Text of proposed rule and any required statements and analyses may be obtained from: Benjamin Shaw, New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, New York 12240, (518) 457-4380, email: usfbas@labor.ny.gov

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:

The statutory authority for the promulgation of this rule is found in Labor Law sections 653, 656, 199 and 21(11).

2. Legislative objectives:

Pursuant to Section 650 of the Labor Law, the stated purposes of Article 19 (the Minimum Wage Act) are: to ensure that wage levels are sufficient to provide adequate maintenance for employees and their families; to promote the health, efficiency and well-being of employees; to prevent unfair competition against other employers and their employees; to promote stability of industry; to maintain the purchasing power of employees; and to minimize the necessity to supplement wages with public money for relief or other public and private assistance.

More generally, section 21(11) authorizes the Commissioner of Labor to issue regulations governing any provision of the NYS Labor Law.

3. Needs and benefits:

Problems identified repeatedly in oral and written testimony submitted to the Wage Board were excessive complexity of regulations, opacity of departmental policy and reliance on case law, inconsistent application, and lack of knowledge or understanding of the regulations by affected and regulated parties.

To remedy these problems, the regulations have been amended to explain all requirements more clearly, using plain language and examples. They consolidate two regulations (12 NYCRR 137 and 12 NYCRR 138) regarding the hotel and restaurant industries into one new regulation (the hospitality industry) at 12 NYCRR 146. Regarding tips, the proposed regulations replace departmental policies and case law with new regulations to provide clarity and uniformity throughout the hospitality industry. They eliminate unnecessary housing regulations by simply requiring compliance with all state, county and local health and housing codes. They eliminate overtime pay requirements unique to the hotel industry, leaving only time-and-a-half after 40 hours as the common rule for all covered workers in the hospitality industry. They extend extra payments that currently apply only to employees at or near the minimum hourly rate (call-in pay, excessive spread of hours pay, uniform maintenance pay) to all covered employees, thus eliminating a phase-out as wage rates rise that is poorly understood and cumbersome to calculate.

(b) Underpayments arising from failure to pay an hourly rate and/or to pay premium overtime pay.

Existing regulations do not prohibit paying salaries to non-exempt workers, per se, although they do require that the salary cover at least the minimum hourly rate for all hours worked and they do require extra pay in addition to the salary, at a half-time of the regularly hourly rate, for any overtime hours. Currently, when non-exempt workers are paid a salary for

all hours worked, the "regular rate" must be derived by dividing the salary by the total number of hours worked during that pay period. For hours worked in excess of forty per week, the employee must be paid time plus one half the regular rate. This requirement, well established in case law, is not well known, and multitudes of overtime violations result from payment of weekly rates. Under the current regulations, which technically allow non-exempt workers to be paid by salary, even a well meaning employer can easily end up violating both the minimum wage/overtime and record keeping requirements of Article 19 and its current attendant regulations.

To remedy these problems, the proposed regulations require that: (i) all non-exempt employees (except commissioned salespeople) be paid an hourly rate; (ii) at the time of hiring and at any time prior to a change in the wage rates, employers must give employees written notices of their regular and overtime hourly rates; and (iii) employers are specifically prohibited from paying employees (except commissioned salespersons) on any basis other than an hourly rate and failure to do so shall result in the commissioner's calculation of an hourly rate by dividing the employee's total weekly earnings, not including exclusions, by the lesser of 40 hours or the actual number of hours worked by the employee during that work week, with the determination of regular and overtime wages due to be based upon such calculated hourly rate.

(c) The size of the gap between regular minimum wage and the tipped rates.

The tipped rate as a proportion of the general minimum rate has declined as follows: 70% in 1974, 69% in 1981, 68% in 1991, and 64% (food service) and 68% (non-food service) from 2000 to the present. Food service workers vastly outnumber other tipped occupations in the industries and the decline of their pay rate as a proportion of the general minimum rate amounts to \$.425 per hour or \$17 per 40-hour week or \$884 per year.

The proposed \$.35 per hour increase in the rate for tipped food service workers only partially recoups the loss. Although small, it is a step in the right direction. Occupations affected by it include waitstaff, bussers and dining room attendants, bartender assistants, bartenders, room service waitstaff and others.

The other proposed increase is \$.75 per hour in the rate for tipped non-food service workers. The tipped rate of these workers as a proportion of the general minimum rate has declined from 70% in 1974 to 68% in 2009, or \$.175 per hour or \$7.00 per week or \$364 per year. Unlike the \$.35 increase, the \$.75 proposed increase is not merely playing catch-up. Instead, it advances these occupations to 78% of the general minimum wage. The occupations covered by this increase include baggage porters, bellhops, door persons, housekeepers, valet parkers and food delivery workers.

(d) Bring clear and equitable rules for handling tips into the regulations.

The proposed regulations flesh out Section 196-d, the Labor Law prohibiting tip appropriation, with basic rules for the handling of tips and mandatory charges on guest bills purported to be gratuities or substitutes for gratuities. They clarify and fill in interstices in the statute by consolidating and incorporating previously issued case law, departmental guidelines, and departmental opinion letters. They allow employees to voluntarily share or pool their tips, allow employers to require tip sharing or tip pooling, allow employers to set the percentages to be shared with or distributed to various service occupations, limit the occupations eligible to receive shares of tips to those that provide direct personal service to patrons, and those that assist the direct service providers to do so, require written notice upon hiring to employees of any tip pooling system, require employers to keep specified records on shared and pooled tips and mandatory charges purported to be gratuities or substitutes for gratuities, relieve employers of any liability for an employee's wrongful withholding of his or her tips from shared or pooled tips, require employers to give all employees access to tip records but not the payroll records of other employees, require employers to distribute in full to employees as gratuities any charge on a guest bill that would be understood by the reasonable customer to be a gratuity or substitute for a gratuity, establish a rebuttable presumption that any charge for "service" or "food service" is a charge purported to be a gratuity, require written notice to customers when a charge for the administration of a banquet, special function or package deal is not a gratuity to be distributed to the employees who provided the service, and require employers to return to employees the full amount of any tips charged to credit cards, less the pro-rated portion of the tip taken by the credit card company.

(e) Existing call-in, spread of hours, and uniform maintenance protections exclude many workers.

Current regulations give these protections only to workers paid at or near the minimum hourly rate. The proposed regulations extend the protections involving these matters to all covered workers, and clarify these requirements for the benefit of both employer and employee.

(f) Eliminate unnecessary uniform maintenance protections.

Current regulations require uniform maintenance pay even when the

uniforms are made of wash and wear material and are routinely washed and dried with other personal garments, i.e., no extra care is required. This is unnecessary. Under the proposed regulations, by adopting a wash-and-wear exemption, far fewer uniforms trigger the extra pay.

(g) Avoid captive audience for meal purchases.

The proposed regulations requires employers, whenever the shift is long enough to invoke the meal period law, to either allow employees to bring their own food or give them a meal at a cost no greater than the meal credit amount in the wage order.

4. Costs:

Costs: There are no added costs to the Department of Labor or to state and local governments. Following are the cost effects on hospitality industry businesses.

(a) The minimum hourly rate for tipped non-food service employees increases by \$.75 per hour. The minimum hourly rate for tipped food service employees increases by \$.35 per hour.

(b) A minimum of three hours call-in pay must be paid to all employees, with payment for actual attendance to be paid at the employees' regular or overtime rate minus tip credit and payment for the balance of the call-in period to be made at the minimum wage with no tip credit subtracted.

(c) An extra hour of pay at the minimum hourly rate for a workday with a spread of hours greater than 10 is extended to all covered employees. Each such day will cost an additional \$7.25.

(d) The adoption of a wash-and-wear exemption will reduce costs for a large number of businesses that currently pay uniform maintenance pay and will no longer be required to do so. The reduction in costs will be up to \$9.00 per week per uniformed employee.

(e) The extension of uniform maintenance pay to all covered employees will increase costs for those employers who have above-minimum wage employees who are required to wear uniforms that require special care. The increase in costs will be up to \$9.00 per week per above-minimum wage uniformed employee.

(f) Meal credits that employers may take for providing meals to food service workers in restaurants and all-year hotels are increased by \$.15 per meal, reducing business costs by that amount.

(g) The added cost of complying with the new requirement to give written pay notices to employees whenever their pay rates change is minimal, mainly consisting of the time it takes to fill out a simple pay notice and obtain the employee's signed receipt, times the number of employees affected.

(h) The requirement that non-exempt employees be paid hourly rates is neutral with respect to costs.

(i) However, there is an added cost, after an employer has failed to pay an hourly rate. The proposed regulations treat the salary as constituting the straight time pay for only the first 40 hours and thus require the payment of full time-and-a-half for the overtime hours, in addition to the salary.

(j) The added cost of lowering the overtime pay threshold for residential employees in hotels from 44 hours to 40 hours is one-half the employee's rate of pay times up to 4 hours, whenever the employee works overtime.

(k) The cost reduction from eliminating the overtime premium on the 7th day when a resort hotel employee works less than 40 hours in a week but works a schedule spread over 7 days is the one-half the employee's regular rate times the number of hours worked on the 7th day.

(l) The costs of keeping records on tip pooling, tip sharing, and mandatory charges on guest bills for gratuities will be new costs for those employers who require pooling or sharing and/or who make mandatory charges, unless they already keep such records for their own operational needs.

(m) The time and costs of disputation and litigation will be reduced for businesses and for the Department of Labor.

5. Local government mandates:

None. Federal, state and local governments and political subdivisions thereof are excluded from coverage under the proposed wage order by Labor Law Section 651.5(n) and 651.5 (last paragraph).

6. Paperwork:

The two new paperwork requirements are: (a) businesses in the hospitality industry will be required to keep and retain for six years records related to tip pooling, tip sharing, charges for gratuities, and charges for services unrelated to gratuities; and (b) employers will be required to give written pay notices to employees whenever pay rates change and to retain signed acknowledgments of receipt for six years.

7. Duplication:

The proposed rule does not duplicate any other state regulations.

8. Alternatives:

The Wage Board considered many alternatives and proposals before adopting its recommendations. Several were debated strenuously. Individual members of the board may not agree with every final Board recommendation. Each understood that some compromises were

necessary. Some decisions involved prioritizing what was most important and balancing of interests. All Board members supported the final Report as a whole.

9. Federal standards:

The federal Fair Labor Standards Act expressly provides that when states have higher or stricter standards, the higher or stricter standard will apply.

Currently, both federal and NYS laws set a minimum rate of \$7.25 per hour and overtime pay at one-and-one-half times the regular rate. The proposed rule exceeds federal standards in the following areas:

The proposed NYS regulations require employers to pay tipped employees at least \$4.75 per hour this year and at least \$5.00 per hour in 2011. The proposed NYS regulations do not allow fair market value credits toward the minimum wage and instead set low fixed limits on the value of meals and lodging as part of the wages paid to employees.

The federal standards set a weekly minimum wage, while some requirements in the proposed NYS regulations apply to both minimum wage and above-minimum wage workers (call-in pay, excessive spread of hours pay, and uniform maintenance pay).

The proposed NYS regulations require at least 3 hours pay for reporting to work, unless the employee has a regularly scheduled shift that is shorter. The proposed NYS regulations require an extra hour of pay when the spread of hours is greater than 10. The proposed NYS regulations prohibit such deductions in their entirety, protecting the wages of above-minimum wage workers as well as minimum wage workers. The proposed NYS regulations do require that such charges be distributed to employees as tips. The proposed NYS uniform maintenance pay amounts are definite, stated amounts and must be added to the wages of all non-exempt employees at any pay rate.

10. Compliance schedule:

Regulated entities should be able to achieve immediate compliance with the regulations. All of the payments to employees required in the proposed rule are types of payments already required by the existing regulations, so that the payroll processes necessary for these payments already exist at all complying enterprises. For the same reason, employers compliant with current regulations will not have any difficulty understanding the payments required under the new regulations.

Regulatory Flexibility Analysis

1. Effect of rule: No local governments will be affected by these regulations. All restaurants and hotels, including small ones, will be affected. The types of businesses included in the terms "restaurant" and "hotel" are specified in Section 146-3.1 of the proposed regulations. Based on 2008 data, approximately 41,800 hotels and restaurants with a combined total of approximately 577,000 employees are located in New York State.

2. Compliance requirements: There are no reporting requirements. New recordkeeping requirements are: (a) to keep records of tip sharing, tip pooling and service charges, and (b) to give written notices to employees when pay rates change and obtain signed acknowledgments of receipt.

All covered employees, except commissioned salespersons, must be paid an hourly rate. If a business fails to pay an hourly rate, then the salary will cover the straight-time pay only for the first 40 hours and full "time-and-a-half" will be due for any overtime hours. The overtime pay threshold for residential employees in hotels goes down from 44 hours to 40 hours and overtime on the 7th day in resorts is eliminated. (Current regulation 138-2.2 states that when employees of resort hotels work seven consecutive days, they must be paid overtime for all hours worked on the seventh consecutive day). The minimum rates of pay for tipped employees increase \$.35 per hour for food service workers and \$.75 per hour for other tipped workers. Call-in pay, spread of hours pay, and uniform maintenance pay are extended to all employees. However, businesses that require only wash-and-wear uniforms and provide a sufficient number of uniforms to employees will no longer have to pay uniform maintenance pay. The meal credits employers may take for providing meals to food service workers are increased. There are regulations regarding tip pooling, tip sharing and the handling of tips and service charges on credit card bills. Tip pooling and tip sharing may be required by the employer or implemented by the employees. If the tip pooling or tip sharing is required by the employer, the employer must keep records of the tips collected, lists of the participating occupations and the share of each tip to which they are entitled and the amount of tips received by each employee from the tip share or tip pool.

3. Professional services: These regulations will not necessarily require small businesses to obtain additional professional services. If records of tip sharing, tip pooling and/or service charges have previously been limited to informal worksheets or the like, a bookkeeper or accountant's assistance may help to come into compliance with the new record-keeping requirements.

4. Compliance costs: As explained in the Regulatory Impact Statement, the minimum hourly rate for tipped non-food service employees increases by \$.75 per hour and for tipped food service employees increases by \$.35

per hour. The cost of providing written pay notices to employees is minimal. Such notices need only be provided to employees who don't read English if the Department has made such notices available at no cost to employers in the employee's primary language, thereby resulting in no additional cost to the employer. Costs may increase for overtime served by residential employees in hotels because overtime will now be triggered after 40 hours work rather than 44 hours. Costs for above minimum wage employees who work spreads of hours greater than 10 in a day will increase by \$.75 per employee. Additional costs related to new record keeping requirements for tips and gratuities will depend upon how much employers will need to adjust their existing recordkeeping practices. Costs reductions include \$.15 per meal for employers who provide meals to employees and elimination of uniform maintenance costs for wash and wear uniforms that do not need special care. Annual costs cannot be estimated as they will vary with the size of the business, the type of business and the particular practices of the business regarding employees' work hours, meals, lodging, uniforms and tips.

5. Economic and technological feasibility: Immediate compliance will be economically and technologically feasible. Overtime pay, tip credits, meal and lodging credits, call-in pay, spread of hours pay, and uniform maintenance pay have existed for decades in the hotel and restaurant industries. Payroll procedures have been already set up. New record-keeping for tips and service charges is within the capacity of businesses in the industry to set up, if they have not already done so.

6. Minimizing adverse impact: To minimize any adverse impact from increasing the minimum hourly wage rates for tipped employees, the increase has been divided into two steps (\$.10 in 2010 and \$.25 in 2011).

7. Small business and local government participation: No local governments participated. A six-member wage board of unpaid citizens met, took public testimony and deliberated for over 5 months. Two board members were from the NYS Restaurant Association and the NYS Hospitality and Tourism Association. Both associations include small businesses among their members. At three public hearings held in Buffalo, Albany and New York City, and by written testimony, some 59 persons owning, managing or representing businesses in the hospitality industry submitted testimony. The 59 people included persons from numerous independent restaurants and hotels, small sole proprietorships and family businesses, small partnerships and investor-owned businesses, and participants in franchised chains. After the wage board issued its report and recommendations, public notice was published and another public comment period of 15 days ensued.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: These regulations apply to all restaurants and hotels in rural areas of the state. The proposal specifically includes rural area location in two of the three characteristics that define "resort hotel." In 2008, the hotel industry employed approximately 81,000 people in approximately 2,800 establishments statewide. The restaurant industry employed approximately 486,000 people in approximately 39,000 establishments statewide. Following is data on the number of establishments and employment in the hotel and restaurant industries by region in 2008. While rural areas have not been separated out from suburban and urban areas, the available data demonstrates that the hospitality industry is located throughout rural areas of the State.

Hotels:

Capital District - 422 establishments, 6,322 employees;
Central NY - 161 establishments, 2,917 employees;
Finger Lakes - 181 establishments, 3,707 employees;
Hudson Valley - 415 establishments, 8,839 employees;
Long Island - 241 establishments, 5,190 employees;
Mohawk Valley - 119 establishments, 1,450 employees;
New York City - 567 establishments, 41,406 employees;
North Country - 242 establishments, 2,665 employees;
Southern Tier - 208 establishments, 2,519 employees;
Western NY - 236 establishments, 5,616 employees.

Restaurants:

Capital District - 2,423 establishments, 30,088 employees;
Central NY - 1,613 establishments, 23,283 employees;
Finger Lakes - 2,181 establishments, 33,444 employees;
Hudson Valley - 4,760 establishments, 47,197 employees;
Long Island - 5,853 establishments, 71,484 employees;
Mohawk Valley - 1,027 establishments, 11,581 employees;
New York City - 16,157 establishments, 196,462 employees;
North Country - 905 establishments, 10,364 employees;
Southern Tier - 1,264 establishments, 16,669 employees;
Western NY - 2,897 establishments, 45,554 employees.

2. Reporting, recordkeeping, and other compliance requirements; and professional services: There are no new reporting requirements. There are two new recordkeeping requirements: (a) records on tip sharing, tip pooling and service charges. Rural area businesses that require employees to share or pool tips or that assess mandatory charges on guest bills for gratuities will need to keep records that can be adequately understood at a

later date and are retained for six years. These are ordinary transactions in the normal course of business. Some employers may want the assistance of a bookkeeper or accountant in setting these up. The Department is not able to estimate the cost; (b) written notice must be given to employees whenever pay rates change, signed by the employee, and retained for six years. This does not require any additional professional services. While such notice must be provided in a language other than English if the employee doesn't read English, the requirement will only attach if the Department has developed notices in the necessary language and made them available to employers on its website. There are new compliance requirements for regulated employers regarding tip pooling, tip sharing, and service charges. In the time since a law against tip appropriation was passed in 1968, enforcement has relied on evolving departmental guidelines and case law. As recommended by the Wage Board, the new regulations set out and clarify the requirements. The regulations are expected to improve compliance with the law and reduce disputation and litigation.

3. Costs: The minimum hourly rate for tipped non-food service employees increases by \$.75 per hour and for tipped food service employees increases by \$.35 per hour. The cost of providing written pay notices to employees is minimal. Costs may increase for overtime served by residential employees in hotels in rural areas because overtime will now be triggered after 40 hours work rather than 44 hours. Costs for above minimum wage employees who work spreads of hours greater than 10 in a day will increase by \$7.25 per employee. Additional costs related to new record keeping requirements for tips and gratuities will depend upon how much employers will need to adjust their existing recordkeeping practices. Costs reductions include \$.15 per meal for employers who provide meals to employees and elimination of uniform costs for wash and wear uniforms that do not need special care.

4. Minimizing adverse impact: To minimize any adverse impact from increasing the minimum hourly wage rates for tipped employees, the increase has been divided into two steps (\$.10 in 2010 and \$.25 in 2011).

5. Rural area participation: A six-member wage board of unpaid citizens met, took public testimony and deliberated for over 5 months. Two board members were from the NYS Restaurant Association and the NYS Hospitality and Tourism Association. Two board members were from UNITE HERE and the NY Hotel and Motel Trades Council, AFL-CIO. Two board members represented the general public, including the chair of the board from the School of Industrial and Labor Relations at Cornell University and a former Assistant Attorney General from Long Island. The board held 3 public hearings around the state. In Buffalo, 8 speakers from the region testified. In Albany, 10 speakers from the region and from Central New York testified. The third hearing was in New York City. Written testimony was received from 67 persons from many areas including rural areas of the state, who were owners, managers, and employees at restaurants and hotels. After over 5 months of deliberations, the wage board issued its report, after which a 15 day comment period ensued. The commissioner of labor accepted most of the board's recommendations and modified a few, giving her reasons.

Job Impact Statement

1. Nature of impact:

It is apparent from the nature and purpose of the rule that it will not have a substantial impact on jobs or on employment opportunities.

These regulations are not expected to have a significant impact on jobs and employment opportunities for non-tipped employees paid the minimum wage. A recent study of the fast food industry in four other states has found that the impact of an increase in the minimum wage rate on employment rates is negligible in the positive or the negative (see *The Effect of a Raised Minimum Wage on Employment: Differences Across State and Social Groups*, St. Lawrence University 2009). Here, there is no general increase in the minimum wage rate, as the minimum hourly rate for non-tipped employees stays the same.

In regard to tipped employees, the purpose of these increases is not only to increase these tipped wage rates alone, but also to combine two different wage orders concerning different minimum wages for tipped employees working in different industries. The minimum hourly rate increases from \$4.65 per hour to \$5.00 per hour for tipped food service workers and from \$4.90 per hour to \$5.65 per hour for other tipped workers. The Wage Board representatives from the hotel and restaurant industries, as well as information provided by employers in these industries, indicated the need to simplify the wage order, which currently contains different minimum wage rates for tipped employees in the food service industry than tipped employees in the hotel industry, as well as two tiers of tipped rates within each industry. To that end, these regulations take the first steps toward creating one minimum wage rate for all tipped employees. In order to avoid any possible or perceived negative impact on the effected industries, the tipped minimum wage rate increases are enacted in steps, mindful of the difficulties a sudden large change would present to struggling businesses.

The Wage Board recognized that it was in the interest of both employ-

ees and employers to reduce the number of worker classifications, along with their respective different minimum wage rates for tipped employees, and recommended that this increase occur over time. Again, these increases in minimum wage rates for tipped employees are not an increase in the minimum wage rate for all employees, do not increase the amount an employee is required to ultimately earn each hour in wages plus tips to meet the existing hourly minimum wage rate, and have the ultimate goal of simplifying the calculation of minimum wage rates for all tipped employees for the benefit of those employees as well as the employers, which currently must attempt to ascertain which employees fit into which categories and pay those employees at different rates, depending on their job duties.

Certain extra payments (uniform maintenance, spread of hours, call-in pay) are extended from minimum wage workers to all covered workers, but these extra payments are required only under certain circumstances that are within the control of the employer and usually can be avoided.

The net effect on costs will depend on the size, type and practices of the particular business. Costs will increase for businesses affected by the increase in minimum hourly rates for tipped employees. By the same token, costs will decrease for businesses benefitting from the adoption of the wash and wear exemption from uniform maintenance pay. Costs can change very little or not at all for businesses in which the two effects cancel each other out. Employers who have no tipped employees, such as sole proprietorships, as well as other establishments where the owner(s) perform the job duties of tipped employees while having other employees perform non-tipped duties (such as desk clerk and maintenance), the fast food industry, buffets, cafeterias, take-out restaurants, food stands, childrens' camps, adult camps, and auto and recreational vehicle parks, will not be affected by the increase in minimum hourly rates for tipped employees. The proposed regulations will have the significant benefit of reducing confusion and uncertainty on the part of employers regarding their legal obligations through simplification of the current wage order, elimination of unnecessary provisions, consolidation of other provisions, clarification of language, and including, for the first time, explicit regulations governing tips.

Long Island Power Authority

NOTICE OF WITHDRAWAL

Economic Development Program Under the Tariff for Electric Service

I.D. No. LPA-33-10-00002-W

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

Action taken: Notice of proposed rule making, I.D. No. LPA-33-10-00002-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on August 18, 2010.

Subject: Economic development program under the Tariff for Electric Service.

Reason(s) for withdrawal of the proposed rule: The Authority is continuing to evaluate its economic development program.

NOTICE OF ADOPTION

Net Metering Provisions of the Tariff for Electric Service

I.D. No. LPA-28-10-00019-A

Filing Date: 2010-10-04

Effective Date: 2010-10-04

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

Action taken: The Long Island Power Authority ("Authority") adopted a proposal to modify its Tariff for Electric Service with regard to net metering to be consistent with Section 66-j of the Public Service Law.

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

Subject: Net Metering provisions of the Tariff for Electric Service.

Purpose: To modify the Tariff for Electric Service with regard to net metering.

Text or summary was published in the July 14, 2010 issue of the Register, I.D. No. LPA-28-10-00019-P.

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

Office of Medicaid Inspector General

NOTICE OF EXPIRATION

The following notices have expired and cannot be reconsidered unless the Office of Medicaid Inspector General publishes new notices of proposed rule making in the NYS Register.

Provider Hearings

I.D. No.	Proposed	Expiration Date
MED-39-09-00007-P	September 30, 2009	September 30, 2010

Provider Hearings

I.D. No.	Proposed	Expiration Date
MED-39-09-00008-P	September 30, 2009	September 30, 2010

Power Authority of the State of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for the Sale of Power and Energy

I.D. No. PAS-42-10-00001-P

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

Proposed Action: Decrease in rates for sale of firm power and related tariff changes applicable to governmental customers located in New York City.

Statutory authority: Public Authorities Law, section 1005(6)

Subject: Rates for the sale of power and energy.

Purpose: To recover the Authority's cost of providing firm power and energy services.

Substance of proposed rule: Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to revise the rates charged to its New York City Governmental Customers ("New York City Customers") for Rate Year 2011.

The Authority proposes to increase the base production rates by 0.8% compared to 2010 rates charged to the New York City Customers.

Written comments on the proposed revisions will be accepted through Monday, December 6, 2010, at the address below. For further information, contact: POWER AUTHORITY OF THE STATE OF NEW YORK, Karen Delince, Corporate Secretary, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, (914) 390-8040 (fax), secretarys.office@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, email: secretarys.office@nypa.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
 Statements and analyses are not submitted with this notice because the amended rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for the Sale of Power and Energy

I.D. No. PAS-42-10-00002-P

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

Proposed Action: Decrease in rates for sale of firm power and related tariff changes applicable to governmental customers located in Westchester County.

Statutory authority: Public Authorities Law, section 1005(6)

Subject: Rates for the sale of power and energy.

Purpose: To recover the Authority's cost of providing firm power and energy services.

Substance of proposed rule: Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to revise the rates charged to its Westchester County Governmental Customers ("Westchester Customers") for Rate Year 2011.

The Authority proposes to increase the base production rates by 16.37% compared to 2010 rates charged to the Westchester Customers.

Written comments on the proposed revisions will be accepted through Monday, December 6, 2010, at the address below. For further information, contact: POWER AUTHORITY OF THE STATE OF NEW YORK, Karen Delince, Corporate Secretary, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, (914) 390-8040 (fax), secretarys.office@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, email: secretarys.office@nypa.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
 Statements and analyses are not submitted with this notice because the amended rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-42-10-00008-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 4545, 4610, and 4540 East Coast LLC, to submeter electricity at 4545, 4610, and 4540 Center Blvd., located in Long Island City, NY.

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 4545, 4610 & 4540 East Coast LLC, to submeter electricity at 4545, 4610 & 4540 Center Blvd., LIC, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by

4545, 4610, and 4540 East Coast LLC to submeter electricity at 4545, 4610, and 4540 Center Boulevard, Long Island City, 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-0475SP1)

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

Request Authorization to Defer Incremental Expenses and Offset These Expenses Against Tax Benefits

I.D. No. PSC-42-10-00009-P

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

Proposed Action: The PSC is considering a petition filed by Central Hudson Gas & Electric Corporation to defer incremental expenses incurred by the Company for the twelve months ended 6/30/10, as well as, whether to offset these expenses against certain tax benefits.

Statutory authority: Public Service Law, section 66(9)

Subject: Request authorization to defer incremental expenses and offset these expenses against tax benefits.

Purpose: To allow Central Hudson Gas & Electric Corporation to defer incremental expenses and offset these expenses against tax benefits.

Substance of proposed rule: Central Hudson Gas & Electric Corporation (Central Hudson or Company) has requested permission to defer for future rate recovery, with carrying charges, \$19.4 million in incremental electric storm restoration, \$2.6 million in incremental electric bad debt write-off expenses, \$1.9 million in incremental electric property tax expense and \$0.7 million in incremental gas property tax expense related to the twelve months ended June 30, 2010. The Company proposes to defer such expenses and the associated deferred income taxes as a regulatory asset in Account 182.xx. If the Commission approves this deferral, there is a reasonable assurance the company will be allowed to recover these costs. In addition, Central Hudson has requested to offset the above described deferred expenses against certain tax benefits arising from a change in accounting related to repair and maintenance costs. This will be accomplished by applying the ratemaking effects of the present tax benefits to rate base. More specifically for electric service the Company would establish a regulatory liability equal to the economic effect (net of tax) of reversing a portion of an electric rate base credit established in Case 00-E-1273. For gas service the Company would establish a gas regulatory liability equal to the revenue requirement of the rate base reduction related to the gas portion of the tax benefits. The Commission may adopt, reject or modify, in whole or in part, Central Hudson's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, 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-M-0473SP1)

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

Daily and Monthly Balancing and Semi-Annual Settlement Provisions

I.D. No. PSC-42-10-00010-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Central Hudson Gas & Electric Corporation to make various changes in its rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 12—Gas.

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

Subject: Daily and monthly balancing and semi-annual settlement provisions.

Purpose: To clarify the daily balancing and revise the monthly balancing and semi-annual settlement provisions.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas & Electric Corporation (Central Hudson) to clarify the daily balancing provisions and revise the monthly balancing and semi-annual settlement provisions contained in Central Hudson's Retail Access Program. The proposed filing has an effective date of April 1, 2011. The Commission may make related changes to other utilities' balancing provisions.

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-0485SP1)

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

Petition for the Submetering of Electricity

I.D. No. PSC-42-10-00011-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 4858 Group, LLC to submeter electricity 456 Main Street, located in Buffalo, 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 4858 Group, LLC to submeter electricity at 456 Main Street, Buffalo, 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 4858 Group, LLC to submeter electricity at 456 Main Street, Buffalo, 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-0479SP1)

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

National Grid's Rule 16.6 - Letter of Credit by Non-Residing Applicants

I.D. No. PSC-42-10-00012-P

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

Proposed Action: The Commission is considering whether to approve, reject, in whole or in part, or modify a petition filed by Dan E. Bargabos regarding the enforcement of Niagara Mohawk Power Corporation d/b/a National Grid's (National Grid) Tariff Rule 16.6 (PSC 220).

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

Subject: National Grid's Rule 16.6 - Letter of Credit by Non-Residing Applicants.

Purpose: To waive the enforcement of National Grid's Rule 16.6 - Letter of Credit by Non-Residing Applicants.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a petition filing by Dan E. Bargabos (Petitioner) regarding the enforcement of Niagara Mohawk Power Corporation d/b/a National Grid's (National Grid) Tariff Rule 16.6 (PSC 220) - Letter of Credit by Non-Residing Applicants. The Petitioner requests Bargabos Homes be reimbursed by National Grid the sum of \$10,774.51 paid on April 29, 2010 and that Rule 16.6 be effective for securities to be posted by the Petitioner's companies for future subdivisions.

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-0486SP1)

Department of State

NOTICE OF ADOPTION

Rule Making

I.D. No. DOS-33-10-00003-A

Filing No. 1040

Filing Date: 2010-10-05

Effective Date: 2010-10-20

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

Action taken: Amendment of Parts 260, 261 and 263 of Title 19 NYCRR.

Statutory authority: Executive Law, sections 91, 102(2) and 146(6)

Subject: Rule Making.

Purpose: To remove outdated regulations and add reference to E-file process for rule making.

Text or summary was published in the August 18, 2010 issue of the Register, I.D. No. DOS-33-10-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Dave Treacy, Department of State, One Commerce Plaza, 99 Washington Avenue, (518) 474-6740

Assessment of Public Comment

The agency received no public comment.

**Susquehanna River Basin
Commission**

INFORMATION NOTICE

Information Notice

18 CFR Parts 806 and 808

Review and Approval of Projects

AGENCY: Susquehanna River Basin Commission.

ACTION: Final rule.

SUMMARY: This document contains final rules that amend the project review regulations of the Susquehanna River Basin Commission (Commission) to include subsidiary allocations for public water supply systems under the scope of withdrawals requiring review and approval; improve notice procedures for all project applications; clarify requirements for grandfathered projects increasing their withdrawals from an existing source or initiating a new withdrawal; refine the provisions governing transfer and re-issuance of approvals; clarify the Executive Director's authority to grant, deny, suspend, rescind, modify, or condition an Approval by Rule; include decisional criteria for diversions into the basin; amend administrative appeal procedures to broaden available remedies and streamline the appeal process; and make other minor regulatory clarifications to the text of the regulations.

DATES: Effective November 1, 2010.

ADDRESSES: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: 717-238-0423, ext. 306; fax: 717-238-2436; e-mail: rcairo@srbc.net. Also, for further information on the final rulemaking, visit the Commission's web site at www.srbc.net.

SUPPLEMENTARY INFORMATION:

Comments and Responses to Proposed Rulemaking

Notice of proposed rulemaking was published in the Federal Register on June 25, 2010; the New York Register on July 7, 2010; the Pennsylvania Bulletin on July 10, 2010; and the Maryland Register on July 16, 2010. The Commission convened public hearings on July 27, 2010, in Binghamton, New York and on July, 2010, in Harrisburg, Pennsylvania. A written comment period was held open until August 10, 2010. Comments on the proposed rulemaking were received at both the hearings and during the comment period. A summary of the comments and the Commission's responses thereto follows.

Comments by Section, Part 806

Section 806.4 Projects requiring review and approval.

Comment: With respect to gas well development and hydrofracking operations, there is a need for the Commission to evaluate the cumulative impacts of water withdrawals and to require flow monitoring at water withdrawal sites.

Response: The Commission does employ cumulative impact analysis in its review and approval of projects. Flows are monitored at all sites where passby flow requirements have been imposed either directly or through the use of reference gages. Commission field inspectors verify that users required to cease taking water at given flow levels are in fact abiding by passby limitations. In addition, the Commission has implemented a Remote Water Quality Monitoring Network with 30 monitoring stations in the areas where drilling in the Marcellus Shale formation is most active.

Comment: The Commission should exercise greater regulatory authority over drilling operations in the Marcellus Shale formation, including assuming jurisdiction over water quality related matters.

Response: The Commission's current regulatory authority extends only

to water withdrawal and consumptive use by gas drilling operations. As established in Section 3.2 of the Susquehanna River Basin Compact, the Commission is directed to utilize the existing agencies of federal and state government who currently exercise regulatory authority on water quality, underground injection, and on the extraction of mineral resources. At this point, the member states are asserting their regulatory authority and it would not be appropriate for the Commission to interpose its authority and duplicate the plenary authority exercised by the states in this area. If, at some point in the future, the Commission concludes, after public hearing, that it must assume jurisdiction in order to effectuate the terms of the comprehensive plan or implement the terms of the Compact, it may then do so.

Section 806.6 Transfer and re-issuance of approvals

Comment: Allowing “transfer of approvals” under 18 CFR § 806.6 is inappropriately treating water as a “commodity” instead of as a “common resource” of the basin.

Response: Under 18 CFR 806.6, the instances where approvals may be transferred with only administrative approval of the Executive Director are limited. Transfers of approvals more than ten years old, those changing the quantity or use of the water, or having pre-compact or pre-regulation elements will require a subsequent application for approval, thus phasing out grandfathered uses and bringing these projects under the authority of the Commission, where the water used can be better managed as a “common resource” of the basin. We would also note that transfer of approvals is not limited to the gas drilling industry. Other transfers occur, such as the transfer of water withdrawal approvals from municipalities to municipal authorities, whenever a project using the waters of the basin is sold to a new owner.

Section 806.15 Notice of Application

Comment: Notification of property owners within one-half mile of a withdrawal is insufficient. Notice should be provided to all property owners in the watershed or even to all basin residents because of the high volumes of water withdrawals for gas production and the contents of fracking water. Also, people farther than a half mile may experience impacts to their water, air, and soil quality.

Response: The one-half mile notification requirement for withdrawals provides more effective notice than the current contiguous property owner requirement that is based on proximity, not science. Ongoing scientific evaluations indicate that a one-half mile notice will cover the vast majority of areas affected by groundwater and surface water withdrawals. Thus, the Commission believes this new standard is both reasonable and appropriate. If data is collected during the aquifer test that indicates that the influence of the withdrawal extends beyond a half mile radius, the staff has the discretion to direct project applicants to send notification to property owners in these extended areas. Because newspaper notice is also required and because the Commission publishes an advanced notice for all withdrawal applications in the Federal Register and state notice publications prior to taking action, other interested parties throughout the watershed and the basin will have notice and opportunity to comment on such applications. Similar information is also provided to the public by the Commission through its web-based Water Resources Portal.

Comment: In amending its notification requirements for project applications, the Commission is properly focusing on those persons who are actually affected and who have a real interest in participating in the approval process.

Response: Agreed.

Comment: The Commission’s proposed rules are scientifically based and therefore sound.

Response: Agreed.

Comment: The notice sent to landowners within one-half mile of a groundwater withdrawal should include an opportunity for the property owner to comment on the project application.

Response: 18 CFR 806.15 (a) specifies that all notices required under this section contain the address, electronic mail address, and phone number of the project sponsor and the Commission, and comments are therefore welcome from any landowner or other interested party who wishes to do so. Also, the form of notice sent to landowners contains information concerning the submission of comments and providing relevant contact information.

Comment: The notice sent to property owners within one-half mile of a groundwater withdrawal should include information on how the 72-hour testing will be done, when it will occur, and other information concerning the evaluation and approval of the groundwater withdrawal project. Follow-up information should be provided to property owners receiving notifications such as the results of water withdrawal testing.

Response: The Commission readily understands that landowners may have an interest in aquifer testing information at the application stage.

Under current Commission procedures, however, applicants submit testing plans and conduct tests prior to the filing of an application that triggers the notice requirement. At this pre-application stage, applicants may also submit information supporting a request for a waiver of the testing requirements, which may or may not be granted. The Commission believes that the requirement for pre-application submission of test information is a conservative management approach helping to ensure that applications are supported by science. Rather than modifying this procedure, the Commission feels that the legitimate concerns expressed in this comment can best be addressed by providing landowners with a right of access to the information sought.

Comment: For applications to use wastewater discharge sources, in addition to the newspaper notice, any property owner within 1,000 feet of the use (or some other appropriate distance compatible with other resource agencies) should be notified by mail.

Response: Newspaper notices noting the use of a wastewater discharge source will be required in every area where the water will be used for natural gas development. The Commission believes that this form of notice will be sufficient. Also, all approved water sources that a natural gas developer may use on a given site are available for viewing on line by interested landowners at the Commission’s web based Water Resources Portal.

Section 806.24 Standards for Diversions

Comment: The meaning of the “catch all phrase” in the proposed revision to 18 CFR 806.24 requiring consideration of the “extent to which the proposed diversion satisfies all other applicable standards set forth in subchapter C of this part,” is not clear. It is recommended that this phrase be struck.

Response: While the Commission agrees that a clarification is needed, it is important that the sponsors of diversion projects understand that they must also abide by the Commission’s general and specific standards set forth in subchapter C of Part 806 governing withdrawals and consumptive use. The Commission has modified this language in the final rule to add more clarity.

Comment: For projects involving a diversion of water out of the basin, the in-basin public should be noticed and have an opportunity to provide written comments. This notice should tell the public where the water is being diverted and why.

Response: The proposed regulations do provide for newspaper publication in the in-basin area, plus since the diversion will also involve a withdrawal of some kind in the in-basin area, property owners within one-half mile will also receive notifications in accordance with 18 CFR 806.15.

General Comments

Comment: The Commission should institute a moratorium on approval of any unconventional gas drilling related water withdrawals until the completion of certain studies that will assess the environmental impacts of drilling and fracking activity.

Response: The Commission can find no evidence linking its approval of water withdrawals and consumptive uses by gas drilling operations in the Marcellus Shale formation with a threat of harm or of injury to the public justifying a moratorium on all approvals. Ultimately, a moratorium based on supposition rather than science cannot be legally justified or defended. It is also far more appropriate for the states and the federal government, who exercise broader authority with respect to water quality, underground injection and mineral extraction, and who have such studies underway, to inform the Commission’s regulatory program as that science develops. In the interim, the Commission continues to study and evaluate the cumulative impact of these withdrawals and consumptive use on the water resources of the basin.

Comment: The idea of allowing water withdrawals for any other reason than to support life is abhorrent.

Response: The Susquehanna River Basin Compact and the Commission Comprehensive Plan do place importance upon the conservation of water to support the living resources of the basin and the Chesapeake Bay, and the Commission devotes a major part of its mission to protecting those resources; however, the purposes of the Compact and the goals of the Comprehensive Plan also include the utilization and development of the basin’s water resources to make secure and protect developments within the states (i.e. economic development). Managing the basin’s waters to protect living resources and developments within the states are not mutually exclusive efforts.

Comment: The Commission did not give sufficient public notice of the public hearings on these proposed rules.

Response: The Commission followed the notice requirements of its own regulations found at 18 CFR 808.1, publishing well in advance of public hearings the text of the proposed rules in the Federal Register and in the member state notice publications, and including in those notices the

date, time and place of two public hearings held in Binghamton, N.Y. on July 27, 2010, and Harrisburg, Pa. on July 29, 2010. Written comments were also invited through August 10, 2010. The Commission gave further notice of the proposed rulemaking contents, the public hearings, and the comment period via its web site and in a news release sent to media throughout the basin. These are the same notice procedures followed by the Commission on past proposed rulemaking actions as well. The Commission is, nevertheless, considering ways that it can improve notice procedures in future rulemaking actions and welcomes this comment.

Comment: The Pennsylvania Department of Environmental Protection (PADEP) is permitting gas drilling on lands subject to frequent inundation, creating a danger that toxic materials or waters stored on such land will be washed away and contaminate streams and rivers.

Response: 18 CFR 806.21 provides that the Commission may suspend the review of any project that has not been approved by a member jurisdiction or a political subdivision thereof. The Commission may also modify, suspend, or revoke a previously granted approval where the project sponsor fails to obtain or maintain the approval of member jurisdiction or political subdivision thereof. All land uses in Pennsylvania in flood prone designated communities are subject to the provisions of the Pennsylvania Flood Plain Management Act and local ordinances adopted pursuant thereto. If a project sponsor is not in compliance with these local ordinances, they run the risk of having their Commission approval suspended or revoked.

Comment: The Commission has been blocking participation of landowners in the approval process for gas drilling consumptive use and withdrawal approvals by withholding information on pending project applications.

Response: The Commission disagrees with this comment. The Commission has historically welcomed and encouraged public comment on applications submitted to the Commission for its review and consideration. It continues to improve its notice requirements, as witnessed by the modifications being made to 18 CFR 806.15 of this final rule, and has taken considerable steps to build its online Water Resources Portal web application to facilitate that end.

Comment by Section, Part 808

Section 808.2 Administrative Appeals

Comment: There is a need to improve some of the provisions of the proposed changes to the administrative appeal provisions of 18 CFR 808.2 by removing certain unneeded language, defining a standard for granting nunc pro tunc appeals, providing for a direct notice of hearing to the petitioner and project sponsor, and specifying a deadline for filing an appeal for consideration at the next regular Commission meeting.

Response: Agreed. These changes have been made to the text of 18 CFR 808.2 in the final rulemaking document.

List of Subjects in 18 CFR Parts 806 and 808:

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission amends 18 CFR Parts 806 and 808 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

Subpart C – Standards for Review and Approval

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

2. In § 806.4, revise paragraphs (a)(2) introductory text, (a)(2)(iv), and (c) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) * * *

(2) Withdrawals. Any project described below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in § 806.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, § 806.5, or 18 CFR part 801. The taking or removal of water by a public water supplier indirectly through another public water supply system or another water user's facilities shall constitute a withdrawal hereunder.

* * * * *

(iv) With respect to groundwater projects in existence prior to July 13, 1978, and surface water projects in existence prior to November 11, 1995, any project that will increase its withdrawal from any source, or initiate a withdrawal from a new source, or combination of sources, by a consecutive 30-day average of 100,000 gpd or more, above that

maximum consecutive 30-day amount which the project was withdrawing prior to the said applicable date.

* * * * *

(c) Any project that did not require Commission approval prior to January 1, 2007, and not otherwise exempt from the requirements of paragraph (a)(1)(iv), (a)(2)(v), or (a)(3)(iv) pursuant to paragraph (b) of this section, may be undertaken by a new project sponsor upon a change of ownership pending action by the Commission on an application submitted by such project sponsor requesting review and approval of the project, provided such application is submitted to the Commission in accordance with this part within 90 days of the date change of ownership occurs and the project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or consumptive use associated with the project do not change pending review of the application. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in quantity in excess of the quantity withdrawn, diverted or consumptively used prior to the change of ownership.

3. In § 806.6, revise paragraphs (a), (b) introductory text, (b)(1), (c) introductory text and (d) introductory text, and add paragraph (e) to read as follows:

§ 806.6 Transfer and re-issuance of approvals.

(a) An existing Commission project approval may be transferred or conditionally transferred to a new project sponsor upon a change of ownership of the project, subject to the provisions of paragraphs (b), (c) and (d) of this section, and the new project sponsor may only operate the project in accordance with and subject to the terms and conditions of the existing approval pending approval of the transfer, provided the new project sponsor notifies the Commission within 90 days from the date of the change of ownership, which notice shall be on a form and in a manner prescribed by the Commission and under which the new project sponsor certifies its intention to comply with all terms and conditions of the transferred approval and assume all other associated obligations.

(b) An existing Commission project approval for any of the following categories of projects may be conditionally transferred, subject to administrative approval by the Executive Director, upon a change of ownership and the new project sponsor may only operate such project in accordance with and subject to the terms and conditions of the transferred approval:

(1) A project undergoing a change of ownership as a result of a corporate reorganization where the project property is transferred to a corporation by one or more corporations solely in exchange for stock or securities of the transferee corporation, provided that immediately after the exchange the transferor corporation(s) own 80 percent of the voting stock and 80 percent of all other stock of the transferee corporation.

* * * * *

(c) An existing Commission approval of a project that satisfies the following conditions may be conditionally transferred and the project sponsor may only operate such project in accordance with and subject to the terms and conditions of the conditionally transferred approval, pending action by the Commission on the application submitted in accordance with paragraph (c)(3) of this section:

* * * * *

(d) An existing Commission project approval for any project not satisfying the requirements of paragraphs (b) or (c) of this section may be conditionally transferred and the project sponsor may only operate such project in accordance with and subject to the terms and conditions of the conditionally transferred approval, pending action by the Commission on an application the project sponsor shall submit to the Commission, provided that:

* * * * *

(e) An existing Commission project approval may be re-issued by the Executive Director at the request of a project sponsor undergoing a change of name, provided such change does not affect ownership or control of the project or project sponsor. The project sponsor may only continue to operate the project under the terms and conditions of the existing approval pending approval of its request for re-issuance, provided it submits its request to the Commission within 90 days from the date of the change, which notice shall be on a form and in a manner prescribed by the Commission, accompanied by the appropriate fee established therefore by the Commission.

4. In § 806.7, revise paragraph (a) to read as follows:

§ 806.7 Concurrent project review by member jurisdictions.

(a) The Commission recognizes that agencies of the member jurisdictions will exercise their review and approval authority and evaluate many proposed projects in the basin. The Commission will adopt procedures to assure compatibility between jurisdictional review and Commission review.

* * * * *

5. Revise § 806.15 to read as follows:
§ 806.15 Notice of application.

(a) Any project sponsor submitting an application to the Commission shall provide notice thereof to the appropriate agency of the member state, each municipality in which the project is located, and the county planning agency of each county in which the project is located. The project sponsor shall also publish notice of submission of the application at least once in a newspaper of general circulation serving the area in which the project is located. The project sponsor shall also meet any of the notice requirements set forth in paragraphs (b) through (e) of this section, if applicable. All notices required under this section shall be provided or published no later than 10 days after submission of the application to the Commission and shall contain a description of the project, its purpose, the requested quantity of water to be withdrawn obtained from for sources other than withdrawals or consumptively used, and the address, electronic mail address, and phone number of the project sponsor and the Commission. All such notices shall be in a form and manner as prescribed by the Commission.

(b) For withdrawal applications submitted pursuant to § 806.4(a)(2), the project sponsor shall also provide the notice required under paragraph (a) of this section to each property owner listed on the tax assessment rolls of the county in which such property is located and identified as follows:

(1) For groundwater withdrawal applications, the owner of any property that is located within a one-half mile radius of the proposed withdrawal location.

(2) For surface water withdrawal applications, the owner of any property that is riparian or littoral to the body of water from which the proposed withdrawal will be taken and is within a one-half mile radius of the proposed withdrawal location.

(c) For projects involving a diversion of water out of the basin, the project sponsor shall also publish a notice of the submission of its application at least once in a newspaper of general circulation serving the area outside the basin where the project proposing to use the diverted water is located. For projects involving a diversion of water into the basin, the project sponsor shall also publish a notice of the submission of its application at least once in a newspaper of general circulation serving the area outside the basin where the withdrawal of water proposed for diversion is located.

(d) For applications submitted under § 806.22(f)(12)(ii) to use a public water supply source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in the area served by the public water supply.

(e) For applications submitted under § 806.22(f)(12)(ii) to use a wastewater discharge source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in each area within which the water obtained from such source will be used for natural gas development.

(f) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt for the notifications to agencies of member states, municipalities and county planning agencies required under paragraph (a) of this section. The project sponsor shall also provide certification on a form provided by the Commission that it has published the newspaper notice(s) required by this section and made the landowner notifications as required under paragraph (b) of this section, if applicable. Until these items are provided to the Commission, processing of the application will not proceed. The project sponsor shall maintain all proofs of notice required hereunder for the duration of the approval related to such notices.

6. In § 806.22, revise paragraphs (e)(1), (e)(6), (f)(3), (f)(9), and (f)(12) to read as follows:

§ 806.22 Standards for consumptive uses of water.

* * * * *

(e) * * *

(1) Except with respect to projects involving natural gas well development subject to the provisions of paragraph (f) of this section, any project whose sole source of water for consumptive use is a public water supply, may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule:

(i) Notification of Intent: No fewer than 90 days prior to the construction or implementation of a project or increase above a previously approved quantity of consumptive use, the project sponsor shall submit a Notice of Intent (NOI) on forms prescribed by the Commission, and the applicable application fee, along with any required attachments.

(ii) Within 10 days after submittal of an NOI under paragraph (e)(1)(i) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

* * * * *

(6) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

* * * * *

(f) * * *

(3) Within 10 days after submittal of an NOI under paragraph (f)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

* * * * *

(9) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any approval hereunder shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4 (a).

* * * * *

(12) The following additional sources of water may be utilized by a project sponsor in conjunction with an approval by rule issued pursuant to paragraph (f)(9) of this section:

(i) Water withdrawals or diversions approved by the Commission pursuant to § 806.4 (a) and issued to persons other than the project sponsor, provided any such source is approved for use in natural gas well development, the project sponsor has an agreement for its use, and at least 10 days prior to use, the project sponsor registers such source with the Commission on a form and in a manner as prescribed by the Commission, and provides a copy of same to the appropriate agency of the member state. Any approval issued hereunder shall be further subject to any approval or authorization required by the member state to utilize such source(s). The project sponsor shall record on a daily basis, and report quarterly on a form and in a manner prescribed by the Commission, the quantity of water obtained from any source registered hereunder.

(ii) Sources of water other than those subject to paragraph (f)(12)(i) of this section, including public water supply or wastewater discharge, provided such sources are first approved by the Executive Director pursuant to this section. Any request to utilize such source(s) shall be submitted on a form and in a manner as prescribed by the Commission, shall satisfy the notice requirements set forth in § 806.15, and shall be subject to review pursuant to the standards set forth in subpart C of this part. Any approval issued hereunder shall be further subject to any approval or authorization required by the member state to utilize such source(s).

7. In § 806.24, add paragraph (c)(2), to read as follows:

§ 806.24 Standards for diversions.

* * * * *

(c) * * *

(2) In deciding whether to approve a proposed diversion into the basin, the Commission shall also consider and the project sponsor shall provide information related to the following factors:

(i) Any adverse effects and cumulative adverse effects the project may have on the Susquehanna River Basin, or any portion thereof, as a result of the introduction or potential introduction of invasive or exotic species that may be injurious to the water resources of the basin.

(ii) The extent to which the proposed diversion satisfies all other applicable general and specific standards set forth in subpart C of this part pertaining to withdrawals and consumptive use.

8. Revise § 806.35 to read as follows:

§ 806.35 Fees

Project sponsors shall have an affirmative duty to pay such fees as established by the Commission to cover its costs of administering the regulatory program established by this part, including any extraordinary costs associated with specific projects.

PART 808—HEARINGS AND ENFORCEMENT ACTIONS

10. The authority citation for Part 808 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

Subpart A – Conduct of Hearings

11. In § 808.2, revise paragraphs (a), (b), (c), (d), (e), (f), (g), and (h) to read as follows:

§ 808.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by a final action or

decision of the Commission or Executive Director on a project application or a records access determination made pursuant to Commission policy may file a written appeal requesting a hearing. In the case of a project approval or denial, such appeal shall be filed by a project sponsor within 30 days of receipt of actual notice, and by all others within 30 days of publication of notice of the action taken on the project in the Federal Register. In the case of records access determinations, such appeal shall be filed with the Commission within 30 days of receipt of actual notice of the determination. Appeals filed later than 20 days prior to a regular Commission meeting will be considered at a subsequent Commission meeting. Appeals shall be filed on a form and in a manner prescribed by the Commission and the petitioner shall have 20 days from the date of filing to amend the appeal form.

(b) The appeal shall identify the specific action or decision for which a hearing is requested, the date of the action or decision, the interest of the person requesting the hearing in the subject matter of the appeal, and a statement setting forth the basis for objecting to or seeking review of the action or decision.

(c) Any request not filed on or before the applicable deadline established in paragraph (a) of this section hereof will be deemed untimely and such request for a hearing shall be considered denied unless the Commission, upon written request and for good cause shown, grants leave to make such filing nunc pro tunc; the standard applicable to what constitutes good cause shown being the standard applicable in analogous cases under federal law. Receipt of requests for hearings pursuant to this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Petitioners shall be limited to a single filing that shall set forth all matters and arguments in support thereof, including any ancillary motions or requests for relief. Issues not raised in this single filing shall be considered waived for purposes of the instant proceeding. Where the petitioner is appealing a final determination on a project application and is not the project sponsor, the petitioner shall serve a copy of the appeal upon the project sponsor within five days of its filing.

(e) If a hearing is granted, the Commission shall serve notice thereof upon the petitioner and project sponsor and shall publish such notice in the Federal Register. The hearing shall not be held less than 20 days after publication of such notice. Hearings may be conducted by one or more members of the Commission, by the Executive Director, or by such other hearing officer as the Commission may designate.

(1) The petitioner may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected member state. The decision of the Executive Director on the request for stay shall not be appealable to the Commission under this section and shall remain in full force and effect until the Commission acts on the appeal.

(2) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

- (i) Irreparable harm to the petitioner.
- (ii) The likelihood that the petitioner will prevail.

(f) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, the case involves a determination by the Executive Director or staff which requires further action by the Commission, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing, the party seeking such hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule.

(g) If a hearing is granted, the Commission shall refer the matter for hearing to be held in accordance with § 808.3, and appoint a hearing officer.

(h) Intervention. (1) A request for intervention may be filed with the Commission by persons other than the petitioner within 20 days of the publication of a notice of the granting of such hearing in the Federal Register. The request for intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance. The hearing officer(s) shall determine whether the person requesting intervention has standing in the matter that would justify their admission as an intervener to the proceedings in accordance with federal case law.

(2) Interveners shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses.

* * * * *

Dated: September 29, 2010.

Thomas W. Beauduy,
Deputy Director.