

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates of Assessment Under the Apple Research and Development Program

I.D. No. AAM-34-11-00001-P

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

Proposed Action: This is a consensus rule making to amend section 204.9 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, section 294(2)

Subject: Rates of assessment under the Apple Research and Development Program.

Purpose: To increase the rates of assessment under the Program to increase the level of funding for apple research.

Text of proposed rule: Section 204.9 of 1 NYCRR is amended to read as follows:

Section 204.9 Budget and assessment.

During each marketing season and not later than July 1, the commissioner shall estimate a budget that includes contributions and assessments necessary for the administration and enforcement of this order and for carrying on duly authorized programs and activities including marketing, and product research and informational services as hereinbefore provided. The commissioner shall announce rates of assessment to provide adequate funds to defray expenditures in the

budget. The rate of assessment shall not exceed [two cents] *four cents* per hundred pounds of apples or [eight] *sixteen* mills [(0.008)] *(.016)* per bushel of apples sold for processing, juice or fresh market use. The total amount of budgeted administrative cost shall not exceed five percent of the total budget.

Text of proposed rule and any required statements and analyses may be obtained from: Dan McCarthy, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-8857, email: Dan.McCarthy@agmkt.state.ny.us

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

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

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

Consensus Rule Making Determination

The rule will increase the rates of assessment upon apples produced in New York that are sold for processing, juice or fresh market use pursuant to Agriculture and Markets Law § 294(2) and 1 NYCRR Part 204, New York State Apple Research and Development Program (ARDP). New York State apple growers approved the increase in the rates of assessment by a referendum vote conducted pursuant to AML § 294(2). Since the referendum vote was preceded by a written petition duly signed by 25% of New York apple producers, AML § 294(2) requires that the Commissioner amend the ARDP as proposed by the producers. Therefore, the proposed rule qualifies as a consensus rule since it implements a nondiscretionary statutory provision.

Job Impact Statement

The rule will increase the rates of assessment upon apples produced in New York that are sold for processing, juice or fresh market use pursuant to Agriculture and Markets Law § 294(2) and 1 NYCRR Part 204, New York State Apple Research and Development Program (ARDP). New York State apple growers approved the increase in the rates of assessment by a referendum vote conducted pursuant to AML § 294(2). The increase in the rates of assessment will increase the funds available for apple research. Industry research is expected to increase job opportunities as new and improved varieties of apples are developed.

The rule is expected to have a positive impact upon jobs and employment opportunities in the State's apple industry.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-34-11-00015-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from 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 Department of Civil Service, by deleting therefrom the position of Director of Affirmative Careers Programs; in the Education Department, by decreasing the number of positions of Assistant Counsel from 35 to 33 and by deleting therefrom the position of Director of Internal Audit; in the Executive Department under the subheading "Office of Employee Relations," by decreasing the number of positions of Assistant Director from 10 to 9 and Associate Director from 3 to 1; in the Executive Department under the subheading "Office of General Services," by decreasing the number of positions of Promotion and Public Affairs Agent from 20 to 16; in the Executive Department under the subheading "Division of Housing and Community Renewal," by deleting therefrom the position of Director Affirmative Action Programs; in the Labor Management Committees, by decreasing the number of positions of Employee Program Manager from 4 to 3; in the Department of Law, by decreasing the number of positions of Assistant Attorney General from 656 to 652, Confidential Assistant from 22 to 21, Confidential Clerk from 30 to 27, Confidential File Clerk from 6 to 4 and Investigator from 177 to 168; in the Executive Department under the subheading "Commission on Quality of Care and Advocacy for Persons with Disabilities," by decreasing the number of positions of Special Assistant from 2 to 1; and, in the Department of Taxation and Finance, by deleting therefrom the position of Counsel.

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: Mark Worden, Associate Attorney, NYS Department of Civil Service, AESOB, Albany, NY 12239, (518) 473-2624, email: mark.worden@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-03-11-00003-P, Issue of January 19, 2011.

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-03-11-00003-P, Issue of January 19, 2011.

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-03-11-00003-P, Issue of January 19, 2011.

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-03-11-00003-P, Issue of January 19, 2011.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-34-11-00016-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 Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Coordinator, Title IV-E Operations (OCFS).

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: Mark Worden, Associate Attorney, NYS Department of Civil Service, AESOB, Albany, NY 12239, (518) 473-2624, email: mark.worden@cs.state.ny.us

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Rural Area Flexibility Analysis

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Job Impact Statement

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Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-34-11-00003-E

Filing No. 722

Filing Date: 2011-08-05

Effective Date: 2011-08-05

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

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

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

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

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

Subject: Empire Zones reform.

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

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

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16

as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

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

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

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

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

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

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

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

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

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide eco-

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

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

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

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

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

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

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall

be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires November 2, 2011.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

LEGISLATIVE OBJECTIVES:

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

NEEDS AND BENEFITS:

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

COSTS:

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

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

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

LOCAL GOVERNMENT MANDATES:

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

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

PAPERWORK:

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

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

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

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

1. Effect of rule

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

2. Compliance requirements

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

3. Professional services

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

4. Compliance costs

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

5. Economic and technological feasibility

The Department of Economic Development (“DED”) estimates that complying with this recordkeeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

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

7. Small business and local government participation

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Department of Environmental Conservation

NOTICE OF ADOPTION

Reporting Requirements for Holders of Food Fish, Lobster, Crab, Food Fish and Crustacea Dealers and Shippers, and Party/Charter Licenses

I.D. No. ENV-17-11-00010-A

Filing No. 726

Filing Date: 2011-08-09

Effective Date: 2011-08-24

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

Action taken: Amendment of Parts 40 and 44 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, section 13-0342

Subject: Reporting requirements for holders of food fish, lobster, crab, food fish and crustacea dealers and shippers, and party/charter licenses.

Purpose: Update the reporting requirements for commercial fishermen, party/charter vessel businesses and food fish and crustacea dealers.

Text of final rule: Existing subdivision 6 NYCRR 40.1(c) is repealed.

New subdivision 6 NYCRR 40.1(c) is adopted to read as follows:

(c) *Reporting requirements.*

(1) *Marine commercial food fishing license, food fish landing license and marine bait permit holders.*

(i) Any person who is the holder of a marine commercial food fishing license, food fish landing license, or marine bait permit issued pursuant to section 13-0335 of the Environmental Conservation Law shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, on a form prescribed by the department. The license holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the department for each month; if no fishing trips were made during a month, a report must be submitted stating no trips were made for that month. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service. If requested in writing by the department, New York license holders who also hold federal fishing permits shall submit to the department the state (blue) copy of the Fishing Vessel Trip Report (NOAA Form No. 88-30) for the month or months identified in the written notification.

(ii) The fishing Vessel Trip Report must be completed with all required information, except for information not yet ascertainable, and signed before the vessel arrives at the dock or lands the catch. Information that may be considered unascertainable before arriving at the dock or landing includes dealer name, dealer number, and date sold.

(2) *Food fish and crustacea dealers and shippers license holders.*

Any person who is the holder of a marine and coastal district food fish and crustacea dealers and shippers license issued pursuant to section 13-0334 of the Environmental Conservation Law shall:

(i) Complete and sign an accurate Purchases From Fishing Vessels and/or Fishermen report detailing each purchase of marine food fish, crustacea, horseshoe crabs, and whelks from harvesters, on a form prescribed by the department. The license holder must submit these reports to the department within 3 days after the end of each week, or at a frequency specified by the department in writing. A Purchases From Fishing Vessels and/or Fishermen report shall be completed, signed and submitted to the department each week; if no

purchases of food fish, crustacean, horseshoe crabs or whelk were made during that week, a report must be submitted stating no purchases were made for the week. Incomplete Purchases From Fishing Vessels and/or Fishermen reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(ii) Effective January 1, 2012, submit complete and accurate purchases from fishing vessels and/or fishermen reports to the Atlantic Coastal Cooperative Statistics Program (ACCSPP) through its website at www.acccsp.org. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service.

(3) *Marine and coastal district party and charter boat license holders.*

(i) Any person who is the holder of a marine and coastal district party and charter license issued pursuant to section 13-0336 of the Environmental Conservation Law shall complete and submit an accurate fishing Vessel Trip Report for each party or charter fishing trip, detailing all fishing activities and all species landed, on a form prescribed by the department. The license holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports must be completed, signed, and submitted to the department for each month; if no fishing trips were made during a month, a report must be submitted for that month stating no trips were made. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. For each fishing trip, the license holder shall complete and sign the fishing Vessel Trip Report prior to the vessel's return to port. Any New York license holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(ii) Upon the request of an on-board observer, who is an authorized representative of the department or of the NOAA Fisheries Service, the holder of a marine and coastal district party and charter boat license shall carry such on-board observer at all times when engaged in activities authorized by such license, and shall report catch and effort information to the department or the NOAA Fisheries Service when requested to do so by such agencies or an authorized representative.

(4) License holders subject to the provisions of this subdivision shall present their logbooks, fishing Vessel Trip Reports or Purchases from Fishing Vessel Reports and/or Fishermen reports and make them available for inspection upon the request of an authorized agent of the department or NOAA Fisheries Service. License holders shall submit their fishing Vessel Trip Reports or Purchases from Fishing Vessels and/or Fishermen reports to the department at the following address: NYSDEC, Bureau of Marine Resources, 205 N. Belle Mead Road, Suite # 1, East Setauket, New York 11733. Reports may be mailed, faxed, emailed or submitted by any other method approved by the department.

(5) In fulfillment of these reporting requirements, license holders subject to the provisions of this subdivision may choose to submit purchases from fishing vessels data or fishing trip data online at the Atlantic Coastal Cooperative Statistics Program website, www.acccsp.org. Complete and accurate fishing trip and purchase data submissions to this website will satisfy the reporting requirements specified in this subdivision. License holders who submit fishing data electronically must maintain a dated logbook, on board the specific fishing vessel, that details all fishing activities for each fishing trip. Data to be recorded in this logbook must include the vessel name, date sailed and date landed, all species landed and the weight or number of each species taken during the dated trip, and other information required by the department. Entries must be entered into the logbook before the vessel arrives at the dock or lands the catch.

(6) Failure to file fishing Vessel Trip Reports or Purchases from Fishing Vessels and/or Fishermen reports as required may disqualify

the owner or operator from receiving future licenses or permits pursuant to Part 175 of this title. Any person who falsifies any fishing Vessel Trip Report or Purchases from Fishing Vessels and/or Fishermen report shall be subject to the penalties established pursuant to the provisions of Article 71 of Environmental Conservation Law and may be subject to permit revocation pursuant to Part 175 of this Chapter.

Existing subdivision 40.1(d) through paragraph 40.1(j)(19) remain the same.

Existing paragraph 6NYCRR 40.1(j)(20) is repealed.

New paragraph 6NYCRR 40.1(j)(20) is adopted to read as follows:

(20) Reporting Requirements.

(a) *Fishing Vessel Trip Reports* - Any person who is a holder of a striped bass commercial permit shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, pursuant to paragraph (1) of subdivision 40.1 (c) of this part. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the department for each month; if no fishing trips were made for striped bass during a month, a report must be submitted for that month stating no striped bass trips were made. Permit holders who operate federally permitted vessels and take striped bass must complete and submit the state (blue) copy of their Fishing Vessel Trip Report (NOAA Form No. 88-30) to the department for each commercial striped bass trip. Permit holders must submit the last report 5 days after the close of the commercial striped bass season or within 5 days after all striped bass tags are used. Permit holders must submit all required information, including, but not limited to, the name of the vessel, the permit number(s), trip type, all species taken, the striped bass tag serial numbers used for the trip, the weight (in pounds), and number of striped bass taken, the name and signature of the permit holder, and the date signed. All reports must be complete. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements and may be returned to the permit holder who submitted them for completion. Once commercial striped bass permit holders have reported 100 percent use of the individual allocation of tags, they are no longer required to submit reports for striped bass. Permit holders who fail to submit acceptable fishing Vessel Trip Reports to the department may be denied future commercial striped bass fishing permits pursuant to Part 175 of this title.

(b) *Striped Bass Tags* - All striped bass commercial permit holders must return any unused tags to the department by December 20 of the year the tags were issued. Permit holders who fail to return unused tags may be denied future commercial striped bass fishing permits pursuant to Part 175 of this title. Permit holders who fail to accurately account for all tags may receive a reduction in the number of tags allocated in the next fishing season in which the permit holder applies for a striped bass commercial permit. This reduction in tags will be equal to the number of tags not accounted for in the previous fishing season.

Existing paragraph 40.1(j)(21) through section 40.7(d)(16) remain unchanged.

Section 44.10 is repealed.

New section 44.10 is adopted to read as follows:

44.10 Reporting requirements.

(a) *Marine commercial lobster, lobster landing, lobster bait gill net, horseshoe crab and crab permit holders.*

(1) Any person who is the holder of a marine commercial lobster, lobster landing or lobster bait gill net permit issued pursuant to section 13-0329 of the Environmental Conservation Law, a marine commercial crab permit issued pursuant to section 13-0331 of the Environmental Conservation Law, or a horseshoe crab permit issued pursuant to 6 NYCRR 44.8 (c), shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, on a form prescribed by the department. The permit holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the

department for each month; if no fishing trips were made during a month, a report must be submitted for that month stating no trips were made. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. Any New York permit holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service. If requested in writing by the department, New York permit holders who also hold federal fishing permits shall submit to the department the state (blue) copy of the Fishing Vessel Trip Report (NOAA Form No. 88-30) for the month or months identified in the written notification.

(2) The fishing Vessel Trip Report must be completed with all required information, except for information not yet ascertainable, and signed before the vessel arrives at the dock or lands the catch. Information that may be considered unascertainable before arriving at the dock or landing includes dealer name, dealer number, and date sold.

(b) *Food fish and crustacea dealers and shippers licenses.* Any person who is the holder of a marine and coastal district food fish and crustacea dealers and shippers license issued pursuant to section 13-0334 of the Environmental Conservation Law shall:

(1) Complete and sign an accurate Purchases From Fishing Vessels and/or Fishermen report detailing each purchase of marine food fish, crustacea, horseshoe crabs, and whelks from harvesters on a form prescribed by the department. The license holder must submit these reports to the department within 3 days after the end of each week, or at a frequency specified by the department in writing. A Purchases From Fishing Vessels and/or Fishermen report shall be completed, signed and submitted to the department each week; if no purchases of food fish, crustacea, horseshoe crabs or whelks were made during that week, a report must be submitted stating no purchases were made for the week. Incomplete Purchases From Fishing Vessels and/or Fishermen reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(2) Effective January 1, 2012, submit complete and accurate purchases from fishing vessels and/or fishermen reports to the Atlantic Coastal Cooperative Statistics Program (ACCS) through its website at www.accsp.org. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service.

(c) License holders subject to the provisions of this subdivision shall present their fishing Vessel Trip Reports or Purchases From Fishing Vessel Reports and/or Fishermen and make them available for inspection upon the request of an authorized agent of the department or NOAA Fisheries Service. Reports shall be submitted to the department at the following address: NYSDEC, Bureau of Marine Resources, 205 N. Belle Mead Road, Suite # 1, East Setauket, New York 11733. Reports may be mailed, faxed, emailed or submitted by any other method approved by the department.

(d) In fulfillment of these reporting requirements, license holders subject to the provisions of this subdivision may choose to submit purchases from fishing vessels data or fishing trip data online at the Atlantic Coastal Cooperative Statistics Program website, www.accsp.org. Complete and accurate fishing trip and purchase data submissions to this website will satisfy the reporting requirements specified in this subdivision. License holders who submit fishing data electronically must maintain a dated logbook, on board the specific fishing vessel, that details all fishing activities for each fishing trip. Data to be recorded in this logbook must include the vessel name, date sailed and date landed, species and weight of the species taken during the dated trip, and other information required by the department. Entries must be entered into the logbook before the vessel arrives at the dock or lands the catch.

(e) Failure to file fishing Vessel Trip Reports or Purchases From Fishing Vessel and/or Fishermen Reports as required may disqualify the owner or operator from receiving future licenses or permits pur-

suant to Part 175 of this title. Any person who falsifies any fishing Vessel Trip Report or Purchases from Fishing Vessel and/or Fishermen Report shall be subject to the penalties established pursuant to the provisions of Article 71 of Environmental Conservation Law and may be subject to permit revocation pursuant to Part 175 of this Chapter.

Section 44.11 is renumbered as section 44.12.

A new section 44.11 is adopted to read as follows:

44.11 Confidentiality of fisheries data.

Fisheries data, statistics or other information collected from individual permit or license holders by the department or available to the department from other states or the federal government shall be confidential and shall not be disclosed except to an authorized user or when required under court order; provided, however, that the department may release or make public any statistics in an aggregate or summary form (with no less than three submitters contributing to that statistic) which does not directly or indirectly disclose the identity of any person who submits such statistics. For the purposes of these regulations an authorized user is any person that is employed by or under contract to the department or who is employed by or is under contract to the NOAA Fisheries Service, the U.S. Fish and Wildlife Service, the Mid-Atlantic Fishery Management Council, the New England Fishery Management Council, the South Atlantic Fishery Management Council, or the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, South Carolina, Georgia or Florida, and who has been designated by such agency or state, under the auspices of the Atlantic Coastal Cooperative Statistics Program to require confidential data as a means to fulfill their job and their job is related to fisheries management and conservation.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 40.1(c), 44.10(a) and 44.11.

Text of rule and any required statements and analyses may be obtained from: Maureen Davidson, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0857, email: mcdavids@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required to accompany this Notice of Adoption. Non-substantive changes were made to text of the proposed rule to add omitted words and correct mistakes in the text (National Marine Fisheries Service should be referred to as NOAA Fisheries Service). The original Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement, as published in the Notice of Proposed Rule Making, remains valid and does not need to be amended.

Assessment of Public Comment

1. Comment: The Department of Environmental Conservation (DEC) received written comment, dated May 5, 2011, indicating that food fish license holders on small boats (less than 26 ft) would have big problems with storing and filling out the vessel trip reports at sea and suggesting that the rule be modified to allow those food fish license holders to fill out the reports at the dock or within 24 hours.

DEC response: DEC acknowledges that fishermen aboard small vessels may have to operate under different conditions for storing and handling vessel trip reports (VTRs). However, the department is seeking to enforce the reporting requirements equally on all affected license holders. As a practice, vessel trip reports must be completed before the catch is landed or, under extenuating circumstances, at the dock. Only if the VTR is completed before landing can an environmental conservation officer effectively evaluate the nature of the fishing trip, verify the catch taken and determine the compliance of the license holder.

2. Comment: DEC received written comment, dated May 16, 2011, indicating that the rule should be put into effect. The comment continues, stating that the department needs to start collecting accurate data so that New York State has accurate landings to use in regulatory meetings. The comment also requested that the SAFIS system be made better.

DEC response: DEC concurs.

NOTICE OF ADOPTION

Hunting with Crossbows and Modified Longbows

I.D. No. ENV-21-11-00002-A

Filing No. 712

Filing Date: 2011-08-05

Effective Date: 2011-08-24

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

Action taken: Addition of sections 2.3 and 2.4; and repeal of section 170.6 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303 and 11-1901

Subject: Hunting with crossbows and modified longbows.

Purpose: To authorize use of a crossbow during certain big game hunting seasons, and to eliminate the modified archer permit.

Text of final rule: Adopt a new section 6 NYCRR 2.3 to read as follows:

2.3 Hunting with a crossbow.

(a) Definitions.

(1) "Crossbow Certificate of Qualification" means a certificate, as provided by the Department of Environmental Conservation (DEC or department), signed by the hunter that will be using a crossbow, certifying that he or she has satisfied the department's legal requirements for crossbow training.

(2) "Late muzzleloading season" means a special season in which the muzzleloader is the only firearm permitted and which immediately follows the regular open season for deer or bear, as defined in sections 1.22 and 1.31, respectively, of Part 1 of this Title.

(3) "Unloaded crossbow" means a crossbow with the bolt removed, regardless whether the crossbow is cocked or uncocked.

(4) "Crossbow that is taken down" means a crossbow that has the limbs removed from the stock, or securely fastened in a case, or locked in the trunk.

(b) Purpose. The provisions of this section shall apply to the taking of deer and bear by crossbow pursuant to section 11-0901 of the Environmental Conservation Law.

(1) Training. Hunters may use a crossbow to hunt deer or bear only after they have completed training in the safe use of hunting with a crossbow and responsible crossbow hunting practices. Such training shall include, but not be limited to, the types and parts of a crossbow, cocking and uncocking the crossbow, proper holding and use while afield, and effective shooting range. The department shall post on-line within the department website, and in the New York State Hunting and Trapping Regulations Guide, requirements and directions for completing crossbow training. After completion of the training, the hunter must complete and sign a crossbow certificate of qualification provided by the department.

(2) Open season. Notwithstanding the provisions of subdivision (e) of section 1.22 and subdivision (4) (i) of section 1.31 of this title, crossbows may be used in any big game season in which the use of a shotgun and muzzleloader is permitted and all late muzzleloading seasons.

(3) License requirements. Any person who hunts or takes deer or bear with a crossbow in any big game season in which the use of a shotgun and muzzleloader is permitted or late muzzleloading season must possess, on his or her person:

(i) for New York State residents, a valid resident big game license and, if hunting in a late muzzleloading season, they must possess a muzzleloading season privilege; for nonresidents, a valid nonresident combination or muzzleloading license and when hunting for bear, a non-resident bear privilege; and

(ii) a signed crossbow certificate of qualification from completion of crossbow training as provided by the department.

(4) Valid Tags. Regular season deer tags, deer management permits, deer management assistance permits, bow/muzzleloader season either-sex tags, and bow/muzzleloader antlerless tags are valid for use when hunting deer with a crossbow. A resident bear tag and nonresident bear tag are valid for use when hunting bear with a crossbow.

(5) Other requirements. Except as otherwise provided in this section, the provisions of the Environmental Conservation Law relating to deer and bear hunting, including hunting hours, manner of taking, tagging, reporting, possession, and transporting, shall apply to hunting and taking deer or bear pursuant to this section.

Adopt a new section 6 NYCRR 2.4 to read as follows:

2.4 Authorization to use a longbow equipped with a mechanical device.

(a) Definitions.

(1) "Modified longbow authorization" means department authorization to use a longbow equipped with a mechanical device to take big game or small game pursuant to this section.

(2) "Longbow equipped with a mechanical device" means an otherwise legal longbow, which has been equipped with a mechanical device attached to the handle or riser of the longbow for holding and releasing the bowstring.

(3) "Longbow" means a longbow, recurve bow or compound bow which is designed to be used by holding the bow at arm's length, with arrow on the string, and which is drawn, pulled and released by hand or with the aid of a hand-held trigger device attached to the bowstring.

(4) "Physician Certification" means a signed statement by a physician duly licensed to practice medicine certifying the nature, extent, and term of physical disability that prohibits the hunter from drawing or holding a longbow.

(5) "Bowhunter with a physical disability" means a person who, due to physical disabilities, is incapable of drawing, holding, or releasing a longbow.

(b) A bowhunter with physical disabilities may receive authorization by the department to use a longbow equipped with a mechanical device to take big game or small game. To obtain such modified longbow authorization the bowhunter must:

(1) obtain a modified longbow authorization form that the department shall post on the DEC website and make available in hard copy to anyone who requests one;

(2) complete the modified longbow authorization form, which shall include information from the bowhunter with physical disabilities, including a signed statement from a physician duly licensed to practice medicine. This physician shall certify that the bowhunter is physically incapable of drawing, holding or releasing a longbow because of a physical disability and shall indicate the term of the disability; and

(3) for New York State residents, a valid hunting license to hunt small game, or license to hunt big game with a bowhunting privilege; for nonresidents, a valid nonresident hunting license to hunt small game, or a valid nonresident combination or bowhunting license to hunt big game, and when hunting for bear, a nonresident bear privilege.

(c) Modified longbow authorization forms are subject to the following conditions:

(1) Application must be made on the modified longbow authorization form provided by the department;

(2) The modified longbow authorization form must be in the holder's possession while hunting with a longbow equipped with a mechanical device. The bowhunter shall also be in possession of all other required licenses and permits;

(3) The modified longbow authorization is valid as per the term indicated in the physician's statement;

(4) The department may provide the holder of a previous modified archer permit authorization for use of a modified longbow. This authorization will replace all previous authorization issued for the terms of the certification; and

(5) The holder of the modified longbow authorization form is subject to all other applicable provisions of the Environmental Conservation Law and rules and regulations adopted pursuant thereto.

Repeal existing section 6 NYCRR 170.6, "Permit to use a bow equipped with a mechanical device."

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2.3(b)(1), (2) and (3).

Text of rule and any required statements and analyses may be obtained from: Bryan Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8883, email: wildliferegs@gw.dec.state.ny.us

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

Revised Regulatory Impact Statement

Two technical corrections were made to further clarify the regulation and to be consistent with the new law. The first was that a crossbow may be used 'in any big game season in which the use of a shotgun and muzzleloader is permitted'. This will better define the allowable big game seasons for crossbow use including the northern zone early bear, all regular, and the Suffolk County special firearms seasons. The second technical correction was to address some of the actual training and demonstration of features that would be covered in the crossbow fortified sportsman education courses (types and parts a crossbow, cocking and uncocking the crossbow, proper holding and use while afield, effective shooting range). The original Regulatory Impact Statement as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation. In addition to these

technical corrections, we revised some of the punctuation in the new regulation for greater consistency throughout.

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

Two technical corrections were made to further clarify the regulation and to be consistent with the new law. The first was that a crossbow may be used 'in any big game season in which the use of a shotgun and muzzleloader is permitted.' This will better define the allowable big game seasons for crossbow use including the northern zone early bear, all regular, and the Suffolk County special firearms seasons. The second technical correction was to address some of the actual training and demonstration of features that would be covered in the crossbow fortified sportsman education courses (types and parts a crossbow, cocking and uncocking the crossbow, proper holding and use while afield, effective shooting range). The original Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Assessment of Public Comment

The Department of Environmental Conservation (DEC or department) received a total of 42 public comments, most of which expressed support for the proposed rule making. The department has prepared "Frequently Asked Questions" (FAQs) in response to some of the more common comments on the regulation. These FAQs are posted on the DEC website (<http://www.dec.ny.gov/outdoor/68802.html>), and a summary of the substantive comments and the department's response follows:

Comment:

The crossbow should be legal for all hunters in all seasons, or the regulation should allow all permanently disabled hunters, hunters who are unable to draw a legal bow, hunters who are 65 years of age or older, or hunters who have a certified physician's statement regarding their disability, to use a crossbow in any season.

Response:

The department acknowledges support for the use of crossbows for hunting during all seasons in which other bowhunting equipment is allowed. However, the new legislation (ECL § 11-0901 sub 17) specifically set the allowable seasons for crossbow use and clarifies under what circumstances a crossbow may be used. The department is obligated to adopt regulations necessary to implement the law as written.

Comment:

Crossbows should not be allowed in a traditional archery season. They should only be allowed in a gun or muzzleloading season.

Response:

In accordance to the new legislation, the use of a crossbow will only be allowed during any big game season in which the use of a shotgun and muzzleloader is permitted and all late muzzleloading seasons. It cannot be used during a bowhunting season or with a bowhunting privilege.

Comment:

More rigorous training and certification should be required of all persons who hunt with a crossbow, including those who may have already completed the standard firearms and/or bowhunting sportsman education courses.

Response:

The new legislation authorizes the department to specify the training required of persons who wish to hunt with a crossbow. The department considered requiring every crossbow hunter to attend a special crossbow hunting course. However, this would place a tremendous burden on many thousands of hunters and would overwhelm our volunteer instructors who would have to meet this demand in addition to providing basic hunter education to new hunters.

There were suggestions of a more rigorous on-line training and testing system with electronic certification, as other states have used and incorporated into their sportsman education courses. However, the time and cost required to develop and implement this would be prohibitive and may have limited utility since the legislation is scheduled to expire at the end of 2012.

The department will modify the sportsman education program to include responsible crossbow use and safety training. The current program training manual includes a section on crossbow use. Sportsman education instructors are also being provided with a crossbow instruction lesson plan, optional use of crossbows for training demonstration, and the availability of informational material, as handouts, from the North American Crossbow Federation on crossbow safety and responsible use.

Comment:

The proposed regulation does not adequately describe how training in safe and responsible crossbow hunting will be incorporated into basic hunter education for new hunters.

Response:

We added language to the regulation specifying that crossbow training shall include, but is not limited to, the types and parts of a crossbow, cocking and uncocking the crossbow, proper holding and use while afield, and effective shooting range. A more detailed description of the training is not a necessary to include in the regulation, as such information is not included for other hunter education training, and doing so could limit our flexibility in developing and refining materials for crossbow training and certification.

Although the program content is not described in detail in the regulation, the department has notified hunter education instructors of the legislative requirement for teaching of safe and responsible crossbow hunting. Our current standard sportsman education program now has a section on crossbow safety that will be covered in all basic hunter education classes. The training manual provided to all students, Today's Hunter, includes a section on "Know Your Crossbow". A crossbow safety lesson plan has been provided to the instructors to ensure that their coverage of the subject complies with the intent of the new legislation. The department is currently in the process of purchasing crossbows for distribution to our instructors so that they may effectively demonstrate the safety features common to many modern crossbows. In addition, the department has permission from the North American Crossbow Federation to offer copies of their "Crossbow 101" video information on safe and responsible use of crossbow to any course attendees.

The department is confident that our hunter education instructors will be well equipped to teach a module on the safe use of crossbows, as required by the new law.

Comment:

Use of crossbows is a safety hazard to DEC officials and other law enforcement while afield.

Response:

The department is not aware of any unique hazards a crossbow will present to department staff while in the field. Sportsmen who use a crossbow to hunt big game in New York will need to abide by the same rules and regulations set forth in the ECL and annual hunting regulations guide while transporting and while afield with a crossbow.

Comment:

The proposed regulations require only that a hunter complete the "modified longbow authorization form", whereas the law requires submission of a physician's statement to DEC.

Response:

The department concluded that this requirement would be reasonably met by requiring those hunters to obtain and carry a signed statement from a physician confirming his or her disability. A hunter using a modified longbow would have to carry this statement of eligibility whenever afield, and would have to present (i.e., submit) this to any Environmental Conservation Officer as proof of compliance. Requiring all disabled hunters who use a modified longbow to submit a copy of their physician's statement or authorization (by mail or other means) was an unnecessary burden on those hunters that would serve no additional purpose beyond enforcement.

Note:

In addition to public comments that were received, the department recognized that the proposed rule needed a technical correction to further clarify when a crossbow may be used. To be consistent with the law, this correction has included the use of a crossbow "in any big game season in which the use of a shotgun and muzzleloader is permitted". This will better define the allowable big game seasons for crossbow use including the Northern Zone early bear, all regular, and the Suffolk County special firearms seasons.

Department of Labor

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Restrictions on the Consecutive Hours of Work for Nurses as Enacted in Section 167 of the Labor Law

I.D. No. LAB-43-10-00003-ERP

Filing No. 727

Filing Date: 2011-08-09

Effective Date: 2011-08-09

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

Action Taken: Addition of Part 177 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21

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

Specific reasons underlying the finding of necessity: Section 167 of the Labor Law was effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

Subject: Restrictions on the consecutive hours of work for nurses as enacted in section 167 of the Labor Law.

Purpose: To clarify the emergency circumstances under which an employer may require overtime for nurses.

Text of emergency/revised rule: A new Part 177 is added to 12 N.Y.C.R.R. to read as follows:

PART 177

RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

(Statutory authority: Labor Law § 167)

§ 177.1 Application.

In accordance with Labor Law, Section 167, this Part shall apply to health care employers, who shall be prohibited from assigning mandatory overtime to nurses except in certain circumstances as described in this regulation.

§ 177.2 Definitions.

(a) "Emergency" shall mean an unforeseen event that could not be prudently planned for by a health care employer and does not regularly occur, including an unanticipated staffing emergency.

(b) "Health care disaster" shall mean a natural or other type of disaster that increases the need for health care personnel, unexpectedly affecting the county in which the nurse is employed or in a contiguous county, as more fully explained in Section 177.3 of this Part.

(c) "Health care employer" shall mean any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, who provides health care services (i) in a facility licensed or operated pursuant to article twenty-eight of the public health law, including any facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, or (ii) in a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, operated or licensed pursuant to the mental hygiene law, the education law or the correction law.

Examples of a health care facility include, but are not limited to, hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, residential drug and alcohol treatment facilities, adult day health care programs, and diagnostic centers.

(d) "Nurse" shall mean a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the education law who provides direct patient care, regardless of whether such nurse is employed full-time, part-time, or on a per diem basis. Nurses who provide services to a health care employer through contracts with third party staffing providers such as nurse registries, temporary employment agencies, and the like, or who are engaged to perform services for health care employers as independent contractors shall also be covered by this Part.

(e) "On call" shall mean when an employee is required to be ready to perform work functions and required to remain on the employer's premises or within a proximate distance, so close thereto that s/he cannot use the time effectively for his or her own purposes. An employee who is not required to remain on the employer's premises or within a proximate distance thereto but is merely required to leave information, at his or her home or with the health care employer, where he or she may be reached is not on call.

(f) "Overtime" shall mean work hours over and above the nurse's regularly scheduled work hours. Determinations as to what constitutes overtime hours for purposes of this Part shall not limit the nurse's receipt of overtime wages to which the nurse is otherwise entitled.

(g) "Patient care emergency" shall mean a situation which is unforeseen and could not be prudently planned for, which requires nurse overtime in order to provide safe patient care as more fully explained in Section 177.3 of this Part.

(h) "Regularly scheduled work hours" shall mean the predetermined number of hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse's position by the health care employer.

(1) For purposes of this Part, for full-time nurses, "the budgeted

hours allocated to the nurses position'' shall be the hours reflected in the employer's full-time employee (FTE) level for the unit in which the nurse is employed.

(2) If no such allocation system exists, regularly scheduled work hours shall be determined by some other measure generally used by the health care employer to determine when an employee is minimally supposed to work.

(3) The term regularly scheduled work hours shall be interpreted in a manner that is consistent with any relevant collective bargaining agreement and other statutes or regulations governing the hours of work, if any.

(4) Regularly scheduled work hours shall include pre-scheduled on-call time subject to the exceptions set forth in Section 177.3(b)(1) of this Part and the time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety.

(5) For a part-time nurse, regularly scheduled work hours mean those hours a part-time nurse is normally scheduled to work pursuant to the employer's budgeted hours allocated. If advance scheduling is not used for part-time nurses, the percentage of full-time equivalent, which shall be established by the health care employer (e.g. a 50% part-time employee), shall serve as the measure of regularly scheduled work hours for a part-time nurse.

(6) For per diem, privately contracted, or employment agency nurses, the employment contract and the hours provided therein shall serve as the basis for determining the nurse's regularly scheduled work hours.

§ 177.3 Mandatory Overtime Prohibition

(a) Notwithstanding any other provision of law, a health care employer shall not require a nurse to work overtime. On call time shall be considered time spent working for purposes of determining whether a health care employer has required a nurse to work overtime. No employer may use on-call time as a substitute for mandatory overtime.

(b) The following exceptions shall apply to the prohibition against mandatory overtime for nurses:

(1) **Health Care Disaster.** The prohibition against mandatory overtime shall not apply in the case of a health care disaster, such as a natural or other type of disaster unexpectedly affecting the county in which the nurse is employed or in a contiguous county that increases the need for health care personnel or requires the maintenance of the existing on-duty personnel to maintain staffing levels necessary to provide adequate health care coverage. A determination that a health care disaster exists shall be made by the health care employer and shall be reasonable under the circumstances. Examples of health care disasters within the meaning of this Part include unforeseen events involving multiple serious injuries (e.g. fires, auto accidents, a building collapse), chemical spills or releases, a widespread outbreak of an illness requiring hospitalization for many individuals in the community served by the health care employer, or the occurrence of a riot, disturbance, or other serious event within an institution which substantially affects or increases the need for health care services.

(2) **Government Declaration of Emergency.** The prohibition against mandatory overtime shall not apply in the case of a federal, state or local declaration of emergency in effect pursuant to State law or applicable federal law in the county in which the nurse is employed or in a contiguous county.

(3) **Patient Care Emergency.** The prohibition against mandatory overtime shall not apply in the case of a patient care emergency, which shall mean a situation that is unforeseen and could not be prudently planned for and, as determined by the health care employer, that requires the continued presence of the nurse to provide safe patient care, subject to the following limitations:

(i) Before requiring an on-duty nurse to work beyond his or her regularly scheduled work hours in connection with a patient care emergency, the health care employer shall make a good faith effort to have overtime covered on a voluntary basis or to otherwise secure nurse coverage by utilizing all methods set forth in its Nurse Coverage Plan required pursuant to Section 177.4 of this Part. The health care employer shall document attempts to secure nurse coverage through use of phone logs or other records appropriate to this purpose.

(ii) A patient care emergency cannot be established in a particular circumstance if that circumstance is the result of routine nurse staffing needs due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the employer for vacation, holidays, sick leave, and personal leave, unless a Nurse Coverage Plan which meets the requirements of Section 177.4 is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency. Nothing in this provision shall be construed to limit an employer's right to deny discretionary time off (e.g., vacation time, personal time, etc.) where the employer is contractually or otherwise legally permitted to do so.

(iii) A patient care emergency will not qualify for an exception to the provisions of this Part if it was caused by the health care employer's

failure to develop or properly and fully implement a Nurse Coverage Plan as required under Section 177.4 of this Part.

(4) **Ongoing Medical or Surgical Procedure.** The prohibition against mandatory overtime shall not apply in the case of an ongoing medical or surgical procedure in which the nurse is actively engaged and in which the nurse's continued presence through the completion of the procedure is needed to ensure the health and safety of the patient. Determinations with regard to whether the nurse's continued active engagement in the procedure is necessary shall be made by the nursing supervisor or nurse manager supervising such nurse.

(c) Nothing in this Part shall prohibit a nurse from voluntarily working overtime. A nurse may signify his or her willingness to work overtime by either: a) agreeing to work a particular day or shift as requested, b) agreeing to be placed on a voluntary overtime list or roster, or c) agreeing to prescheduled on-call time pursuant to a collective bargaining agreement or other written contract or agreement to work.

§ 177.4 Nurse Coverage Plans

(a) Every health care employer shall implement a Nurse Coverage Plan, taking into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors. Such plan should also reflect the health care employer's typical levels and types of patients served by the health care facility.

(b) The Plan shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of mandatory overtime including contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list or roster of nurses seeking voluntary overtime.

(c) The Plan must identify the Supervisor(s) or Administrator(s) at the health care facility or at another identified location who will make the final determination as to when it is necessary to utilize mandatory overtime. The Plan may require a nurse to assist in making telephone calls consistent with the Nurse Coverage Plan to find his or her own shift replacement, but may not require a nurse to self-mandate overtime.

(d) The Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and seek alternative staffing through the methods identified in subdivision (b) of this Section. In the event that the health care employer does utilize mandatory overtime, the documentation of such efforts to avoid the use of mandatory overtime shall be made available, upon request, to the nurse who was required to work the mandatory overtime and/or to the nurse's collective bargaining representative, provided, however, that the names and other personal identifying information about patients shall not be included unless authorized under State and federal law and regulations.

(e) The Plan shall be in writing and upon completion or amendment of such plan, it shall:

(i) be made readily available to all nursing staff through distribution to nursing staff, or conspicuously posting the Plan in a physical location accessible to nursing staff, or through other means that will ensure availability to nursing staff, e.g. posting on the employer's intranet site or its functional equivalent.

(ii) be provided to any collective bargaining representative representing nurses at the health care facility.

(iii) be provided to the Commissioner of Labor, or his or her designee, upon request.

(f) Nothing herein shall be read to establish the Nurse Coverage Plans required herein as standards to be used in assessing the health care employer's compliance with any other obligation or requirement, including facility accreditation.

(g) All such Plans were to have been prepared by October 13, 2009 in accordance with emergency regulations that were in effect. For health care employers who were not operating covered facilities on October 13, 2009, a Nurse Coverage Plan shall be in place prior to the time they commence operations.

§ 177.5 Report of Violations

Parties who wish to file complaints of violations of this Part shall follow procedures and utilize the forms set forth for this purpose on the Department's website.

§ 177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

The provisions of this Part shall not be construed to diminish or waive any rights or obligations of any nurse or health care provider pursuant to any other law, regulation, or collective bargaining agreement.

§ 177.7 Waiver of Rights Prohibited

A health care employer covered by this Part may not utilize employee waivers of the protections afforded under Labor Law § 167 or this Part as an alternative to compliance with such law or regulation. A health care employer who seeks such a waiver from a nurse in its employ shall be considered to have violated this Part.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on October 27, 2010, I.D. No. LAB-43-10-00003-EP. The emergency rule will expire November 6, 2011.

Emergency rule compared with proposed rule: Substantial revisions were made in section 177.4(c).

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

Data, views or arguments may be submitted to: Joan Connell, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law was July 1, 2009.

2. Legislative objectives:

Legislation passed during the 2008 legislative session recognized the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse's performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these projected costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan.

The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and a log of efforts to obtain coverage using the Plan,

these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Paperwork:

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime. The rule does provide alternative, paperless options to meet this requirement including posting of the Nurse Coverage Plan on the employer's intranet or by sending electronic copies of the Plan to staff and their representatives.

6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan to cover for these expected staff absences, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care.

The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the draft regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the draft regulations. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer's intranet. The Department revised the draft regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. The Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

The representatives of public sector nurses had comments about the Nurse Coverage Plans and the requirement for documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency. The representatives were concerned that some health care employers might have a nurse working alone and if that nurse is unable to find relief through alternative staffing methods, he or she might then have to self-mandate overtime. A Nurse Coverage plan that requires a nurse to self-mandate overtime is inadequate. The Department filed proposed/emergency regulations which required Nurse Coverage Plans to identify the Supervisor or Administrator at the health care facility or at another identified location who will make the final determination as to when it is necessary to utilize mandatory overtime. The proposed regulations also provided that the Plan could not require a nurse to find his or her replacement or to self-mandate overtime. Based upon comments received from DOCS regarding the proposed regulations, the Department revised the proposed regulations to allow the nurse to assist in making telephone calls consistent with the Nurse Coverage Plan to find his or her own shift

replacement. However, the nurse may not be required to self-mandate overtime. This change to the proposed regulations necessitates that the Department file these revised proposed regulations and an Assessment of Public Comment. The Assessment has a more detailed discussion of the reasons for revising the proposed regulations and also discusses other comments received and the Department's response to those comments.

Parties commenting on behalf of nurses in the public sector also asked that the regulations outline a system of record keeping regarding the documentation of all attempts to avoid the use of mandatory overtime. It was suggested that such documentation include information that would already be available in the employer's payroll records. The information provided in a nurse's complaint, the employer payroll records, and the documentation regarding all attempts to avoid mandatory overtime through the use of the Nurse Coverage Plan, should be sufficient for the Department to complete an investigation regarding a violation of Section 167 and 12 NYCRR Part 177. The representatives also suggested that in the event a health care employer utilizes mandatory overtime for a patient care emergency, the documentation regarding the efforts to avoid the use of such mandatory overtime should be available upon request to the nurse who had to work the mandatory overtime and/or the collective bargaining representative. The Department added language to Section 177.4(d) to require that such documentation is made available, upon request, to the nurse or the collective bargaining representative. The representatives also noted that any amendment to Nurse Coverage Plans should be made available to nurses and their collective bargaining representatives. Accordingly, Section 177.4(d) now includes language regarding amendments to the Nurse Coverage Plans.

The representatives of public sector nurses also suggested that Section 177.3(c) be revised to make it clear that an individual nurse must volunteer to remain on-call regardless of any contractual provisions which provide for on-call time for nurses. The Department does not have the authority to modify the terms of collective bargaining agreements. If the collective bargaining agreement provides for on-call time for nurses, than such on-call time is presumed to be voluntary.

The representatives of public sector nurses all suggest the regulations collapse the separate and independent requirements set forth in Labor Law, Section 167(3)(c) to prudently plan for routine staffing shortages and to make good faith efforts to cover staffing on a voluntary basis before mandating overtime when a patient care emergency exists. The regulations require Nurse Coverage Plans to take into account typical patterns of absenteeism and to reflect the employer's typical levels and types of patients served in the facility. The Nurse Coverage Plan must identify and describe as many alternative staffing methods as are available to the employer to ensure adequate staffing other than by use of mandatory overtime during a patient care emergency. This language clearly requires employers to have a Nurse Coverage Plan that provides sufficient staffing to account for typical patterns of absenteeism and, at the same time, have alternative staffing methods to cover patient care emergencies.

The representatives of public sector nurses also suggest that the regulations provide for enforcement action against a health care employer who fails to develop and implement the required policies and procedures and maintain the required recordkeeping. While the Department does find penalties to be an effective means of encouraging employer compliance with regulations protecting the rights of workers, the implementing legislation does not provide for such penalties.

The representatives of public sector nurses also suggest that the regulations should clearly set forth protections against reprisals for filing a complaint. Such protections already exist under Section 215 of the Labor Law for nurses in private facilities. Civil Service Law, Section 75-b prohibits retaliatory actions by public employers against public employees.

The representatives of public sector nurses also suggest that the regulations set forth that the investigatory process be completed within 90 days and include an informal conference or means by which a Department Investigator, the complainant and/or the collective bargaining representative, and the employer meet to discuss issues arising from the investigation. The representatives also suggest a closing conference and a clearly defined appeal process or mechanism to dispute the Department's issuance of an order in a situation where the complainant employee or collective bargaining representative disputes the Department's decision. In short, the representatives of public sector nurses are requesting a procedural investigatory process similar to that for public employee safety and health complaints pursuant to Labor Law, Section 27-a. However, that investigatory process is clearly detailed in Section 27-a and includes site inspections, where representatives of the employer and an authorized employee representative are given an opportunity to accompany the Department Investigator during an inspection. This type of on-site inspection is needed to view whether safety and health hazards exist.

The representatives of public sector nurses suggest that nurse administrators or employees that have a nursing license, but do not provide direct patient care in their positions be covered under the provisions of Section

167 if the employer mandates them to provide direct patient care. Such a requirement is clearly contrary to the statutory provisions of Section 167. Specifically, Section 167(1)(b) defines a nurse as a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the Education Law who provides direct patient care. (Emphasis supplied) The Department does not have the statutory authority to expand the coverage of Section 167 to nurse administrators or other employees that have a nursing license, but do not have regularly scheduled work hours where they provide direct patient care.

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

The rule would be effective on the date of final adoption. However, emergency regulations have been in place for some time which have established the requirement for Nurse Coverage Plans. The Nurse Coverage Plans were required to be established by October 13, 2009.

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

The changes made to the last published rule do not necessitate revision to the previously published RFA, RAFA and JIS. Therefore, an RFA, RAFA and JIS is not attached.

Assessment of Public Comment

The Department received written comments on the proposed regulations, 12 NYCRR Part 177, regarding mandatory overtime for nurses from the Public Employees Federation (PEF), the New York State Nurses Association (NYSNA), the New York State Department of Education (State Education) and the New York State Department of Correctional Services (DOCs). The comments related to the following:

- the definition of the term "on call" as set forth in the proposed regulations at Section 177.2(e)
- patient care emergencies as an exception to the prohibition against mandatory overtime
- the use of Nurse Coverage Plans as a "safe harbor" for the good faith effort defense
- voluntary overtime
- who is responsible for making decisions regarding implementation of the Nurse Coverage Plan

The full text of the Assessment of Public Comment is available on the Department of Labor website at www.labor.ny.gov

Office of Mental Health

EMERGENCY RULE MAKING

Implementation of 1.1% Medicaid Fee Reductions for Operating Rates of Continuing Day Treatment Programs

I.D. No. OMH-34-11-00002-E

Filing No. 711

Filing Date: 2011-08-04

Effective Date: 2011-08-04

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

Action taken: Amendment of Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 43.01 and 43.02

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

Specific reasons underlying the finding of necessity: The rulemaking serves to implement a reduction in the Medicaid fees paid to Continuing Day Treatment (CDT) Programs licensed pursuant to Article 31 of the Mental Hygiene Law and operated by agencies licensed pursuant to Article 28 of the Public Health Law, as well as CDT Programs licensed solely under Article 31 of the Mental Hygiene Law. The reduction in rates for these programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs, and is consistent with the 2011-2012 enacted State budget. As the rate reductions are effective as of April 1, 2011, the rule has been deemed to warrant emergency filing.

Subject: Implementation of 1.1% Medicaid fee reductions for operating rates of Continuing Day Treatment Programs.

Purpose: To reduce rates for Continuing Day Treatment Programs consistent with the 2011-2012 enacted State budget.

Text of emergency rule: 1. Paragraph (4) of subdivision (a) of section 588.13 of Title 14 NYCRR is repealed and paragraph (5) is renumbered and amended to read as follows:

[(5)] (4) Reimbursement under the medical assistance program for non-state operated continuing day treatment programs licensed solely pursuant to article 31 of the Mental Hygiene Law, and Part 587 of this Title for services provided on or after [July 1, 2010] *April 1, 2011*, shall be in accordance with the following fee schedule. The reimbursement for any regular visit shall be based upon the cumulative number of program hours provided in a calendar month to an individual recipient, excluding time spent in meals, adding two hours for each half-day visit and four hours for each full-day visit. Collateral, group collateral pre-admission and crisis visits will be reimbursed at the half-day rate for program hours 1- 40 regardless of the cumulative total of hours for regular visits in that month. Collateral, group collateral, pre-admission and crisis visits shall not be included in the calculation of the cumulative total hours in the program for a recipient. When the program hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. Regular visits shall be reimbursed on the basis of program attendance and service provision as set forth in section 588.7 of this Part. The rates of reimbursement are as follows:

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

Program hours 1-40 \$[62.70]62.01 full day (4 hours)
 Program hours 1-40 \$[31.35]31.01 half day (2 hours)
 Program hours 41-64 \$[47.03]46.51 full day (4 hours)
 Program hours 41-64 \$[23.52]23.26 half day (2 hours)
 Program hours 65+ \$[34.65]34.27 full day (4 hours)
 Program hours 65+ \$[17.33]17.14 half day (2 hours)
 Collateral \$31.01
 Group Collateral \$31.01
 Crisis \$31.01
 Pre-Admission \$31.01

(ii) For programs operated in Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tompkins, Wayne, Wyoming and Yates counties:

Program hours 1-40 \$[56.43]55.81 full day (4 hours)
 Program hours 1-40 \$[28.22]27.91 half day (2 hours)
 Program hours 41-64 \$[47.03]46.51 full day (4 hours)
 Program hours 41-64 \$[23.52]23.26 half day (2 hours)
 Program hours 65+ \$[34.65]34.27 full day (4 hours)
 Program hours 65+ \$[17.33]17.14 half day (2 hours)
 Collateral \$27.91
 Group Collateral \$27.91
 Crisis \$27.91
 Pre-Admission \$27.91

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Tioga, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schoenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

Program hours 1-40 \$[55.39]54.78 full day (4 hours)
 Program hours 1-40 \$[27.70]27.40 half day (2 hours)
 Program hours 41-64 \$[47.03]46.51 full day (4 hours)
 Program hours 41-64 \$[23.52]23.26 half day (2 hours)
 Program hours 65+ \$[34.65]34.27 full day (4 hours)
 Program hours 65+ \$[17.33]17.14 half day (2 hours)
 Collateral \$27.40
 Group Collateral \$27.40
 Crisis \$27.40
 Pre-Admission \$27.40

2. Subdivision (b) of Section 588.13 is amended to read as follows:

(b) Reimbursement under the medical assistance program for non-State operated continuing day treatment programs licensed pursuant to Article 31 of the Mental Hygiene Law and operated by agencies licensed pursuant to Article 28 of the Public Health Law, and Part 587 of this Title shall be in accordance with the following fee schedule:

(1) [For services provided on or after January 1, 2009, and prior to April 1, 2009, the fee shall be \$51.05 for a visit.

(2) [For services provided on or after [April 1, 2009] *April 1, 2011*, the reimbursement for any regular visit shall be based upon the cumulative number of program hours provided in a calendar month for an individual recipient, excluding time spent in meals, adding two hours for each half-day visit and four hours for each full-day visit. Collateral, group collateral, pre-admission and crisis visits will be reimbursed at the half-day rate for program hours 1-40 regardless of the cumulative total of hours for regular visits in that month. Collateral, group collateral, pre-admission and crisis visits shall not be included in the calculation of the cumulative total hours

in the program for a recipient. When the program hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. Regular visits shall be reimbursed on the basis of program attendance and program provision as set forth in section 588.7 of this Part. The rates of reimbursement are as follows:

Program hours 1-40 \$[62.70]62.01 full day (4 hours)
 Program hours 1-40 \$[42.01]41.55 half day (2 hours)
 Program hours 41+ \$[47.03]46.51 full day (4 hours)
 Program hours 41+ \$[31.51]31.16 half day (2 hours)
 Collateral \$41.55
 Group Collateral \$41.55
 Crisis \$41.55
 Pre-Admission \$41.55

[(3)] (2) For amounts paid under [paragraph (1) or (2)] *this subdivision*:

(i) There shall be added an allowance for the cost of capital, which shall be determined by the application of the principles of cost-finding for the Medicare program. No capital expenditure for which approval by the Office is required under the applicable provisions of the Mental Hygiene Law or Part 551 of this Title shall be included in allowable capital costs for purposes of rate computation unless such approval has been secured.

(ii) Allowable capital expenditures shall not include costs specifically excluded pursuant to Section 2807-c of the Public Health Law.

(iii) The capital payment per visit for a provider's continuing day treatment programs shall be determined by dividing all allowable capital costs of the provider's licensed outpatient mental health clinic, day treatment, and continuing day treatment, after deducting any exclusions, by the sum of the total number of visits for such programs.

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 November 1, 2011.

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

Regulatory Impact Statement

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

Section 43.01 of the Mental Hygiene Law gives the Commissioner of Mental Health the authority to set rates for outpatient services at facilities operated by the Office of Mental Health.

Section 43.02 of the Mental Hygiene Law provides that payments under the Medical Assistance Programs for services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of Budget.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to 14 NYCRR Part 588 are being made in accordance with the 2011-2012 enacted State Budget (Chapter 59 of the Laws of 2011).

3. Needs and benefits: The amendments to Part 588 are necessary to implement Medicaid fee reductions for the operating rate of Continuing Day Treatment (CDT) Programs that are licensed pursuant to Article 31 of the Mental Hygiene Law and operated by agencies licensed pursuant to Article 28 of the Public Health Law, as well as to reduce the Medicaid fee for CDT Programs licensed solely under Article 31 of the Mental Hygiene Law. These amendments are required to implement a continuation of the 1.1% reduction to Medicaid, as required by the enacted State budget. These rate decreases have been approved by the Director of the Division of the Budget and are effective as of April 1, 2011.

4. Costs:

a) Costs to state government: These regulatory amendments will not result in any additional costs to State government. It is estimated that the total savings to the State share of Medicaid will be \$266,431.

b) Costs to local government: These regulatory amendments will not result in any additional costs to local government other than in their status as a provider of mental health services. Such costs are addressed under 4(c) "Costs to regulated parties".

c) Costs to regulated parties: These regulatory amendments will not result in any additional costs to regulated parties, but will reduce the rates paid under the Medical Assistance Program for CDT programs. Currently there are a total of 82 CDT Programs, nine of which are county-operated. It is estimated that the full annual State share impact of this rate cut is \$266,431, resulting in total Medicaid reduction of \$532,862.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: As noted above, this amendment is consistent with the 2011-2012 enacted State budget. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs, and reflects the serious fiscal condition of the State. The only alternative to the regulatory amendment would be to make further budgetary cuts to other programs which would have the potential to put those providers at financial risk. Therefore, that alternative was not considered.

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

10. Compliance schedule: These regulatory amendments are effective immediately. The rate adjustment is considered effective as of April 1, 2011.

Regulatory Flexibility Analysis

The rulemaking serves to implement a Medicaid fee reduction of the operating rate of Continuing Day Treatment (CDT) Programs. The reduction in rate for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State. As there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to implement a Medicaid fee reduction of the operating rate of Continuing Day Treatment (CDT) Programs will not impose any adverse economic impact on rural areas. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rulemaking, which serves to implement a Medicaid fee reduction of the operating rate of Continuing Day Treatment (CDT) Programs will have no impact upon jobs and employment opportunities. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operation of Psychiatric Inpatient Units of General Hospitals

I.D. No. OMH-34-11-00006-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 580.6(b)(4) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04

Subject: Operation of Psychiatric Inpatient Units of General Hospitals.

Purpose: To prohibit commingling of adults and children receiving services in groups in hospitals licensed by the Office of Mental Health.

Text of proposed rule: Paragraph (4) of subdivision (b) of section 580.6 of Title 14 NYCRR is amended to read as follows:

(4) If minors under the age of 18 are admitted to the hospital, they shall not be commingled with adults in areas of the unit where the adults reside, *nor shall they receive services in groups which include adults*. In extraordinary circumstances, such commingling may be permitted upon written approval of the Office, on a situational and time-limited basis.

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

Consensus Rule Making Determination

This rule making is filed as a Consensus rule on the grounds that its purpose is to bring the regulation into conformance with non-discretionary statutory requirements prohibiting commingling of adults and children in group settings.

Chapter 188 of the Laws of 2011 (S.5678/A.8357) requires that the Office of Mental Health (Office) promulgate regulations to prohibit commingling of adolescents and adults in hospitals licensed by the Office. Existing regulations prohibit commingling of adolescent and adult patients in areas of the hospital unit where adults reside, but the regulations do not specifically include the provision that children and adolescents shall not receive services in groups which include adults. This rule making is designed to update the regulations to include this provision of law, which became effective on July 20, 2011.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction and to set standards of quality and adequacy of facilities, equipment, personnel, services, records, and programs for the rendition of services for persons diagnosed with mental illness, pursuant to an operating certificate.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the amendments that they will have no impact on jobs and employment opportunities. The rule merely serves to bring existing regulations into compliance with non-discretionary statutory requirements regarding commingling of children and adults who are receiving services in group settings in hospitals licensed by the Office of Mental Health.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Implementation of 1.1% Medicaid Fee Reductions for Operating Rates of Continuing Day Treatment Programs

I.D. No. OMH-34-11-00017-P

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

Proposed Action: Amendment of Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 43.01 and 43.02

Subject: Implementation of 1.1% Medicaid fee reductions for operating rates of Continuing Day Treatment Programs.

Purpose: To reduce rates for Continuing Day Treatment Programs consistent with the 2011-2012 enacted State budget.

Text of proposed rule: 1. Paragraph (4) of subdivision (a) of section 588.13 of Title 14 NYCRR is repealed and paragraph (5) is renumbered and amended to read as follows:

[(5)] (4) Reimbursement under the medical assistance program for non-state operated continuing day treatment programs licensed solely pursuant to article 31 of the Mental Hygiene Law, and Part 587 of this Title for services provided on or after [July 1, 2010] *April 1, 2011*, shall be in accordance with the following fee schedule. The reimbursement for any regular visit shall be based upon the cumulative number of program hours provided in a calendar month to an individual recipient, excluding time spent in meals, adding two hours for each half-day visit and four hours for each full-day visit. Collateral, group collateral pre-admission and crisis visits will be reimbursed at the half-day rate for program hours 1- 40 regardless of the cumulative total of hours for regular visits in that month. Collateral, group collateral, pre-admission and crisis visits shall not be included in the calculation of the cumulative total hours in the program for a recipient. When the program hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. Regular visits shall be reimbursed on the basis of program attendance and service provision as set forth in section 588.7 of this Part. The rates of reimbursement are as follows:

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

Program hours 1-40	\$[62.70]	62.01 full day (4 hours)
Program hours 1-40	\$[31.35]	31.01 half day (2 hours)
Program hours 41-64	\$[47.03]	46.51 full day (4 hours)
Program hours 41-64	\$[23.52]	23.26 half day (2 hours)
Program hours 65+	\$[34.65]	34.27 full day (4 hours)
Program hours 65+	\$[17.33]	17.14 half day (2 hours)
Collateral	\$31.01	
Group Collateral	\$31.01	

Crisis \$31.01
Pre-Admission \$31.01

(ii) For programs operated in Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tompkins, Wayne, Wyoming and Yates counties:

Program hours 1-40 \$[56.43]55.81 full day (4 hours)
 Program hours 1-40 \$[28.22]27.91 half day (2 hours)
 Program hours 41-64 \$[47.03]46.51 full day (4 hours)
 Program hours 41-64 \$[23.52]23.26 half day (2 hours)
 Program hours 65+ \$[34.65]34.27 full day (4 hours)
 Program hours 65+ \$[17.33]17.14 half day (2 hours)
Collateral \$27.91
Group Collateral \$27.91
Crisis \$27.91
Pre-Admission \$27.91

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Tioga, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

Program hours 1-40 \$[55.39]54.78 full day (4 hours)
 Program hours 1-40 \$[27.70]27.40 half day (2 hours)
 Program hours 41-64 \$[47.03]46.51 full day (4 hours)
 Program hours 41-64 \$[23.52]23.26 half day (2 hours)
 Program hours 65+ \$[34.65]34.27 full day (4 hours)
 Program hours 65+ \$[17.33]17.14 half day (2 hours)
Collateral \$27.40
Group Collateral \$27.40
Crisis \$27.40
Pre-Admission \$27.40

2. Subdivision (b) of Section 588.13 is amended to read as follows:

(b) Reimbursement under the medical assistance program for non-State operated continuing day treatment programs licensed pursuant to Article 31 of the Mental Hygiene Law and operated by agencies licensed pursuant to Article 28 of the Public Health Law, and Part 587 of this Title shall be in accordance with the following fee schedule:

(1) [For services provided on or after January 1, 2009, and prior to April 1, 2009, the fee shall be \$51.05 for a visit.

(2) [For services provided on or after [April 1, 2009] *April 1, 2011*, the reimbursement for any regular visit shall be based upon the cumulative number of program hours provided in a calendar month for an individual recipient, excluding time spent in meals, adding two hours for each half-day visit and four hours for each full-day visit. Collateral, group collateral, pre-admission and crisis visits will be reimbursed at the half-day rate for program hours 1-40 regardless of the cumulative total of hours for regular visits in that month. Collateral, group collateral, pre-admission and crisis visits shall not be included in the calculation of the cumulative total hours in the program for a recipient. When the program hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. Regular visits shall be reimbursed on the basis of program attendance and program provision as set forth in section 588.7 of this Part. The rates of reimbursement are as follows:

Program hours 1-40 \$[62.70]62.01 full day (4 hours)
 Program hours 1-40 \$[42.01]41.55 half day (2 hours)
 Program hours 41+ \$[47.03]46.51 full day (4 hours)
 Program hours 41+ \$[31.51]31.16 half day (2 hours)
Collateral \$41.55
Group Collateral \$41.55
Crisis \$41.55
Pre-Admission \$41.55

[(3)] (2) For amounts paid under [paragraph (1) or (2)] *this subdivision*:

(i) There shall be added an allowance for the cost of capital, which shall be determined by the application of the principles of cost-finding for the Medicare program. No capital expenditure for which approval by the Office is required under the applicable provisions of the Mental Hygiene Law or Part 551 of this Title shall be included in allowable capital costs for purposes of rate computation unless such approval has been secured.

(ii) Allowable capital expenditures shall not include costs specifically excluded pursuant to Section 2807-c of the Public Health Law.

(iii) The capital payment per visit for a provider's continuing day treatment programs shall be determined by dividing all allowable capital costs of the provider's licensed outpatient mental health clinic, day treatment, and continuing day treatment, after deducting any exclusions, by the sum of the total number of visits for such programs.

Text of proposed rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Joyce.Donohue@omh.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: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 43.01 of the Mental Hygiene Law gives the Commissioner of Mental Health the authority to set rates for outpatient services at facilities operated by the Office of Mental Health.

Section 43.02 of the Mental Hygiene Law provides that payments under the Medical Assistance Programs for services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of Budget.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to 14 NYCRR Part 588 are being made in accordance with the 2011-2012 enacted State Budget (Chapter 59 of the Laws of 2011).

3. Needs and benefits: The amendments to Part 588 are necessary to implement Medicaid fee reductions for the operating rate of Continuing Day Treatment (CDT) Programs that are licensed pursuant to Article 31 of the Mental Hygiene Law and operated by agencies licensed pursuant to Article 28 of the Public Health Law, as well as to reduce the Medicaid fee for CDT Programs licensed solely under Article 31 of the Mental Hygiene Law. These amendments are required to implement a continuation of the 1.1% reduction to Medicaid, as required by the enacted State budget. These rate decreases have been approved by the Director of the Division of the Budget and are effective as of April 1, 2011.

4. Costs:

a) Costs to state government: These regulatory amendments will not result in any additional costs to State government. It is estimated that the total savings to the State share of Medicaid will be \$266,431.

b) Costs to local government: These regulatory amendments will not result in any additional costs to local government other than in their status as a provider of mental health services. Such costs are addressed under 4(c) "Costs to regulated parties".

c) Costs to regulated parties: These regulatory amendments will not result in any additional costs to regulated parties, but will reduce the rates paid under the Medical Assistance Program for CDT programs. Currently there are a total of 82 CDT Programs, nine of which are county-operated. It is estimated that the full annual State share impact of this rate cut is \$266,431, resulting in total Medicaid reduction of \$532,862.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: As noted above, this amendment is consistent with the 2011-2012 enacted State budget. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs, and reflects the serious fiscal condition of the State. The only alternative to the regulatory amendment would be to make further budgetary cuts to other programs which would have the potential to put those providers at financial risk. Therefore, that alternative was not considered.

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

10. Compliance schedule: These regulatory amendments are effective immediately. The rate adjustment is considered effective as of April 1, 2011.

Regulatory Flexibility Analysis

1. Effect of rule: Currently there are a total of 82 OMH-licensed Continuing Day Treatment (CDT) programs, nine of which are county operated. Counties have three major roles with regard to mental health services - oversight, administration of state and county funding, and direct service delivery. Their role as a local governmental unit gives them responsibility for the oversight of their county mental health system, coordination with other county health, human services and legal systems and planning for county-wide mental health needs. Many counties also choose to fund and/or directly provide community mental health services. County roles must be separated in order to determine the financial impact of these proposed new clinic regulations.

- Counties as Local Governmental Units. There is no financial impact as this regulation does not impact state aid grants.

- Counties as funders of mental health services. There is no financial impact (for the same reason as noted above). The county share of Medicaid is capped, so any increase in overall costs would not be borne by the counties.

- Counties as providers. Counties can choose to operate licensed outpatient mental health programs, including CDTs. The rule is needed to implement the 1.1% reduction in State Medicaid expenditures for mental health programs, including CDTs. The estimated full annual State share of the impact of this rate cut is \$266,431. Of that amount \$27,029 will be borne by the nine county-run providers.

2. Compliance requirements: There will be no additional recordkeeping or compliance requirements as a result of this rulemaking.

3. Professional services: There will be no professional services required as a result of this rulemaking.

4. Compliance costs: As stated above, the expected cost to county-run CDT providers is \$27,029 (State share).

5. Economic and technological feasibility: There will be no additional costs related to economic and technological feasibility as a result of this rulemaking.

6. Minimizing adverse impact: The reduction in rates for these non-State operated programs is a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State.

7. Small business and local government participation: The counties are well aware of the fiscal condition of the State and the impact of the enacted State budget. Briefing documents have been made available to the counties, and formal letters will be mailed to all CDT providers in early August.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to implement a Medicaid fee reduction of the operating rate of Continuing Day Treatment (CDT) Programs will not impose any adverse economic impact on rural areas. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rulemaking, which serves to implement a Medicaid fee reduction of the operating rate of Continuing Day Treatment (CDT) Programs will have no impact upon jobs and employment opportunities. The reduction in rates for the CDT programs is part of a continuation of the 1.1% reduction in State Medicaid expenditures for mental health programs. These proposed changes are consistent with the 2011-2012 enacted State budget and reflect the serious fiscal condition of the State.

Office of Parks, Recreation and Historic Preservation

NOTICE OF ADOPTION

Pets at Campsites, Cabins and Cottages in State Parks

I.D. No. PKR-23-11-00002-A

Filing No. 724

Filing Date: 2011-08-05

Effective Date: 2011-08-24

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

Action taken: Amendment of section 372.7(g) of Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, sections 3.09(5)(8) and 7.11(2)

Subject: Pets at Campsites, Cabins and Cottages in State Parks.

Purpose: To limit the number of pets at a campsite, cabin or cottage to two per reservation in parks where pets are allowed.

Text or summary was published in the June 8, 2011 issue of the Register, I.D. No. PKR-23-11-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Office of Parks, Recreation and Historic Preservation, ESP, Agency Building 1, 19th floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

EMERGENCY RULE MAKING

Approval for Hudson Transmission Partners, LLC to Incur Indebtedness and Borrow Up to \$750,000,000

I.D. No. PSC-34-11-00005-EA

Filing Date: 2011-08-08

Effective Date: 2011-08-08

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

Action taken: The PSC adopted an order approving, on an emergency basis, the petition on behalf of Hudson Transmission Partners, LLC (HTP) to incur indebtedness, for a term in excess of twelve months, by borrowing up to \$750,000,000 to finance construction.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4), (5) and 69

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

Specific reasons underlying the finding of necessity: This action is taken on an emergency basis pursuant to State Administrative Procedures Act (SAPA) § 202(6). The adequacy and reliability of the supply of electricity is essential to the public health, safety and general welfare of the citizens of New York. A failure to timely adopt the financing could potentially impair the ability of HTP to meet its construction schedule, and could adversely affect the availability of needed capacity for reliability in New York City. The access to new power supply sources, which HTP will provide, will be critical to maintain reliability as existing resources are retired or, in the event that generating facilities such as the Indian Point Nuclear Station are not re-licensed. As a result, compliance with the advance notice and comment requirements of SAPA § 202(1) would be contrary to the public interest, and the immediate authorization of the proposed financing is necessary for the preservation of the public health, safety and general welfare.

Subject: Approval for Hudson Transmission Partners, LLC to incur indebtedness and borrow up to \$750,000,000.

Purpose: To finance the construction of Hudson Transmission Partners, LLC's electric transmission facility.

Substance of emergency rule: The Public Service Commission adopted an order approving the petition by Hudson Transmission Partners, LLC (HTP) for approval to incur indebtedness, for a term in excess of twelve months, by borrowing up to \$750,000,000 to finance the construction of HTP's electric transmission facility.

The agency adopted the provisions of this emergency rule as a permanent rule, pursuant to SAPA section 202(6)(c), because the purposes of the emergency measure would be frustrated if subsequent notice procedures were required.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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 rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-E-0215EA1)

NOTICE OF WITHDRAWAL

Approval to Incur Indebtedness, for a Term in Excess of Twelve Months, by Borrowing Up to \$750,000,000 to Finance Construction

I.D. No. PSC-22-11-00002-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. PSC-22-11-00002-AAA, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on June 1, 2011.

Subject: Approval to incur indebtedness, for a term in excess of twelve months, by borrowing up to \$750,000,000 to finance construction.

Reason(s) for withdrawal of the proposed rule: Submitted incorrect form.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Application for New Gas Service to Broad Channel, Queens, New York, and Waiver of Obligation to Serve Due to Cost**

I.D. No. PSC-34-11-00008-P

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

Proposed Action: The PSC is considering whether to grant a July 8, 2011 application and petition of The Brooklyn Union Gas Company (National Grid, KEDNY), for review of a gas service extension request and a waiver of Public Service Law Section 31's obligation to serve.

Statutory authority: Public Service Law, art. 2, section 31(4)

Subject: Application for new gas service to Broad Channel, Queens, New York, and waiver of obligation to serve due to cost.

Purpose: To grant or deny application for gas service petition and waiver of obligation to serve under 16 NYCRR Section 230.2.

Substance of proposed rule: The Commission is considering whether to approve or reject (1) an application for service, filed by The Brooklyn Union Gas Company, d/b/a National Grid (KEDNY) on behalf of the residents Broad Channel, an island community located in Jamaica Bay, New York (Broad Channel); and (2) a petition, which seeks relief from KEDNY's Public Service Law § 31(4) obligation to extend natural gas service to Broad Channel. KEDNY submitted the application as a courtesy to Board Channel residents and also seeks to waive its obligation to grant that application because the cost to extend such service is greater than two times KEDNY's corporate average cost per foot to install gas service lines. See 16 NYCRR § 230.2. KEDNY seeks either a full waiver of its obligation to serve or a contribution from Broad Channel residents to cover the cost differential of installing the facilities necessary to provide gas service. The Commission shall consider all related matters contained in the filing.

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

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

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

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

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

(11-G-0358SP1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Competitive Transition Charge (CTC)**

I.D. No. PSC-34-11-00009-P

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

Proposed Action: The Commission is considering a proposed filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service, P.S.C. Nos. 214 and 220.

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

Subject: Competitive Transition Charge (CTC).

Purpose: To remove the CTC from electric rates in compliance with Commission Order issued January 24, 2011 in Case 10-E-0050.

Substance of proposed rule: The Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) to remove the Competitive Transition Charge from electric rates and establish a mechanism to recover certain deferral account balances in compliance with Commission order issued January 24, 2011 in Case 10-E-0050. The proposed filing has an effective date of November 12, 2011. The Commission may adopt in whole or in part, modify or reject National Grid's proposal. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

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

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

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

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

(10-E-0050SP5)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Daily Balancing and Imbalance Trading**

I.D. No. PSC-34-11-00010-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 the Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) to make various changes in rates, charges, rules and regulations contained in Schedule for Gas Service, PSC No. 12.

Statutory authority: Public Service Law, section 66

Subject: Daily Balancing and Imbalance Trading.

Purpose: To implement daily balancing and imbalance trading for monthly and daily balanced customers.

Substance of proposed rule: The Commission is considering a proposal filed by The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) to amend KEDNY's tariff for customers taking service under Service Classification No. 18—Non-Core Transportation Service and Service Classification No. 19—Seller Transportation Aggregation Service: 1) provide customers the option to take either daily or monthly balancing; 2) establish gas delivery procedures for daily balancing; 3) establish cash out provisions for daily balancing; 4) modify cash out provisions for monthly balancing to provide for imbalance trading; 5) establish imbalance trading for monthly and daily balanced customers; 6) modify form of service agreement for non-core transportation service to provide for daily balancing and to update associated pricing provisions and 7) remove form of service agreement for core transportation and swing service. The Seller State-

ment is being modified to set forth the charges associated with daily balancing. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

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

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

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

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

(06-G-1185SP13)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Provide Customers the Daily Balancing or Monthly Balancing Programs

I.D. No. PSC-34-11-00011-P

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

Proposed Action: The Commission is considering a proposed tariff filing by KeySpan Gas East Corporation d/b/a National Grid (KEDLI) to make various changes in rates, charges, rules and regulations contained in Schedule for Gas Service, PSC No. 1.

Statutory authority: Public Service Law, section 66

Subject: Provide customers the Daily Balancing or Monthly Balancing programs.

Purpose: To implement daily balancing and imbalance trading for monthly and daily balanced customers.

Substance of proposed rule: The Commission is considering a proposal filed by KeySpan Gas East Corporation d/b/a National Grid (KEDLI) to amend KEDLI's tariff for customers taking service under Service Classification No. 7—Interruptible Transportation Service No. 8—Seller Service and Service Classification No. 13—Temperature Controlled Transportation Service: 1) terminate the existing daily balancing program; 2) provide customers the option to take either the new daily balancing program or monthly balancing; 3) establish gas delivery procedures for daily balancing; (4) establish cash out provisions for daily balancing; 5) modify cash out provisions for monthly balancing to provide for imbalance trading; 6) establish imbalance trading form monthly and daily balanced customers; and 7) modify forms for gas service to provide for daily balancing. In addition, the Seller Statement is being modified to set forth the charges associated with daily balancing. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

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

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

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

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

(06-G-1186SP10)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Lightened and Incidental Regulation of Gateway's Ownership and Operation of its Gas Transportation Pipeline

I.D. No. PSC-34-11-00012-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 a petition from Gateway Delmar LLC (Gateway) requesting lightened and incidental regulation of its ownership and operation of its gas transportation pipeline.

Statutory authority: Public Service Law, sections 2(13), (22), 5(1)(b), 64, 65, 66, 66(13), 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened and incidental regulation of Gateway's ownership and operation of its gas transportation pipeline.

Purpose: Consideration of lightened and incidental regulation of Gateway's ownership and operation of its gas transportation pipeline.

Substance of proposed rule: The Public Service Commission is considering a petition from Gateway Delmar LLC (Gateway) requesting lightened and incidental regulation of its ownership and operation of the gas transportation pipeline to be purchased from American Midstream Onshore Pipelines LLC. The approximately 3000 feet pipeline runs between the interstate Tennessee Gas Pipeline at an interconnection located in the Town of Bethlehem, New York to an adjacent manufacturing plant owned by Owens-Corning Fiberglass Corporation (Owens Corning), and will be used by Gateway to provide gas transportation service to Owens Corning. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

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

(11-G-0361SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Deferral of 2008, 2009 and 2010 Transmission and Distribution Investment Costs

I.D. No. PSC-34-11-00013-P

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

Proposed Action: The Commission is considering whether to approve, modify or reject, in whole or in part, petitions by Niagara Mohawk Power Corporation d/b/a National Grid for authorization to defer 50% of the revenue requirement associated with its 2008-2010 T&D costs.

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

Subject: Deferral of 2008, 2009 and 2010 Transmission and Distribution Investment Costs.

Purpose: To consider petitions for deferral of certain transmission and distribution investment costs.

Substance of proposed rule: In three related petitions dated May 31, 2011, Niagara Mohawk Power Corporation d/b/a National Grid requested authority to defer 50% of the revenue requirement impact associated with its 2008, 2009 and 2010 Transmission and Distribution Investment Costs (T&D costs) pursuant to Clause 1.2.4.16 of the October 11, 2001 Merger Joint Proposal in Case 01-M-0075 and the Commission's September 5,

2008 Order in Case 07-E-1533. The T&D cost amounts requested to be deferred are \$18,525,684 for 2008; \$11,146,089 for 2009 and \$12,023,620 for 2010. The Commission may adopt, reject or modify, in whole or in part, the authority requested.

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

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

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

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

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

(07-E-1533SP3)

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

Issuance of Long-Term Indebtedness in the Principal Amount of Up to \$20,000,000

I.D. No. PSC-34-11-00014-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition of Long Island Water Corporation seeking authorization for the issuance of long-term indebtedness of up to \$20 million.

Statutory authority: Public Service Law, section 89-f

Subject: Issuance of long-term indebtedness in the principal amount of up to \$20,000,000.

Purpose: To permit Long Island Water Corporation to refinance existing debt obligations and finance new construction projects.

Substance of proposed rule: The Public Service Commission is deciding whether to grant, modify, or deny in whole or in part, a petition by Long Island Water Corporation, d/b/a Long Island American Water (LIAW), seeking an authority, pursuant to PSL 89-f, to issue long-term indebtedness in the principal amount of up to \$20,000,000 for the purpose of refinancing existing debt obligations and financing new construction projects. The Commission shall consider all other related matters.

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

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

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

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

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

(11-W-0399SP1)

Department of State

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Annual Reports Relating to Administration and Enforcement of the Uniform Code

I.D. No. DOS-34-11-00007-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 1203.4 of Title 19 NYCRR.

Statutory authority: Executive Law, section 381(1)

Subject: Annual reports relating to administration and enforcement of the Uniform Code.

Purpose: To eliminate requirement that cities, villages, towns, and counties annually submit a report to the Secretary of State.

Public hearing(s) will be held at: 10:00 a.m., Oct. 17, 2011 at Department of State, Conference Rm. 1135, One Commerce Plaza, 99 Washington Ave., Albany, NY.

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

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

Text of proposed rule: 1. Subdivision (a) of section 1203.4 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed.

2. Subdivision (b) of section 1203.4 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is renumbered to be subdivision (a).

Text of proposed rule and any required statements and analyses may be obtained from: Steven Rocklin, Department of State, Division of Code Enforcement and Administration, 99 Washington Ave., Albany, NY 12231, (518) 474-6740, email: Steven.Rocklin@dos.state.ny.us

Data, views or arguments may be submitted to: Richard DiGiovanna, Department of State, Office of Counsel, 99 Washington Ave., Albany, NY 12231, (518) 474-6740, email: Richard.DiGiovanna@dos.state.ny.us

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

Consensus Rule Making Determination

Subdivision 11 of State Administrative Procedure Act § 102 provides that "consensus rule means a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely . . . makes technical changes or is otherwise non-controversial." The Department of State has concluded that this rule making is non-controversial and therefore no person is likely to object to its adoption. The proposed rule making would delete subdivision (a) of section 1203.4 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Currently, this subdivision provides that every city, village, town and county charged under subdivision 2 of section 381 of the Executive Law with the responsibility of administering and enforcing the Uniform Fire Prevention and Building Code shall annually submit to the Secretary of State a report of the individual municipality's activities relative to administration and enforcement of the code. Such annual report is on a form prescribed by the Secretary.

The subject of this rule making makes it highly unlikely that any one will object to its adoption. Rather than impose a requirement upon a regulated party, the deletion of subdivision (a) of section 1203.4 would eliminate the requirement to submit an annual report. The municipalities currently subject to such requirement are unlikely to oppose its elimination and therefore unlikely to object to adoption of this rule making. Should the Department of State determine that it has need of information previously collected by means of the annual report, such information may be obtained through direct contact with the particular municipality at issue.

Therefore, it is appropriate to characterize this rule making as a consensus rule. No one is likely to object to its adoption.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the proposed rule that it will not have a substantial adverse

impact on jobs and employment opportunities in New York. The proposed rule making would delete subdivision (a) of section 1203.4 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Currently, this subdivision provides that every city, village, town and county charged under subdivision 2 of section 381 of the Executive Law with the responsibility of administering and enforcing the Uniform Fire Prevention and Building Code shall annually submit to the Secretary of State a report of the activities of the individual municipality relative to administration and enforcement of the code. The Department has determined that elimination of the requirement to submit an annual report would yield a savings of approximately one working day for each local government code enforcement official resulting in a total savings statewide of 4000 working days. This equates to an approximate savings of \$440,000 for municipalities across the state. Such savings can be used to fund other municipal programs and projects and possibly thereby create additional jobs and employment opportunities.

The Department finds that it is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities.

Urban Development Corporation

EMERGENCY RULE MAKING

Small Business Revolving Fund

I.D. No. UDC-34-11-00004-E

Filing No. 723

Filing Date: 2011-08-05

Effective Date: 2011-08-05

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

Action taken: Addition of Part 4250 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; L. 2010, ch. 59, section 16-t

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

Specific reasons underlying the finding of necessity: The delay in the approval of the State budget and the current economic crisis, including high unemployment and the immediate lack of financing from traditional financial institutions for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Small Business Revolving Loan Fund in order to promptly provide assistance to the State's small businesses in order to sustain and increase employment generated by these businesses.

Subject: Small Business Revolving Fund.

Purpose: Provide the basis for administration of Small Business Revolving Loan Fund including evaluation criteria and application process.

Text of emergency rule: SMALL BUSINESS REVOLVING LOAN FUND
Section 4250.1 Purpose.

The purpose of these regulations is to set forth and codify administration by the New York State Urban Development Corporation (the "Corporation") of the Small Business Revolving Loan Fund (the "Program") authorized by Section 16-t of the New York State Urban Development Corporation Act (the "Act"). The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations' loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

Section 4250.2 Definitions.

a) "Administrative Costs" shall mean expenses incurred by a Community Based Lending Organization in its administration of a Program Loan from the Corporation.

b) "Administrative Income" shall mean income from (i) fees charged by a Community Based Lending Organization, including application fees, commitment fees and loan guarantee fees related to the Business Loans made to borrowers by the Community Based Lending Organization and (ii) interest income earned on the portion of the Program funds held by the Community Based Lending Organization (whether such funds are undisbursed Program funds or are repayment proceeds of Business Loans made by the Community Based Lending Organization).

c) "Business Loan" shall mean a loan made by a Community Based Lending Organization to an Eligible Business for an Eligible Project that is either a Micro-Loan or a Regular Loan.

d) "Community Based Lending Organizations" shall mean community development financial institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

e) "Community Development Financial Institution" or "CDFI" shall mean a community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions.

f) "Corporation" shall mean the New York State Urban Development Corporation d/b/a Empire State Development Corporation, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State of New York created by Chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

g) "Eligible Businesses" shall have the meaning given in Section 4250.3 below.

h) "Eligible Project" shall have the meaning given in Section 4250.3 below.

i) "Eligible Uses" shall have the meaning given in Section 4250.4 below.

j) "Ineligible Businesses" shall mean newspapers, broadcasting, or other news media; medical facilities, libraries, community or civic centers. It also means any business relocating from one municipality with the State to another, except when the business is relocating within a municipality with a population of at least one million and the governing body of the municipality approves or each municipality from which such business operation will be relocated agrees to such relocation.

k) "Ineligible Projects" shall mean any project that is not an Eligible Project, including, without limiting the foregoing, public infrastructure improvements and funding for providing payment or distribution as a loan to owners, members and partners or shareholders of the applicant business or their family members.

l) "Loan Fund" shall mean the Small Business Revolving Loan Fund created by the Small Business Revolving Loan Fund Legislation.

m) "Loan Fund Account" shall mean each and every account established by the Community Based Lending Organization for the purpose of depositing Program funds.

n) "Loan Fund Legislation" shall mean Section 16-t of the Act.

o) "Loan Fund Proceeds" shall mean any and all monies made available to the Corporation for deposit to the Loan Fund, including monies appropriated by the State and any income earned by, or incremental to, the amount due to the investment of the same, or any repayment of monies advanced from the Loan Fund.

p) "Micro-Loan" shall mean a Small Business loan that has a principal amount that is less than or equal to twenty-five thousand dollars.

q) "Minority Business Enterprise" shall mean a business enterprise which is at least fifty-one percent owned, or in the case of a publicly-owned business at least fifty-one percent of the common stock or other voting interests of which is owned, by one or more minority persons and such ownership must have and exercise the authority to independently control the day to day business decisions of the entity. Minority persons shall mean persons who are:

1. Black;

2. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;

3. Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

4. American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification.

r) "Program Loan Fund Agreement" shall mean the agreement between the Corporation and the Community Based Lending Organization

pursuant to which the Program funds will be disbursed to and used by the Community Based Lending Organization.

s) "Program Loan" shall mean a loan made by the Corporation to a Community Based Lending Organization.

t) "Regular Loan" shall mean a Small Business loan that has a principal amount greater than twenty-five thousand dollars.

u) "Service Delivery Area" shall mean one or more contiguous counties or municipalities to be served by the Community Based Lending Organization and described in the Program Loan Fund Agreement between the Corporation, as lender, and the Community Based Lending Organization, as borrower.

v) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis.

w) "State" shall mean the State of New York.

x) "Women Business Enterprise" shall mean a business enterprise that is at least fifty one percent owned, or in the case of a publicly-owned business at least fifty one percent of the common stock or other voting interests of which is owned, by United States citizens or permanent resident aliens, one or more who are women, regardless of race or ethnicity, and such ownership interest is real, substantial and continuing and such woman or women have and exercise the authority to independently control the day to day business decisions of the enterprise.

y) "Working Capital Loans" shall mean short and medium term loans for working capital, revolving lines of credit and seasonal inventory loans made by Community Based Lending Organizations to Eligible Businesses for Eligible Projects.

Section 4250.3 Eligible Business, Eligible Projects and Ineligible Projects.

Business Loans shall be offered by Community Based Lending Organizations on the terms and conditions that are in accordance with and subject to the Act and the provisions of this Part. Business Loans shall be provided by the Community Based Lending Organization only to Eligible Businesses for Eligible Projects and shall not be used for Ineligible Projects. The terms "Eligible Business", "Eligible Projects" and "Ineligible Projects" are defined as follows.

An "Eligible Business" is a:

1. business enterprise that is resident in and authorized to do business in New York State,
2. independently owned and operated,
3. not dominant in its field, and
4. employs one hundred or fewer persons.

An "Eligible Project" is a Business Loan from a Community Based Lending Organization to an Eligible Business in the Service Delivery Area for an Eligible Use, whereby the Community Based Lending Organization has reviewed every Business Loan application to determine the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State. An "Eligible Project" cannot be an "Ineligible Project" as defined below.

An "Ineligible Project" shall mean: (i) a project or use that would result in the relocation of any business operation from one municipality within the state to another, except under one of the following conditions, (A) When a business is relocating within a municipality with a population of at least one million where the governing body of such municipality approves such relocation, or (B) each municipality from which such business operation will be relocated has consented to such relocation; (ii) projects with respect to newspapers, broadcasting or other news media, medical facilities, libraries, community or civic centers, and public infrastructure improvements; (iii) providing funds, directly or indirectly, for payments, distribution or as a loan (except in the case of a loan to a sole proprietor for business use), to owners, members, partners or shareholders of the applicant business, except as ordinary income for services rendered; (iv) any project that results in a Business Loan to a person who is a member of the board or other governing body, officer, employee, or member of a loan committee, or a family member of the Community Based Lending Organization or who shall participate in any decision on the use of Program funds if such person is a party to or has a financial or personal interest in such loan.

Section 4250.4 Eligible Uses.

Eligible Uses of Program funds by a Small Business borrower of the Community Based Lending Organization are:

1. working capital;
2. acquisition and/ or improvement of real property;
3. acquisition of machinery and equipment; and
4. refinancing of debt obligations provided that:
 - a. it does not refinance a loan already in the portfolio of the Community Based Lending Organization;
 - b. the refinanced loan will provide a tangible benefit to the business borrower as determined by the Corporation in writing; and

c. the aggregate of the principal of all borrower refinancing loan amounts in the Community Based Lending Organization's Program loan portfolio is not greater than twenty-five percent (25%) of the principal amount of the Corporation's Program loan to the Community Based Lending Organization.

Section 4250.5 Fees.

A Community Based Lending Organization may charge application, commitment and loan guarantee fees pursuant to a schedule of fees adopted by the institution and approved in writing by the Corporation.

Section 4250.6 Niagara, St. Lawrence, Erie, and Jefferson Counties.

Notwithstanding anything to the contrary in this rule, the Corporation shall provide at least five hundred thousand dollars in Program funds to Community Based Lending Organizations for the purpose of making loans to small businesses located in each of the following counties: Niagara, St. Lawrence, Erie and Jefferson.

Section 4250.7 Business Loan Types and Limits.

a) There shall be two categories of Business Loans to Eligible Businesses:

1. a microloan that shall have a principal amount that is less than twenty-five thousand dollars; and
2. a regular loan that shall have a principal amount not less than twenty-five thousand dollars.

b) The Program funds amount used by the Community Based Lending Organization to fund a Business Loan shall not be more than fifty percent of the principal amount of such loan and shall not be greater than one hundred and twenty-five thousand dollars.

c) No less than ten percent (10%) of the aggregate Program funds shall be allocated by the Corporation for Microloans.

Section 4250.8 General Evaluation Criteria.

a) In addition to such criteria as may be set forth by the Corporation from time to time in solicitations for applications from Community Based Lending Organizations, the Corporation shall evaluate the Program assistance application of a Community Based Lending Organization in conformance with the Act and in accordance with the criteria set forth in this Part, including as applicable:

1. The ability of the Community Based Lending Organization to analyze small business applications for Business Loans, to evaluate the credit worthiness of small businesses, and to monitor and service Business Loans.
2. The ability of the Community Based Lending Organization to review every Business Loan application in order to determine, among other things, the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State.
3. The ability of the Community Based Lending Organization to target and market to Minority and Women-Owned Enterprises and other small businesses that are having difficulty accessing traditional credit markets.

b) The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations' loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

Section 4250.9 General Requirements.

a) Program funds shall be disbursed to a Community Based Lending Organization by the Corporation in the form of a Program Loan.

1. The term of the Program Loan shall commence upon closing of the Program Loan Fund Agreement between the Corporation and the Community Based Lending Organization.

2. The Program Loan shall carry a low interest rate determined by the Corporation based on then prevailing interest rates and the circumstances of the Community Based Lending Organization.

b) Notwithstanding the performance of the Business Loans made by the Community Based Lending Organization using Program funds, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's Program Loan to the Community Based Lending Organization.

c) At the discretion of the Corporation, a portion of Program loan funds

may be disbursed to the Community Based Lending Organization in the form of a grant or forgivable loan provided that those funds are used by the Community Based Lending Organization for administrative expenses associated with Business Loans to Eligible Borrowers for Eligible Projects, loan-loss reserves, or other eligible expenses as may be approved in writing by the Corporation.

d) Notwithstanding any provision of law to the contrary, the Corporation may establish a Program fund for Program use and pay into such fund any funds available to the Corporation from any source that are eligible for Program use, including moneys appropriated by the State.

e) Interest received by the Corporation from Program Loans to Community Based Lending Organizations may be used at the discretion of the Corporation for Program Loans and the management, marketing, and administration of the Program.

f) If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

Section 4250.10 Loan Fund Accounts.

Each Community Based Lending Organization shall deposit Program funds awarded by the Corporation, repayments, and interest earned into a bank account in a State or Federal chartered banking institution.

Section 4250.11 Application and Approval Process.

The Corporation shall identify eligible Community Based Lending Organizations through one or more competitive statewide or local solicitations.

Section 4250.12 Auditing, Compliance and Reporting.

a) The Community Based Lending Organization shall submit to the Corporation annual reports and additional reports as requested at the discretion of the Corporation stating:

1. The number of Business Loans made;
2. The amount of each Business Loan;
3. The amount of Program Loan proceeds used to fund each Business Loan;
4. The use of Business Loan proceeds by the borrower;
5. The number of jobs created or retained;
6. A description of the economic development generated;
7. The status of each outstanding Business Loan; and
8. Such other information as the Corporation may require.

b) The Corporation may conduct audits of the Community Based Lending Organization in order to ensure compliance with the provisions of this section, any regulations promulgated with respect thereto and agreements between the Community Based Lending Organization and the Corporation of all aspects of the use of Program funds and Business Loan transactions.

c) In the event that the Corporation finds substantive noncompliance, the Corporation may terminate the Community Base Lending Organization's participation in the Program.

d) Upon termination of a Community Based Lending Organization's participation in the Program, the Community Based Lending Organization shall return to the Corporation, promptly after its demand thereof, all Program fund proceeds held by the Community Based Lending Organization; and provide to the Corporation, promptly after its demand thereof, an accounting of all Program funds received by the Community Based Lending Organization, including all currently outstanding Business Loans that were made using Program funds. Notwithstanding such termination, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's loans to the Community Based Lending Organization.

e) In the event that a Community Based Lending Organization's participation in the Program is terminated, the Corporation, in its discretion, can reassign all or part of the award made to such Community Based Lending Organization to one or more Community Based Lending Organizations that are already administering the Program and that serve the same Service Area or portions thereof without an additional solicitation.

Section 4250.13 Confidentiality.

a) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Loan Fund administered through the selected Community Based Lending Organizations by the Corporation, shall be confidential and exempt from public disclosures.

b) To the extent permitted by law, no full time employee of the State of

New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section 4250.14 Non-Discrimination and Affirmative Action.

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254 (11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires November 2, 2011.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Sr. Counsel, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-t of the Act provides for the creation of the Small Business Revolving Loan Fund (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation"), within available appropriations, to provide low interest loans to Community Development Financial Institutions and other Community Based Lending Organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-t of the Act sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4250 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$25 million to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program (i) allows the Corporation to evaluate the effectiveness of community based lending organizations with respect to their ability to make loans to credit worthy small businesses, (ii) decentralizes to community based lending organizations the evaluation of the credit and operations of small businesses within the respective communities served by such organizations, and (iii) enhances the ability of community based lending organizations to make loans to small businesses in the communities served by such organizations. The rule facilitates these aspects of the Program by providing for a competitive process to select community based financial institutions for Program Loans and defining eligible and ineligible small businesses and eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the community development financial institutions in making loans to small businesses.

4. Costs: The Program is funded by a State appropriation in the amount of twenty-five million dollars. Pursuant to the rule, community based lending organizations must provide not less than fifty percent of the principal amount of each small business loan funded with Program funds. The costs to a community based lending organization involved in the Program would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans. The rule also

provides for approval by the Corporation of fees charged by a community based lending institutions in connection with loans to small businesses that use Program funds.

5. **Paperwork / Reporting:** There are no additional reporting or paperwork requirements as a result of this rule on community based lending organizations participating in the Program except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and loan documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. **Local Government Mandates:** The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. **Duplication:** The regulations do not duplicate any existing state or federal rule.

8. **Alternatives:** While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, the State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing low interest loans to community based lending organizations for lending to small businesses in accordance with the statutory requirements of the Program.

9. **Federal Standards:** There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. **Compliance Schedule:** The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

1. **Effects of Rule:** In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Development Financial Institution" is defined as community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions; and "Community Based Lending Organizations" is defined as Community Development Financial Institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation") make low interest loans to community based lending organizations in order to provide funding for those lending organizations' loans (including microloans in principal amounts equal to or less than twenty-five thousand dollars) to small businesses, located within the State, that are unable to obtain adequate credit or credit terms for such credit.

2. **Compliance Requirements:** There are no compliance requirements for small businesses and local governments in these regulations.

3. **Professional Services:** Applicants do not need to obtain professional services to comply with these regulations.

4. **Compliance Costs:** There are no compliance costs for small businesses and local governments in these regulations.

5. **Economic and Technological Feasibility:** There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

6. **Minimizing Adverse Impact:** This rule has no adverse impacts on small businesses or local governments because it is designed to provide low interest loans to community based lending organizations in order to enhance the ability of such organizations to fund loans to small businesses.

7. **Small Business and Local Government Participation:** A number of community based lending organizations that engage in lending to small businesses responded to a survey circulated by the Corporation regarding implementation of the program as reflected in the rule.

Rural Area Flexibility Analysis

1. **Types and Estimated Numbers of Rural Areas:** Community development financial institutions and other community based lending organizations serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Small Business Revolving Loan Fund (the "Program") assistance pursuant to a State-wide request for proposals.

2. **Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:** The rule will not impose any new or additional

reporting or recordkeeping requirements other than those that would be required of any community based lending organization receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any community based lending organization that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. **Costs:** The costs to community based lending organizations that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. **Minimizing Adverse Impact:** The purpose of the Program is to provide loans to community based lending organizations in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may not be able to borrow funds at acceptable rates from larger financial institutions. This rule provides a basis for cooperation between the State and CBLOs, including CBLO that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such CBLO and the small businesses, including small businesses located in rural areas of the State, that such CBLOs serve.

5. **Rural Area Participation:** This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of CBLOs that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program is targeted to minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.