

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

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

I.D. No. AAM-01-11-00014-E

Filing No. 1

Filing Date: 2010-12-31

Effective Date: 2010-12-31

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

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

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

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

Specific reasons underlying the finding of necessity: The repeal of sections 141.1(j) and 142 and the addition of Part 141 of 1 NYCRR is being adopted as an emergency measure because of the threat that the Emerald Ash Borer (EAB) will spread outside the areas it now infests in New York State.

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

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

The pest was first discovered in Michigan in 2002, and has since spread to at least 12 other states as well as to two provinces in Canada. In 2009, EAB was detected in New York in Cattaraugus County. This prompted the establishment of a quarantine in Cattaraugus County and adjacent Chautauqua County. In 2010, the pest was detected in Monroe, Livingston, Genesee, Steuben, Greene and Ulster Counties. As a result of these latest findings, on October 1, 2010, the Department, on an emergency basis, repealed Part 141 and adopted a new Part 141, which establishes a quarantine in the following counties: Cattaraugus, Monroe, Livingston, Genesee, Steuben, Greene, Ulster, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung. Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties will serve as a buffer between counties with known or suspected infestations and those which have no known infestations. Since the current emergency regulation expires on January 1, 2011, this measure will readopt the regulation on an emergency basis.

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

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

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

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

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

Part 141

Control of the Emerald Ash Borer

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

Section 141.1. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

Section 141.2. Quarantine area.

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

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

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

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

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

(b) Regulated movement.

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

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

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

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

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

Section 141.4. Conditions governing the intrastate movement of regulated articles

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

Section 141.5. Conditions governing the issuance of certificates and permits

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

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

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

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

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

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

Section 141.6. Inspection and disposition of shipments

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

Section 141.7. Assembly of regulated articles for inspection

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

be inspected as a basis for certification must be free from matter which makes inspection impracticable.

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

Section 141.8. Marking requirements

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

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. AAM-01-11-00014-P, Issue of January 5, 2011. The emergency rule will expire February 28, 2011.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

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

On August 9, 2010, the Pennsylvania Department of Agriculture expanded the Commonwealth's Emerald Ash Borer quarantine by adding 31 counties to the 12 counties currently under quarantine. The quarantine in Pennsylvania now includes the 42 western counties of the

commonwealth. This is significant since movement of wood products occurs frequently across the New York - Pennsylvania border and although Pennsylvania's action is not coordinated with New York's, it strongly correlates with the Department's proposed quarantine.

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

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

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

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

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

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

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

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

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

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

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

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

The regulations would also provide that persons shipping, transporting, or receiving regulated articles may be required to enter into written compli-

ance agreements. These agreements would allow the shipment of these articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that EAB is not spread.

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

4. Costs:

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

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

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

(c) Costs to private regulated parties: There are 2,768 licensed nursery growers and/or nursery dealers in the quarantined counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol for ash nursery stock. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

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

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

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

(d) Costs to the regulatory agency:

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

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

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

The alternative of no action was considered. However, that option was not feasible, given the threat EAB poses to the State's forests and forest-based industries. Additionally, the option of establishing a quarantine

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business:

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

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

2. Compliance requirements:

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

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

3. Professional services:

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

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

4. Compliance costs:

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

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

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

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

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

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

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

5. Minimizing adverse impact:

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

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

6. Small business and local government participation:

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

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

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

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

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

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

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

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

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

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

Outreach efforts will continue.

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

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

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

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

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

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

3. Costs:

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

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

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

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

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

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

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

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

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

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

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

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

Outreach efforts will continue.

Job Impact Statement

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

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

By helping to prevent the spread of EAB, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and

employment opportunities associated with the State's nursery, forestry and wood-working industries.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Certification of Small Grain Seed

I.D. No. AAM-03-11-00012-P

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

Proposed Action: Amendment of Part 97 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 141 and 142

Subject: Certification of small grain seed.

Purpose: To amend land requirements, field standards and seed standards for the certification of small grain seeds.

Public hearing(s) will be held at: 11:00 a.m., March 23, 2011 at Department of Agriculture and Markets, 10B Airline Dr., 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: Subdivisions (b), (c) and (d) of section 97.1 are repealed.

Subdivision (b) of section 97.2 is amended to read as follows:

(b) [Spring oats and barley] *A crop of spring grain* may be grown where the previous crop was of the same or higher certification class of the same variety.

Subdivision (a) of section 97.4 is repealed and a new subdivision (a) of section 97.4 is added to read as follows:

(a) *General. (1) The field shall be considered the unit of certification. A field cannot be divided for purposes of certification unless satisfactory isolation exists.*

(2) *Isolation:*

(i) *Wheat, Oats, Barley, Triticale, Spelt. A strip of ground adequate to prevent mechanical mixtures, but no less than three feet wide, which is either mowed, uncropped, or planted to some crop other than the kind being certified, must be present between any plantings of wheat, oats, barley, triticale or spelt, and any other such plantings or combination of plantings.*

(ii) *Rye. A field producing any class of certified seed must be isolated by at least 660 feet from fields of any other variety or the same variety of lower certified seed class.*

(3) *A field producing either foundation or registered seed being grown from seed which has been treated for the control of loose smut shall be isolated at least 330 feet from other fields or the same crop which are not planted to treated seed.*

Subdivision (b) of section 97.4 is amended to read as follows:

(b) Specific requirements.

Factor	Maximum permitted in each class		
	Foundation	Registered	Certified
Other varieties ¹	none	0.02%	0.05%
Inseparable other crops ²	none	none	0.03%
Prohibited weeds ³	none	none	none
Seed-borne diseases:			
1. Common bunt or stinking smut of wheat	0.001%	0.01%	0.10%
2. Loose smut of wheat	0.10%	0.25%	0.50%
3. Dwarf bunt in wheat	none	none	1 plant/acre

¹ Other varieties shall be considered to include offtype plants not typical of the variety that can be differentiated from the variety that is being inspected.

² Inseparable other crops shall include crop plants, seed of which cannot be thoroughly removed by the usual methods of cleaning. [Certified small grain fields shall be free of the following vetches: hairy (*Vicia villosa*),

narrowleaf (*V. angustifolia*), common (*V. sativa*).] *Winter barley and winter wheat fields shall be free of rye.*

³ *Certified small grain fields shall be free of corn cockle (*Agrostemma githago*), wild onion and/or garlic (*Allium spp*) and the following vetches: hairy (*Vicia villosa*), narrow leaf (*V. angustifolia*), and common (*V. sativa*).*

Section 97.5 is repealed and a new section 97.5 is added to read as follows:

Section 97.5 Seed Standards

(a) General provisions.

Factor	Foundation	Class of Seed	
		Registered	Certified
Pure seed (minimum)	99.00%	99.00%	99.00%
Inert matter (maximum)	1.00%	1.00%	1.00%
Weed seeds (maximum)	2 per lb.	5 per lb.	0.03%
Objectionable weed seeds	none	none	none
Other crops, excluding other varieties (maximum)	2 per lb.	5 per lb.	10 per lb.
Other small grains of same growing season (maximum)	none	1 per lb.	5 per lb.
Other distinguishable varieties (maximum)	none	2 per lb.	10 per lb.
Germination (minimum):			
Wheat, Oats, Barley, Triticale, Spelt	80%	85%	85%
Rye	80%	80%	80%

(b) Additional provisions.

(1) The maximum number of all weed seeds in the certified class of seed shall not exceed 15 seeds per pound of grain in oats or barley and 10 seeds per pound in rye, spelt, triticale, and wheat.

*(2) Weeds considered as objectionable are quackgrass (*Elytrigia repens*), charlock [Wild Mustard] (*Brassica kaber*) and other wild Brassica species; Canada thistle (*Cirsium arvense*), corn cockle (*Agrostemma githago*), dodder (*Cuscuta spp.*), bindweed (*Convolvulus arvensis*), horsenettle (*Solanum carolinense*), wild onion (*Allium spp.*), wild radish (*Raphanus raphanistrum*), Russian knapweed (*Acroptilon repens*), bedstraw (*Galium spp.*) and leafy spurge (*Euphorbia esula*).*

*(3) All certified small grain seed shall be free of vetch (*Vicia spp.*). Certified winter barley and wheat seed shall also be free of rye seeds.*

(4) Variations which are typical of the variety shall not be included as other varieties.

(5) Fatuoid oats will be scored as pure seed.

(6) In the fluorescence test of oats, the following tolerances for off-types will be permitted. Foundation class - 9 seeds per pound; Registered class - 18 seeds per pound; Certified class - 36 seeds per pound.

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 141 of the Agriculture and Markets Law provides, in part, that the Commissioner, after consultation with the Dean of the State College of Agriculture, shall adopt and promulgate appropriate standards for the certification of seed.

Section 142(1) of the Agriculture and Markets Law provides, in part, that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Agriculture and Markets Law Article 9 as he may deem necessary.

2. Legislative Objectives:

The proposed amendments carry out the public policy objectives that the Legislature sought to advance in enacting Agriculture and Markets Law section 141(2) in that, after consultation with the Dean of the New York State College of Agriculture and Life Sciences, the proposal amends appropriate land requirements, field standards and seed standards for certification of small grain seed. In doing so, the proposal supplements and gives full effect to the provisions of Agriculture and Markets Law Article 9 relating to the inspection and sale of small grain seed, as provided by Agriculture and Markets Law section 142(1).

3. Needs and Benefits:

The accurate labeling of small grain seeds is important to New York State's agricultural industry. Agriculture and Markets Law Article 9 governs the labeling of seeds and requires that characteristics such as the percentage of germination, the percentage of each seed component, the percentage of weed seeds, the percentage of inert matter and the name and number of seeds per pound of each kind of noxious weed seed present be set forth on the label of seeds. Pursuant to Agriculture and Markets Law section 136, the term "certified" on a seed label indicates that such seed has been produced or collected, processed and labeled in accordance with the procedures and in compliance with the rules and regulations of an officially recognized certification agency. As such, the designation of seed as certified is relied upon by the agricultural industry as an indicator of premium quality seed that has been grown, harvested and processed under specified conditions and that has been sampled, tested and found to meet the strict standards established for certified seed. Pursuant to section 141 of the Agriculture and Markets Law, the Commissioner has designated the New York State College of Agriculture and Life Sciences as the official seed certifying agency for the State of New York.

In order for seed to be eligible for labeling as certified seed, small grain seeds must be planted, grown, harvested and processed under special conditions. The seeds are inspected in the field by representatives of the certifying agency and, after harvesting and processing, representative samples of each lot are taken and submitted to a seed laboratory, such as the New York State Testing Laboratory at Geneva, New York or another laboratory approved by the official seed certifying agency, for analysis. If the results of the analysis verify that the seed meets the certified seed standards for varietal purity, inert matter, weed seeds and germination, the certifying agency issues tags to the grower for use in labeling the seed as certified.

Part 97 of 1 NYCRR, entitled "Small Grain Seed Certification Standards," provides that the general seed certification standards set forth in Part 96 of 1 NYCRR, also apply to the certification of small grains. Part 97 of 1 NYCRR also sets forth land requirements, field inspection, field standards and seed standards for the certification of small grain seeds.

The proposal would amend section 97.1, entitled "Application and amplification of general seed certification standards," by repealing subdivisions (b), (c) and (d), since these provisions governing privately developed seed varieties and approved planting stock are already set forth in Part 96 of 1 NYCRR.

The proposal would amend section 97.2, entitled "Land requirements," by amending "Spring oats and barley" to read "A crop of spring grain." This ensures that small grain seed certification standards apply to other seed varieties, including spring wheat, spring triticale, rye and spelt.

The proposal would repeal subdivision (a) of section 97.4, entitled "Field standards," and add a new subdivision (a) of section 97.4. The new subdivision (a) of 97.4 would make technical changes to general field use requirements (section 97.4(a)(1)) to further clarify those requirements. The new subdivision (a) of 97.4 would also amend the isolation requirements (sections 97.4(a)(2) and 97.4(a)(3)), and add other seed varieties, including spring wheat, spring triticale, rye and spelt.

The proposal would amend subdivision (b) of section 97.4, entitled "Specific requirements," to require that fields of winter barley and winter wheat be free of rye and to prohibit the following weeds from certified small grain fields: corn cockle (*Agrostemma githago*), wild onion and/or garlic (*Allium spp*); and the following vetches: hairy (*Vicia villosa*), narrowleaf (*V. angustifolia*), and common (*V. sativa*).

The proposal would amend subdivision (a) of section 97.5, entitled "Seed standards," by revising tolerances in the Class of Seed Table (Table) to better conform with standards of the Association of Official Seed Certifying Agencies (AOSCA); by adding triticale, spelt and rye to the Table; and by making technical changes to the Table.

The proposal would amend subdivision (b) of section 97.5, by making technical changes to the Latin genus names of some weeds in paragraph (2); by adding a new paragraph (5) which provides that fatuoid oats are a pure seed; and by adding a new paragraph (6) which establishes tolerances for fluorescence testing of off-type oats.

The proposed amendments are necessary and beneficial since they revise and update New York State's Small Grain Seed Certification Standards by incorporating the latest nationally recognized standards and prac-

tics for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C §§ 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201) as well as AOSCA standards. The proposed amendments also add certification standards for triticale, spelt and rye. In so doing, the proposed amendments will provide an up to date, efficient and effective seed certification program that will help to ensure the continued availability of premium New York certified seed to agricultural producers.

4. Cost:

a. Costs to regulated parties:

It is not anticipated that initial capital costs will be incurred by a regulated business to comply with the proposed rule. The annual costs for continuing compliance with the proposed rule will depend on the amount of seed that a grower submits for certification.

The proposed amendments would not affect existing costs for seed certification. Seed certification fees for spring grains are \$5.50 per acre for fields 200 acres or less in size, plus \$5.00 per field entered. Fees for fields over 200 acres in size are \$5.25 per acre plus \$5.00 per field entered. If reinspection of a field is requested the cost is \$25.00 for the first field and \$25.00 for any additional fields. If a second reinspection is required the cost is \$50.00 for the first field and \$25.00 for any additional fields. If a third and subsequent reinspections are requested the cost is \$100.00 for the first field and \$25.00 for any additional fields. The estimated inspection cost per an average field of 12.4 acres would be \$73.20.

The cost of having seed tested for purity and germination for certification purposes depends upon the variety of seed tested and ranges from \$8.50 to \$15.00 per sample. The estimated cost of testing the approximately 200 samples that will be required would be approximately \$1,700 to \$3,000.

It is anticipated that the smaller sample size required by the rule and the Federal Seed Act will reduce the amount of time required to draw a sample and the resulting cost by as much as 50%. The actual savings will depend on the number of samples submitted by a particular seed producer.

The proposed amendments would not incur any additional training costs. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the costs associated with training are as follows: the cost of the AASCO Handbook for Seed Sampling which is \$30.00 plus \$5.00 shipping and handling when obtained through the New York State Seed Improvement Project; and approximately \$500.00 per person in training costs including registration fee, labor and travel expenses. The total costs for training is unknown, since costs are predicated on the number of persons requiring training and that number is unknown.

b. Costs to agency, state and local governments:

The proposed amendments would not incur any costs to the agency, state and local governments.

c. Source:

The cost analysis is based on information provided by the New York Seed Improvement Project and the New York Seed Testing Laboratory.

5. Local Government Mandates:

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

6. Paperwork:

The proposed amendments would not incur any additional paperwork requirements on regulated parties. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the following paperwork and/or recordkeeping requirements already apply to regulated parties: list of certain information whenever certification of a crop variety is requested (section 96.2); official certification label affixed to the container in which all classes of seed are when offered for sale or an invoice, in the case of seed sold in bulk (section 96.6); and documentary evidence setting forth the source of seed used for the production of foundation, registered or certified seed.

7. Duplication:

None. The proposed rule conforms to the Federal Seed Act and the Federal Seed Act Regulations, but the federal regulations generally govern interstate transactions, rather than intrastate transactions.

8. Alternatives:

No other alternatives were considered, since the proposed amendments revise and update New York State's Small Grain Seed Certification Standards by incorporating the latest nationally recognized standards and practices for seed certification. This conforms New York State's standards to the Federal Seed Act (7 U.S.C §§ 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201) as well as Association of Official Seed Certifying Agencies (AOSCA) standards. The proposed amendments also add certification standards for triticale, spelt and rye. In so doing, the proposed amendments will provide an up to date, efficient and effective seed certification program that will help to ensure the continued availability of premium New York certified seed to agricultural producers.

In drafting the proposed regulations, the Department conferred with growers of certified seed, as well as representatives of the New York Seed Improvement Project (NYSIP) at Cornell University. In particular, Alan Westra of NYSIP reviewed the initial draft of the proposed regulations and suggested revisions which were made to make the proposed regulations more consistent with standards set forth by the AOSCA as well as standards used by Pennsylvania. Additionally, Dr. Wayne Guerke of the Department of Agriculture Seed Laboratory in Georgia was consulted on the proposed regulations and suggested revisions which were made concerning field inspections and isolation. The proposed regulations were also discussed with representatives of the New York State Seed Testing Laboratory.

9. Federal Standards:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas. It conforms New York State's seed certification standards to the Federal Seed Act and the Federal Seed Act Regulations.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The small businesses affected by the proposal include the approximately 13 New York State producers of certified seed, hundreds of dealers and retailers of small grain certified seed and thousands of farmers and other consumers who purchase small grain certified seed. The proposed amendments would have no impact on local government.

2. Compliance requirements:

The proposed amendments would not incur any additional paperwork requirements on regulated parties. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the following paperwork and/or recordkeeping requirements already apply to regulated parties: list of certain information whenever certification of a crop variety is requested (section 96.2); official certification label affixed to the container in which all classes of seed are when offered for sale or an invoice, in the case of seed sold in bulk (section 96.6); and documentary evidence setting forth the source of seed used for the production of foundation, registered or certified seed.

3. Professional services:

The type of professional services that a small business is likely to need to comply with the proposed amendments are the services of an approved seed testing laboratory. Local governments are not affected.

4. Compliance costs:

It is not anticipated that initial capital costs will be incurred by a regulated business to comply with the proposed rule. The annual costs for continuing compliance with the proposed rule will depend on the amount of seed that a grower submits for certification.

The proposed amendments would not affect existing costs for seed certification. Seed certification fees for spring grains are \$5.50 per acre for fields 200 acres or less in size, plus \$5.00 per field entered. Fees for fields over 200 acres in size are \$5.25 per acre plus \$5.00 per field entered. If reinspection of a field is requested the cost is \$25.00 for the first field and \$25.00 for any additional fields. If a second reinspection is required the cost is \$50.00 for the first field and \$25.00 for any additional fields. If a third and subsequent reinspections are requested the cost is \$100.00 for the first field and \$25.00 for any additional fields. The estimated inspection cost per an average field of 12.4 acres would be \$73.20.

The cost of having seed tested for purity and germination for certification purposes depends upon the variety of seed tested and ranges from \$8.50 to \$15.00 per sample. The estimated cost of testing the approximately 200 samples that will be required would be approximately \$1,700 to \$3,000.

It is anticipated that the smaller sample size required by the rule and the Federal Seed Act will reduce the amount of time required to draw a sample and the resulting cost by as much as 50%. The actual savings will depend on the number of samples submitted by a particular seed producer.

The proposed amendments would not incur any additional training costs. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the costs associated with training are as follows: the cost of the AASCO Handbook for Seed Sampling which is \$30.00 plus \$5.00 shipping and handling when obtained through the New York State Seed Improvement Project; and approximately \$500.00 per person in training costs including registration fee, labor and travel expenses. The total costs for training is unknown, since costs are predicated on the number of persons requiring training and that number is unknown.

The continuing compliance costs will vary for small businesses depending on the size of such business and the number of seed lots submitted for certification.

5. Economic and technological feasibility:

Compliance with the proposal by small businesses is technologically feasible. Small businesses engaged in growing small grain certified seed are already sampling seed and submitting samples to certified laboratories for testing.

6. Minimizing adverse economic impact:

The proposed amendments are designed to minimize any adverse economic impact on small businesses by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for small grain seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C. § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201).

7. Small business and local government participation:

The Department complied with SAPA § 202-b(6) by meeting with growers of certified seed, as well as representatives of the New York Seed Improvement Project (NYSIP) at Cornell University.

On April 1, 2010, the New York Seed Improvement Cooperative, Inc. Small Grains Committee held a meeting at Waterloo, New York. Participants included 13 certified small seed growers in New York as well as the following officials: Dr. Gary Bergstrom, Professor, Plant Pathology, Cornell University, Dr. Mark Sorrells, Professor of Plant Breeding Chair Dept. of Plant Breeding and Genetics, Cornell University, Dr. Margaret Smith, Dir. Assoc. Acad. Professor, Dept. of Plant Breeding and Genetics, Cornell University, David Benscher, Research Support Specialist, Cornell University, Doug Eldred, Mark Greene, Ritchie Lent, Seedway Inc., Hugh Dudley, Peter Shuster, Alan Westra, NYSIP; and Jan Morawski of the New York State Department of Agriculture and Markets.

At the meeting, Alan Westra reviewed the initial draft of the proposed regulations and suggested revisions which were made to make the proposed regulations more consistent with standards set forth by the Association of Official Seed Certifying Agencies (AOSCA) as well as standards used by Pennsylvania. Alan Westra asked participants if there was any objection to the revisions and no objections were noted.

Additionally, Dr. Wayne Guerke, formerly of the Department of Agriculture Seed Laboratory in Georgia, was consulted on the proposed regulations and suggested revisions which were made concerning field inspections and isolation. The proposed regulations were also discussed with representatives of the New York State Seed Testing Laboratory.

Outreach efforts will continue.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

There are approximately 13 producers growing certified small grain seed, hundreds of dealers and retailers of small grain certified seed and thousands of farmers and other consumers who purchase small grain certified seed. These producers, dealers, retailers, farmers and consumers are located throughout the rural areas of New York State.

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

The proposed amendments would not incur any additional paperwork requirements on regulated parties. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the following paperwork and/or recordkeeping requirements already apply to regulated parties: list of certain information whenever certification of a crop variety is requested (section 96.2); official certification label affixed to the container in which all classes of seed are when offered for sale or an invoice, in the case of seed sold in bulk (section 96.6); and documentary evidence setting forth the source of seed used for the production of foundation, registered or certified seed.

The type of professional services likely to be needed in a rural area to comply with the proposed amendments are the services of an approved seed testing laboratory.

3. Costs:

It is not anticipated that initial capital costs will be incurred by a regulated business to comply with the proposed rule. The annual costs for continuing compliance with the proposed rule will depend on the amount of seed that a grower submits for certification.

The proposed amendments would not affect existing costs for seed certification. Seed certification fees for spring grains are \$5.50 per acre for fields 200 acres or less in size, plus \$5.00 per field entered. Fees for fields over 200 acres in size are \$5.25 per acre plus \$5.00 per field entered. If reinspection of a field is requested the cost is \$25.00 for the first field and \$25.00 for any additional fields. If a second reinspection is required the cost is \$50.00 for the first field and \$25.00 for any additional fields. If a third and subsequent reinspections are requested the cost is \$100.00 for the first field and \$25.00 for any additional fields. The estimated inspection cost per an average field of 12.4 acres would be \$73.20.

The cost of having seed tested for purity and germination for certification purposes depends upon the variety of seed tested and ranges from \$8.50 to \$15.00 per sample. The estimated cost of testing the approxi-

mately 200 samples that will be required would be approximately \$1,700 to \$3,000.

It is anticipated that the smaller sample size required by the rule and the Federal Seed Act will reduce the amount of time required to draw a sample and the resulting cost by as much as 50%. The actual savings will depend on the number of samples submitted by a particular seed producer.

The proposed amendments would not incur any additional training costs. Since the general seed certification standards set forth in Part 96 of 1 NYCRR also apply to small grain seed certification standards contained in Part 97 of 1 NYCRR, the costs associated with training are as follows: the cost of the AASCO Handbook for Seed Sampling which is \$30.00 plus \$5.00 shipping and handling when obtained through the New York State Seed Improvement Project; and approximately \$500.00 per person in training costs including registration fee, labor and travel expenses. The total costs for training is unknown, since costs are predicated on the number of persons requiring training and that number is unknown.

It is not anticipated that there will be any variation in these costs for different types of entities in rural areas.

4. Minimizing adverse impact:

The proposed amendments are designed to minimize any adverse impact on rural areas by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201). The approaches suggested by SAPA § 202-bb(2) and similar approaches were considered.

5. Rural area participation:

The Department complied with SAPA § 202-bb(7) by meeting with growers of certified seed, as well as representatives of the New York Seed Improvement Project (NYSIP) at Cornell University.

On April 1, 2010, the New York Seed Improvement Cooperative, Inc. Small Grains Committee held a meeting at Waterloo, New York. Participants included 13 certified small seed growers in New York as well as the following officials: Dr. Gary Bergstrom, Professor, Plant Pathology, Cornell University, Dr. Mark Sorrells, Professor of Plant Breeding Chair Dept. of Plant Breeding and Genetics, Cornell University, Dr. Margaret Smith, Dir. Assoc. Acad. Professor, Dept. of Plant Breeding and Genetics, Cornell University, David Benscher, Research Support Specialist, Cornell University, Doug Eldred, Mark Greene, Ritchie Lent, Seedway Inc., Hugh Dudley, Peter Shuster, Alan Westra, NYSIP; and Jan Morawski of the New York State Department of Agriculture and Markets.

At the meeting, Alan Westra reviewed the initial draft of the proposed regulations and suggested revisions which were made to make the proposed regulations more consistent with standards set forth by the Association of Official Seed Certifying Agencies (AOSCA) as well as standards used by Pennsylvania. Alan Westra asked participants if there was any objection to the revisions and no objections were noted.

Additionally, Dr. Wayne Guerke, formerly of the Department of Agriculture Seed Laboratory in Georgia, was consulted on the proposed regulations and suggested revisions which were made concerning field inspections and isolation. The proposed regulations were also discussed with representatives of the New York State Seed Testing Laboratory.

Outreach efforts will continue.

Job Impact Statement

1. Nature of impact:

It is not anticipated that the rule will have an impact on jobs and employment opportunities.

2. Categories and numbers affected:

The number of persons employed by the approximately 13 producers of certified seed in New York State is unknown.

3. Regions of adverse impact:

It is not anticipated that the rule would have a disproportionate adverse impact on jobs or employment opportunities in any region of the State.

4. Minimizing adverse impact:

The Department has attempted to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for small grain seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201).

5. Self-employment opportunities:

The rule would not have a measurable impact on opportunities for self-employment.

Office of Alcoholism and Substance Abuse Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Incident Reporting in Chemical Dependency and Problem Gambling Treatment Provider Services

I.D. No. ASA-03-11-00008-EP

Filing No. 1361

Filing Date: 2010-12-30

Effective Date: 2010-12-30

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

Proposed Action: Repeal of Part 306; and addition of Part 836 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 22.07, 32.01, 32.02, 32.07, 33.16, 33.23 and 33.25; and L. 2008, ch. 323, section 19

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

Specific reasons underlying the finding of necessity: Pursuant to changes in the Social Services Law and Mental Hygiene Law, the agency is required to promulgate rules to establish reporting requirements; section 19 of Chapter 323 of the Laws of 2008 authorizes emergency adoption.

Subject: Incident reporting in chemical dependency and problem gambling treatment provider services.

Purpose: To ensure compliance with state and federal laws regarding reporting of incidents.

Substance of emergency/proposed rule (Full text is posted at the following State website: www.oasas.state.ny.us): The proposed new regulation for "Incident Reporting in OASAS Certified or Funded Services" replaces the current regulation. Statutory amendments to the Mental Hygiene Law (Chapter 24 of the Laws of 2007, known as "Jonathan's law") and to the Social Services Law relating to reporting cases of patient abuse or child abuse and neglect are incorporated into the new regulation. The intent of the regulation is to establish and clarify minimum standards for incident management policies required of any chemical dependence or problem gambling service provider certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office").

The regulation establishes guidelines for providers' amendment and implementation of required incident reporting policies developed based on each provider's treatment modality, community location, and client age. Each provider's policy must include an incident management plan to include establishing an incident review committee, provisions for periodic staff training about procedures when an incident occurs, reporting and recording requirements.

Incident management plans are intended to prevent the recurrence of incidents involving and affecting OASAS service providers in order to enhance the quality of care and provide every individual receiving services with humane treatment and a safe environment. The new regulation establishes parameters for a record keeping and reporting process. The regulation identifies "serious incidents" that occur within a facility and must be reported to the Office and to other regulatory entities as required by law such as the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC), the Statewide Central Register of Child Abuse and Maltreatment (Statewide Central Register), as distinguished from incidents which may be recorded internally by the service provider and made available for review by the Office on request. In this context, the new regulation also clarifies the relationship between federal confidentiality law (42 CFR Part 2) and other state reporting requirements.

The regulation identifies serious incidents as those which are or appear to be a crime under state law. The new regulation incorporates specific provisions responsive to recent changes in the Mental Hygiene Law and the Social Service Law that establish procedures consistent with those laws in the area of child abuse, neglect, missing patients, and patient abuse. The regulation address all incident reports in addition to those listed. The regulation outlines an internal incident reporting process, an external

incident reporting process, establishing a special review committee, recordkeeping, and the duty to cooperate with inspections by the Statewide Central Register and the CQC to the extent permitted by federal law.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire February 27, 2011.

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

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

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

Regulatory Impact Statement

14 NYCRR Part 306, Incidents at Facilities for Alcoholism and Alcohol Abuse, will be repealed and a new Part 836 will replace it. The new Part 836 is submitted for public review and comment. Part 836 will require all providers to amend policies and procedures by which each provider will record and/or report to required authorities all incidents as defined in the regulation and responsive to most recent applicable state and federal laws.

Amendments to the Mental Hygiene Law ("Jonathan's Law, Chapter 24 of the laws of 2007) and the Social Service Law required the Office to promulgate regulations that establish procedures consistent with those laws in the area of child abuse, neglect, missing patients, and patient abuse. The regulation provides guidance for an internal incident reporting process and requirements for an external incident reporting process including: establishment of an incident review committee; recordkeeping; and to the extent permitted and required by law, compliance with federal confidentiality laws (42 CFR Part 2) protecting drug and alcohol treatment patients and state laws requiring reporting of certain incidents of abuse to the NY Statewide Central Register of Child Abuse and Maltreatment ("Statewide Central Register"), and cooperation with inspections by the Office and the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC).

1. Statutory Authority:

(a) Section 19.07(c) of the Mental Hygiene Law charges the Office with the responsibility for seeing that persons in need of treatment for chemical dependence receive high quality care and treatment, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected.

(b) Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner ("Commissioner") of the Office to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

(c) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(d) Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse and chemical dependence facilities and staff.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Section 22.07(c) of the Mental Hygiene Law authorizes the Commissioner to promulgate rules and regulations to ensure that the rights of individuals who have received, and are receiving, chemical dependence services are protected.

(g) Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the Mental Hygiene Law.

(h) Section 32.02 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary to ensure quality services to those suffering from problem gambling.

(i) Section 32.07(a) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations to effectuate the provisions and purposes of Article 32 of the Mental Hygiene Law.

(j) Section 33.16(a)(6) and 33.16(b)(4) of the Mental Hygiene Law defines a "qualified person" as an individual receiving services, his or her legal guardian, or a parent, spouse or adult child who has authority to provide consent for care and treatment.

(k) Section 33.23 of the Mental Hygiene Law requires directors of facilities certified by OASAS to provide telephone notification to a "qualified person" of an incident involving a client within 24 hours of the initial report.

(l) Section 33.25 of the Mental Hygiene Law requires facilities to release records to "qualified persons", upon request, relating to allegations and investigations of client abuse or mistreatment.

(m) Section 412-a of the Social Services Law defines "abused child in

residential care” and “neglected child in residential care” and includes, within the definition of “residential care” care provided to a child in an inpatient or residential setting certified by OASAS and specifically designated by such Office as serving youth.

(n) Section 45.19 of the Mental Hygiene Law requires reporting of deaths and allegations of abuse or mistreatment to the Commission on Quality of Care and Advocacy for Persons with Disabilities (hereinafter, “CQC”).

(o) Article 6, Title 6 of the Social Services Law requires the reporting of suspected abuse or maltreatment of persons under 18 years of age to the New York Statewide Central Register of Child Abuse and Maltreatment (hereinafter, “Statewide Central Register”).

(p) Section 413 of the Social Services Law identifies persons required to report cases of suspected child abuse or maltreatment to the Statewide Central Register.

(q) Section 415 of the Social Services Law requires suspected child abuse or maltreatment to be reported immediately by telephone and to be followed by a written report on a form supplied by the commissioner of the office of children and family services, and further describes procedures for reporting.

The relevant sections of the Mental Hygiene Law cited above authorize the Commissioner of OASAS to regulate the provision of services to patients, how such chemical dependency services are delivered, and to establish standards for the provision of such services and qualifications of staff. Sections of the Mental Hygiene Law known as “Jonathan’s Law” also require recordkeeping and reporting of certain incidents of abuse to qualified persons. Provisions of the Social Services law comprise reporting requirements relative to alleged abuse of children in residential care. The proposed regulation will affect the administration of services by requiring each provider to establish updated policies and procedures regarding incident reporting that reflect the requirements of “Jonathan’s Law” and the reporting of child abuse and neglect in residential care.

Establishing policy and procedures with regard to incident reporting will establish a standard for all facilities which is in the best interest of the client providing better health care and a stronger basis of recovery from addiction.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 (Mental Hygiene Law Article 32) requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. Section 19 of Chapter 323 of the laws of 2008 relating to abused children in residential care, permits the Office to promulgate and adopt rules and regulations on an emergency basis for the purpose of implementing the provisions of such act. Establishing a rule requiring treatment providers to create a policy and procedure for incident reporting and clearly identifying the responsibilities of each provider is a best clinical practice which will enhance the treatment experience and is in the best interest of the clients and their families.

3. Needs and Benefits:

The proposed amendments are necessary to enable clinical staff to provide a safe environment where incidents are addressed uniformly and consistent with a clear delineation of reporting responsibilities. Such a policy reflects a best clinical practice for providers of chemical dependency services. Incident reporting is already required of treatment providers pursuant to 14 NYCRR Part 306. However, in addition to requirements to comply with recent statutory amendments, uniformity and consistency may be lacking in the current regulation. The proposed new regulation will require all providers of chemical dependency services to become compliant with the statutory requirements for the reporting of a crime, child abuse or neglect, sexual misconduct and abuse. The purpose of the regulation is to establish guidelines for providers to create a policy setting out all of the responsibilities of providers, compilation of information relevant to reporting an incident, and external reporting procedures such as reporting to the Statewide Central Register, the Office, and the CQC. Each facility/provider shall establish an incident reporting policy consistent with this regulation and consistent with state and federal law.

4. Costs:

a. Costs to regulated parties: Providers are regulated parties. Costs incurred by providers will be minimal, consisting of additional paper and printing materials, and staff time necessary to comply with amendments to state law. Because treatment providers already have an incident reporting policy and are informed of requirements of statutory changes, existing policies will only need to be updated pursuant to this regulation.

b. Costs to the agency, state and local governments: There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments. However, where local governments operate programs, they may incur minimal costs as indicated in #4 above.

6. Paperwork:

Part 836 will require some additional paperwork for certified and or funded providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control record keeping, it is not expected that new record keeping requirements will be excessive.

7. Duplications:

There is no duplication of other state or federal requirements.

8. Alternatives:

An alternative of establishing a uniform policy and procedure at the agency level required of all providers was explored and it was decided that each provider is in a unique situation and should establish policies and procedure aligned with the special needs and environment of their patients and location. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment. The comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OTDA. Recommendations from both agencies regarding reporting of alleged child abuse and neglect have been incorporated into the proposed regulation.

9. Federal Standards:

42 CFR Part 2 applies to this regulation in that it specifies the confidentiality rules applicable in chemical dependency services which have to be considered for external incident reporting. Most reporting requirements in state law are preempted by the federal statute, with the exception of deaths and initial reports of alleged child abuse and neglect.

10. Compliance Schedule:

Providers are expected to be in compliance with this regulation upon its emergency adoption.

Regulatory Flexibility Analysis

Types / Numbers:

The proposed new Part 836 will impact all approximately 1550 providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or “Office”).

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health require-

ments for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFS. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Rural Area Flexibility Analysis

Types / Numbers:

The proposed new Part 836 will impact all (currently 1550) providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office"). Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the

comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFS. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Job Impact Statement

No change in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the amendments either clarify or streamline provider actions which will not be eliminated or supplemented. Treatment providers will not need to hire additional staff or reduce staff size; the proposed changes will not adversely impact jobs outside of the agency; the proposed changes will not result in the loss of any jobs within New York State.

New York State Canal Corporation

NOTICE OF ADOPTION

Snowmobiling on Canal Lands

I.D. No. NCC-46-10-00018-A

Filing No. 6

Filing Date: 2011-01-04

Effective Date: 2011-01-19

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

Action taken: Amendment of section 150.6 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), 382(7)(d) and (k); Canal Law, sections 10(9), (15), (26), 85, 100 and 138-b(5)(a)

Subject: Snowmobiling on Canal Lands.

Purpose: Authorize the issuance of revocable permits to organized snowmobile clubs where local municipal support has been demonstrated.

Text or summary was published in the November 17, 2010 issue of the Register, I.D. No. NCC-46-10-00018-P.

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

Text of rule and any required statements and analyses may be obtained from: Marcy Pavone, NYS Thruway Authority, 200 Southern Blvd., Albany, New York 12209, (518) 436-2860, email: marcy_pavone@thruway.state.ny.us

Assessment of Public Comment

The Canal Corporation received seven comments in support of the proposed rule making from snowmobiling clubs and businesses across New York State. No other public comments were received.

Office of Children and Family Services

EMERGENCY RULE MAKING

The Protection of Children in Residential Facilities from Child Abuse and Neglect

I.D. No. CFS-52-10-00005-E

Filing No. 5

Filing Date: 2011-01-04

Effective Date: 2011-01-04

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

Action taken: Amendment of Parts 166, 180 and 182 of Title 9 NYCRR; and amendment of Parts 433 and 434 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f); and L. 2008, ch. 23, section 19

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

Specific reasons underlying the finding of necessity: The adoption of these regulations on an emergency basis is necessary to protect the health, safety and welfare of children in residential care by implementing the provisions of Chapter 323 of the Laws of 2008, which relates to the protection of children in residential facilities from child abuse and neglect.

Subject: The protection of children in residential facilities from child abuse and neglect.

Purpose: To implement chapter 323 of the Laws of 2008.

Substance of emergency rule: Part 433 of Title 18 (Child Abuse and Neglect in Residential Care)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates the scope statement to include the statutory changes and implements the updated statutory definitions. The amendment also updates the obligations and procedures of the Office of Children and Family Services (OCFS), authorized agencies and residential care facilities in conformance with the statutory changes and updates outdated references to the former Department of Social Services.

Sections 434.1, 434.2, and 434.10 of Title 18 (Child Protective Services Administrative Hearing Procedure)

The amendment implements statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. The amendment also updates outdated references to the former Department of Social Services.

Section 166-1.4 of Title 9 (Prevention and Remediation Procedures)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in OCFS-operated residential facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 180.3 and 180.5 of Title 9 (Juvenile Detention Facilities Regulations)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in juvenile detention facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-1.2 and 182-1.12 of Title 9 (Runaway and Homeless Youth Regulations for Approved Runaway Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-2.2 and 182-2.11 of Title 9 (Runaway and Homeless Youth Regulations for Transitional Independent Living Support Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. CFS-52-10-00005-P, Issue of December 29, 2010. The emergency rule will expire April 3, 2011.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

Chapter 436 of the Laws of 1997 transferred certain functions, powers, duties and obligations of the former Department of Social Services and all of the functions, powers, duties and obligations of the former Division for Youth to OCFS.

Chapter 323 of the Laws of 2008 amended sections 412, 413, 415, 422, 424-a, 424-b, 424-c and 460-c of the SSL and created sections 412-a and 424-d of the SSL to clarify the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. Section 19 of Chapter 323 of the Laws of 2008 authorizes OCFS to promulgate rules and regulations on an emergency basis for the purpose of implementing the provisions of the Chapter.

2. Legislative objectives:

The regulations implement Chapter 323 of the Laws of 2008 relating to the protection of children in residential facilities from child abuse and neglect. Specifically, the regulations implement the updated statutory definitions and requirements for additional determinations relating to reports of child abuse and maltreatment in residential settings that were enacted in the new sections 412-a and 424-d of the SSL. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS.

The regulations also implement statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. In addition, the regulations make technical changes, such as updating outdated references to the former Department of Social Services and the former Division for Youth.

3. Needs and benefits:

The regulations are necessary for OCFS to conform to statutory changes to the SSL relating to the protection of children in residential

facilities from child abuse and neglect. Specifically, the regulations clarify and update the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS. Additionally, the statute and regulations require an immediate law enforcement referral in the event that an investigation reveals that it is likely that a crime may have been committed against a child.

The regulations are also necessary to conform the regulations to the statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard.

The regulations will not apply to incidents that occur before January 17, 2009, which is the effective date of the statutory changes.

4. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Local government mandates:

For local governments that operate residential facilities for children, the regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

6. Paperwork:

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

The proposed regulations are required to implement the state law, Chapter 323 of the Laws of 2008. No alternatives were considered.

9. Federal standards:

The regulations and Chapter 323 of the Laws of 2008 are consistent with the requirements of the federal Child Abuse Prevention and Treatment Act (CAPTA), which does not have special requirements pertaining to children in residential care.

10. Compliance schedule:

Chapter 323 of the Laws of 2008 provides for a January 17, 2009 effective date of the changes set forth in the regulations. For purposes of transition between the former statutory and regulatory provisions and the new law, the effective date will apply to the date when the abuse or neglect was alleged to have occurred. If a report came in on or after January 17, 2009 that involves an incident or incidents that occurred before January 17, 2009, the former definitions of abuse and neglect of children in residential care will apply.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The regulations will affect social services districts, voluntary authorized agencies, residential runaway and homeless youth programs and counties that contract for detention programs. There are 58 social ser-

vices districts, approximately 160 voluntary authorized agencies and 83 residential runaway and homeless youth programs. There are 38 counties plus New York City that contract for detention programs.

2. Reporting, recordkeeping and compliance requirements:

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Professional services:

No new or additional professional services would be required by small businesses or local governments in order to comply with the regulations.

4. Compliance costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Economic and technological feasibility:

The social services districts, counties, voluntary authorized agencies and other agencies affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact. The regulations build on existing procedures.

7. Small business and local government participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December of 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. In addition, there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

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

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will

continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

4. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact on rural areas. The regulations build on existing procedures.

5. Rural area participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A Statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Job Impact Statement

A full job impact statement has not been prepared for the regulations which contain new requirements imposed by Chapter 323 of the Laws of 2008. The regulations will not have an impact on jobs and employment opportunities because they will not adversely impact the number of staff authorized agencies must maintain to provide residential care for children.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-03-11-00001-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To delete a position 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 Agriculture and Markets, by deleting therefrom the position of Assistant Commissioner.

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

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

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-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-03-11-00002-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Homeland Security and Emergency Services," by adding thereto the positions of DHSES Training Extra (12).

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

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

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-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-03-11-00003-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To delete a position 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 Executive Department under the subheading "Office for Technology," by deleting therefrom the position of Manager Information Services.

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

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

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

Consolidated Regulatory Impact Statement

1. Statutory authority: The New York State Civil Service Commission is authorized to promulgate rules for the jurisdictional classification of offices within the classified service of the State by Section 6 of the Civil Service Law. In so doing, it is guided by the requirements of Sections 41, 42 and 43 of this same law.

2. Legislative objectives: These rule changes are in accord with the statutory authority delegated to the Civil Service Commission to prescribe rules for the jurisdictional classification of the offices and positions in the classified service of the State.

3. Needs and benefits: Article V, Section 6, of the New York State Constitution requires that, wherever practicable, appointments and promotions in the civil service of the State, including all its civil divisions, are to be made according to merit and fitness. It also requires that competitive examinations be used, as far as practicable, as a basis for establishing this eligibility. This requirement is intended to provide protection for those individuals appointed or seeking appointment to civil service positions while, at the same time, protecting the public by securing for it the services of employees with greater merit and ability. However, as the language suggests, the framers of the Constitution realized it would not always be possible, nor indeed feasible, to fill every position through the competitive process. This point was also recognized by the Legislature for, when it enacted the Civil Service Law to implement this constitutional mandate, it provided basic guidelines for determining which positions were to be outside of the competitive class. These guidelines are contained in Section 41, which provides for the exempt class; 42, the non-competitive class and 43, the labor class. Thus, there are four jurisdictional classes within the classified service of the civil service and any movement between them is termed a jurisdictional reclassification.

The Legislature further established a Civil Service Department to administer this Law and a Civil Service Commission to serve primarily as an appellant body. The Commission has also been given rulemaking responsibility in such areas as the jurisdictional classification of offices within the classified service of the State (Civil Service Law Section 6). In exercising this rule-making responsibility, the Commission has chosen to provide appendices to its rules, known as Rules for the Classified Service, to list those positions in the classified service which are in the exempt class (Appendix 1), non-competitive class (Appendix 2), and labor class (Appendix 3).

In effect, all positions, upon creation at least, are, by constitutional mandate, a part of the competitive class and remain so until removed by the Civil Service Commission, through an amendment of its rules upon showing of impracticability in accordance with the guidelines provided by the Legislature. The guidelines are as follows. The exempt class is to include those positions specifically placed there by the Legislature, together with all other subordinate positions for which there is no requirement that the person appointed pass a civil service examination. Instead, appointments rest in the discretion of the person who, by law, has determined the position's qualifications and whether the persons to be appointed possess those qualifications. The non-competitive class is to be comprised of those positions which are not in the exempt or labor classes

and for which the Civil Service Commission has found it impracticable to determine an applicant's merit and fitness through a competitive examination. The qualifications of those candidates selected are to be determined by an examination which is sufficient to insure selection of proper and competent employees. The labor class is to be made up of all unskilled laborers in the service of the State and its civil divisions, except those which can be examined for competitively.

4. Costs: The removal of a position from one jurisdictional class and placement in another is descriptive of the proper placement of the position in question in the classified service, and has no appreciable economic impact for the State or local governments.

5. Local government mandates: These amendments have no impact on local governments. They pertain only to the jurisdictional classification of positions in the State service.

6. Paperwork: There are no new reporting requirements imposed on applicants by these rules.

7. Duplication: These rules are not duplicative of State or Federal requirements.

8. Alternatives: Within the statutory constraints of the New York State Civil Service Commission, it is not believed there is a viable alternative to the jurisdictional classification chosen.

9. Federal standards: There are no parallel Federal standards and, therefore, this is not applicable.

10. Compliance schedule: No action is required by the subject State agencies and, therefore, no estimated time period is required.

Consolidated Regulatory Flexibility Analysis

The proposal does not affect or impact upon small businesses or local governments, as defined by Section 102(8) of the State Administrative Procedure Act, and, therefore, a regulatory flexibility analysis for small businesses is not required by Section 202-b of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on small businesses or local governments.

Consolidated Rural Area Flexibility Analysis

The proposal does not affect or impact upon rural areas as defined by Section 102(13) of the State Administrative Procedure Act and Section 481(7) of the Executive Law, and, therefore, a rural area flexibility analysis is not required by Section 202-bb of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on rural areas.

Consolidated Job Impact Statement

The proposal has no impact on jobs and employment opportunities. This proposal only affects the jurisdictional classification of positions in the Classified Civil Service.

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

Jurisdictional Classification**I.D. No.** CVS-03-11-00004-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for the Prevention of Domestic Violence," by decreasing the number of positions of Domestic Violence Program Specialist from 12 to 11 and by increasing the number of positions of Domestic Violence Program Assistant from 1 to 2.

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

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

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

Regulatory Impact Statement

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

previously printed under a notice of proposed rule making, I.D. No. CVS-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.

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mental State of an Inmate at the Time of a Superintendent’s (Tier III) Hearing

I.D. No. COR-03-11-00011-P

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

Proposed Action: Renumbering of sections 254.6(b)(1)(ii)-(viii) to 254.6(b)(1)(iii)-(ix); and addition of section 254.6(b)(1)(ii) to Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Mental state of an inmate at the time of a Superintendent’s (Tier III) hearing.

Purpose: To create a designation to indicate to the hearing officer that an inmate’s mental health is at issue.

Text of proposed rule: The Department of Correctional Services is renumbering sub-sections 254.6(b)(1)(ii)-254.6(b)(1)(viii) as 254.6(b)(1)(iii)-254.6(b)(ix) and is adding a new sub-section 254.6(b)(1)(ii) as indicated below:

(b) Mental state or intellectual capacity. When an inmate’s mental state or intellectual capacity is at issue, a hearing officer shall consider evidence regarding the inmate’s mental condition or intellectual capacity at the time of the incident and at the time of the hearing in accordance with this section.

(1) For the purposes of this section, an inmate’s mental state shall be deemed at issue when:

(i) the inmate is classified as level 1 by the Office of Mental Health (OMH), as indicated on the hearing record sheet;

(ii) the inmate is designated as an “S” by OMH, as indicated on the hearing record sheet;

(iii) the inmate is charged with engaging in an act of self-harm in violation of rule 123.10 (section 270.2[B][23][i] of this Title), as indicated on the misbehavior report;

(ii)iv) the incident occurred while the inmate was being transported to or from the Central New York Psychiatric Center (CNYPC), as alleged in the misbehavior report;

(i)v) the inmate was an inpatient at the CNYPC within nine months prior to the incident, as indicated on the hearing record sheet;

(vi) the incident occurred while the inmate was assigned to an OMH satellite unit, or intermediate care program, as indicated on the hearing record sheet;

(vii) the incident occurred while the inmate was being escorted to or from an OMH satellite unit or intermediate care program, as alleged in the misbehavior report;

(viii) the hearing was delayed or adjourned, after an extension of time was obtained in accordance with section 251-5.1 of this Title, because the inmate became an inpatient at the CNYPC or was assigned to the OMH satellite unit; or

([vii]ix) it appears to the hearing officer, based on the inmate’s testimony, demeanor, the circumstances of the alleged offense or any other reason, that the inmate may have been mentally impaired at the time of the incident or may be mentally impaired at the time of the hearing.

Text of proposed rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue, Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority

Sections 112 of Correction Law assigns to the Commissioner the superintendence, management and control of all inmates confined within correctional facilities of all matters relating to the government, discipline, and policing thereof.

Legislative Objective

By vesting the commissioner with the rulemaking authority as stated in section 112 of Correction Law, the legislature intended the commissioner to promulgate such rules and regulations governing inmate discipline that are in the best interest of institutional and public safety and welfare, but also to provide a reasonable and fair means to administer disciplinary action in the event that a mentally ill inmate violates an institutional rule of conduct.

Needs and Benefits

The change would add an OMH “S” designation to the list of automatic triggers that would require a hearing officer’s consideration of an inmate’s mental state in Tier III inmate disciplinary hearings (Superintendent’s Proceedings). The “S” designation is assigned to inmates that have been determined by OMH to currently have or to have recently had, a serious mental illness. The consideration of an inmate’s mental state in such cases should enhance the Tier III inmate disciplinary hearing process by providing the hearing officer with additional input that may be relevant in reaching a proper disciplinary disposition.

Costs

a) To agency, the state and local governments: None.

b) Costs to private regulated parties: None. The proposed amendment does not apply to private parties.

c) This cost analysis is based upon the expectation that the number of additional Superintendent’s Hearings where an inmate’s mental state health would have to be considered as a result of this proposed change will be modest. This conclusion is based on the fact that the current regulation already lists eight other criteria requiring consideration of an inmate’s mental state in Superintendent’s Hearings and that the procedures for such consideration are already in place.

Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules. The designation is being added to a form that already exists and is in use.

Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

Alternatives

No alternatives are apparent and none have been considered. The proposed amendment was recommended by the advocacy group Disability Advocates Incorporated. With the continued assistance and

input of clinical professionals from the Office of Mental Health, the Department believes it can provide this additional enhancement to the Tier III inmate disciplinary process.

Federal Standards

There are no apparent minimum standards of the Federal government regarding this issue.

Compliance Schedule

The Department of Correctional Services will achieve compliance with the proposed rules upon publication in the New York State Register.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely establishes a designation on an established form, so that the disciplinary hearing officer will note that an inmate's mental health is at issue and must then consider required evidence in accordance with established Department procedures.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely establishes a designation on an established form, so that the disciplinary hearing officer will note that an inmate's mental health is at issue and must then consider required evidence in accordance with established Department procedures.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely establishes a designation on an established form, so that the disciplinary hearing officer will note that an inmate's mental health is at issue and must then consider required evidence in accordance with established Department procedures.

30, 2011, relating to Qualified School Construction Bonds issued pursuant to 26 USC section 54F and Qualified Zone Academy Bonds issued pursuant to 26 USC sections 1397E and 54E. The following is a summary of the substance of the proposed amendment.

Section 155.22 is revised to organize the regulation into subdivision (a), relating to Qualified Zone Academy Bonds, and subdivision (b), relating to Qualified School Construction Bonds. The provisions relating to Qualified Zone Academy Bonds (QZAB) are revised to provide for a separate Charter school allocation from the QZAB State limitation amount. The QZAB provisions are also updated to include QZAB issued under 26 USC 54E, as added by Pub.L. 110-343, 122 Stat. 3765, 3869. Prior to the addition of section 54E, QZAB were issued pursuant to 26 USC section 1397E.

Provisions relating to Qualified School Construction Bonds (QSCB) are established in section 155.22(b).

Section 155.22(b)(1) sets forth the purpose of the subdivision, to establish procedures for the allocation and issuance of QSCB as authorized by 26 USC section 54F.

Section 155.22(b)(2) sets forth definitions for terms used in the subdivision.

Section 155.22(b)(3) establishes procedures for allocating respective amounts of the QSCB State limitation amount to local educational agencies (LEAs), including provisions for allocating to the large city school districts, charter schools, and all other LEAs.

Section 155.22(b)(4) establishes procedures for making adjustments for unused allocations.

Section 155.22(b)(5) requires QSCB to be used within three years after issuance.

Section 155.22(b)(6) requires that capital construction projects to be financed through the issuance of QSCB must be submitted for review to the Office of Facilities Planning in the State Education Department.

Section 155.22(b)(7) provides that capital construction projects funded in whole or in part with QSCB and involving the repair, renovation or alternation of public school facilities that are approved by the Commissioner, shall be eligible to receive building aid pursuant to the provisions of Education Law section 3602(6).

Revised rule making(s) were previously published in the State Register on November 17, 2010.

Revised rule compared with proposed rule: Substantial revisions were made in section 155.22(b)(3).

Text of revised proposed rule and any required statements and analyses may be obtained from Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: John B. King, Jr. Senior Deputy Commissioner P-12 Education, State Education Department, State Education Building Room 125, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Revised Rule Making in the State Register on November 17, 2010, the proposed rule has been further revised in response to public comment to delete a requirement in section 155.22(b)(3)(iii)(d) that limited the QSCB charter school allocation for a given calendar year to \$500,000 per charter school.

The above revision does not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Revised Rule Making in the State Register on November 17, 2010, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The aforesaid revision does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Revised Rule Making in the State Register on November 17, 2010, the proposed rule has been substan-

Crime Victims Board

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Crime Victims Board publishes a new notice of proposed rule making in the NYS Register.

Loss of Earnings

I.D. No.	Proposed	Expiration Date
CVB-52-09-00002-P	December 30, 2009	December 30, 2010

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Qualified School Construction Bonds (QSCB) and Qualified Zone Academy Bonds (QZAB)

I.D. No. EDU-35-10-00019-RP

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

Proposed Action: Amendment of section 155.22 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 207, 305(1) and (2); and 26 USC sections 54E and 54F

Subject: Qualified School Construction Bonds (QSCB) and Qualified Zone Academy Bonds (QZAB).

Purpose: Establish criteria for QSCB and to update QZAB provisions.

Substance of revised rule: The Commissioner of Education proposes to amend section 155.22 of the Commissioner's Regulations, effective March

tially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The aforesaid revisions do not require any changes to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Revised Rule Making in the State Register on November 17, 2010, the proposed amendment has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment, as so revised, will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the State Register on November 17, 2010, 2010, the State Education Department received the following comments:

1. COMMENT:

The \$500,000 annual limitation per charter school for Qualified Zone Academy Bonds (QZAB) and Qualified School Construction Bonds (QSCB) is too small to make issuance of the bonds financially feasible, and would have the unintended consequence of effectively preventing charter schools from participating in these programs. Given that the total allocation for charter schools in the proposed rule is \$5 million, it is recommended that there be no maximum allocation per charter school per school year. Should the total allocation be increased, it is recommended that the maximum allocation be \$5 million per charter school per school year, which is similar to the maximum allocation for a typical school district.

DEPARTMENT RESPONSE:

The Department agrees. The proposed rule, as originally published in the September 1, 2010 State Register included provisions imposing a \$500,000 annual limitation per charter school for both QZAB and QSCB. The Department was attempting through these provisions to spread the available allocation amounts as widely as possible within the Charter School community. However, the Department subsequently determined that this limitation could result in the unintended consequence of limiting the usefulness of the program to individual Charter Schools. The revised rule (published in the November 17, 2010 State Register and adopted as an emergency action effective November 23, 2010) deleted the \$500,000 limitation for QZAB, but inadvertently did not delete the \$500,000 limitation for QSCB. The Department has now further revised the rule to remove the \$500,000 QSCB annual limitation per charter school.

2. COMMENT:

The proposed rule's separation of charter schools into a separate funding pool from school districts is unjustified.

DEPARTMENT RESPONSE:

The Department disagrees. Charter Schools are currently approved to educate a limited percentage of the students in relation to the state total and it would be inappropriate for them to gain access to significantly more program funding that would be disproportionate to their population.

3. COMMENT:

If there is a distinction to be drawn between charter schools and school districts, charter schools' share of the total allocations should be determined based on the number of students they are chartered to enroll, not their present enrollment. It is estimated that 88,500 students will be served when charter schools that are now operating reach their full growth.

DEPARTMENT RESPONSE:

The Department disagrees. The Department is providing the same funding per student for both populations. Using the allocation of \$5,000,000 against the comment's estimate of 88,500 students, results in funding level of \$56.50 per student. For the rest of the State, the

analysis results in \$169,000,000 against approximately 3 million students or \$56.33 per student. A confirming calculation reveals that 88,500 students represents approximately 3% of the total state enrollment, and \$5M represents approximately 3% of the total \$174 Million of available funding. No change to the method of allocation is warranted.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Distinguished Educators

I.D. No. EDU-43-10-00009-RP

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

Proposed Action: Amendment of sections 100.17 and 100.16 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305(1), 211-b(1-5) and 211-c(1-8); and L. 2007, ch. 57, part A, section 1

Subject: Distinguished educators.

Purpose: To prescribe requirements regarding appointment of distinguished educators to assist low-performing schools.

Substance of revised rule: The Commissioner of Education proposes to add a new section 100.17 and amend section 100.16 of the Commissioner's Regulations, effective March 30, 2011, relating to the appointment of distinguished educators to assist low-performing schools pursuant to Education Law sections 211-b and 211-c. The following is a summary of the substance of the revised proposed rule.

1. Subdivision (a) of section 100.17 sets forth criteria regarding eligibility for designation as a distinguished educator.

2. Subdivision (b) of section 100.17 sets forth selection criteria for distinguished educators appointed to a school district and distinguished educators appointed to a school within a school district.

3. Subdivision (c) of section 100.17 sets forth procedures, criteria and requirements for the appointment of distinguished educators, including provisions for reassignment of an appointed distinguished educator.

4. Subdivision (d) of section 100.17 sets forth the roles and responsibilities of distinguished educators and school districts, including specific responsibilities for distinguished educators appointed to a school district and distinguished educators appointed to a school within a school district.

5. Subdivision (e) of section 100.17 sets forth provisions for the removal of distinguished educators.

6. Subdivision (f) of section 100.17 sets for reporting requirements for appointed distinguished educators.

7. Subdivision (g) of section 100.17 sets forth provisions for the evaluation of distinguished educators.

8. Subdivision (h) of section 100.17 sets forth provisions for school district and school follow-up procedures upon completion of service of a distinguished educator.

9. Section 100.16 of the Regulations of the Commissioner of Education, regarding calculation of reasonable and necessary expenses of distinguished educators is amended to provide that the consulting fee for distinguished educators assigned to school districts shall be increased by an additional ten percent.

Revised rule compared with proposed rule: Substantial revisions were made in section 100.17(b)(1), (2), (c)(3) and (d)(1), (2).

Text of revised proposed rule and any required statements and analyses may be obtained from Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: John B. King, Jr., Senior Deputy P-12 Education, State Education Department, State Education Building, Room 125, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the proposed rule has been revised as follows:

Section 100.17(b)(1)(ii)(a) has been revised to replace the phrase “NYS certification as a superintendent of schools” with the phrase “New York State certification as a School District Administrator or School District Leader or a substantially equivalent certification, as determined by the Commissioner, issued by a jurisdiction outside the State”, in order to reflect the proper certification titles as currently used under Part 80 of the Commissioner’s Regulations, and also to expand the pool of potential candidates eligible for appointment as distinguished educators to include qualified individuals who hold substantially equivalent certification outside the State of New York.

Section 100.17(b)(2)(ii)(a) has been revised to replace the phrase “NYS certification as a building principal, assistant principal or teacher” with the phrase “New York State certification as a School Administrator and Supervisor, or School Building Leader, or Teacher or a substantially equivalent certification, as determined by the Commissioner, issued by a jurisdiction outside the State. . . .” in order to reflect the proper certification titles as currently used under Part 80 of the Commissioner’s Regulations, and also to expand the pool of potential candidates eligible for appointment as distinguished educators to include qualified individuals who hold substantially equivalent certification outside the State of New York.

Section 100.17(c)(3)(ii), providing for agreements between the Commissioner and distinguished educators, and between distinguished educators and school districts, has been deleted as unnecessary and redundant. Upon further consideration, the Department has determined that the functions of such agreements may be carried out through the Action Plan provisions in section 100.17(f) and the Evaluation provisions in section 100.17(g). Consistent with this determination, a revision to section 100.17(f) has been made to require that such action plans be submitted to the Commissioner or Commissioner’s designee for approval and, upon approval, a copy shall be provided to the school district. Section 100.17(g) has also been revised for purposes of consistency to delete reference to the “standards and criteria specified in the agreement” and replace it with “goals and objections specified in the action plan.”

Section 100.17(b)(1)(iii) and (b)(2)(iii) have been revised, for purposes of clarification, to replace the phrase “have been directly involved in teaching or administration within a school district, charter school, BOCES or a nonprofit educational organization within the past three years”, with the phrase “have experience as a teacher or administrator in a school district, charter school, BOCES or a nonprofit educational organization within the past three years.”

Section 100.17(d)(1)(ii)(d) has been revised to replace the term “ensure” with “facilitate” so as to now read “facilitate increased student performance across the district” in order to more appropriately describe this responsibility of the distinguished educator.

Section 100.17(d)(2)(v) has been revised to add “contracts” to the list of things that may affect a distinguished educator’s right to return to his or her previous employment.

Section 100.17(g), regarding removal of distinguished educators, has been revised, for purposes of clarification, to replace the phrase “shall serve at the pleasure of the Commissioner” to “shall serve within the sole discretion of the Commissioner.”

References in section 100.17 to a distinguished educator being “appointed” to a school within a school district, have been revised to replace such term with “assigned” in order to ensure consistency with Education Law section 211-c, which provides for the appointment of distinguished educators to a school district. Therefore, under the revised proposed rule, a distinguished educator is appointed to a school district and may be assigned to a school within such district.

Nonsubstantial revisions were also made for purposes of ensuring consistency, providing clarification, and correcting grammatical errors.

The above changes require that the following sections of the previously published Regulatory Impact Statement be revised to read as follows:

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c to establish requirements for the appointment of

distinguished educators to assist low performing schools, and will not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, beyond those inherent in the Education Law.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner’s Regulations.

Consistent with and to the extent permitted under any applicable provisions of law, existing collective bargaining agreements, and contracts:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee’s term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

PAPERWORK:

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Commissioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and shall also submit such action plan to the Commissioner or Commissioner’s designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner or Commissioner’s designee in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, requires that the following section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement Education Law sec-

tions 211-b and 211-c and imposes no compliance requirements on school districts beyond those inherent in the statutes.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner's Regulations.

Consistent with and to the extent permitted under any applicable provisions of law, existing collective bargaining agreements, and contracts:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee's term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Commissioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and submit such action plan to the Commissioner or Commissioner's designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, requires that the following section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c [as added by Chapter 57 of the Laws of 2007] and imposes no compliance requirements on entities in rural areas beyond those inherent in the statute.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner's Regulations.

Consistent with and to the extent permitted under any applicable provisions of law, existing collective bargaining agreements, and contracts:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee's term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Commissioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and shall submit such action plan to the Commissioner or Commissioner's designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith. The proposed rule, as revised, is necessary to implement Education Law sections 211-b and 211-c by establishing selection criteria for the appointment of Distinguished Educators. The proposed revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed revised rule that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

EMERGENCY RULE MAKING

New Source Review Requirements for Proposed New Major Facilities and Major Modifications to Existing Facilities

I.D. No. ENV-03-11-00005-E

Filing No. 1355

Filing Date: 2010-12-29

Effective Date: 2010-12-29

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

Action taken: Amendment of Parts 200, 201 and 231 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103 and 71-2105; and Federal Clean Air Act, sections 160-169 and 171-193 (42 USC Sections 7470-7479; 7501-7515)

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

Specific reasons underlying the finding of necessity: The Department's Division of Air Resources ("DAR") is amending 6 NYCRR Parts 200, 201 and 231. The revisions include two primary components, which are intended to incorporate: (1) key provisions of Environmental Protection Agency's ("EPA's") May 16, 2008 and October 20, 2010 NSR final rules for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micro-meters ("PM-2.5"), 73 FR 28321 ("2008 NSR PM-2.5 final rule") and 75 FR 64864 ("2010 NSR PM-2.5 final rule"), respectively; and (2) key provisions of EPA's June 3, 2010 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514 ("GHG Tailoring Rule"). As set forth further below, failure to implement the 2008 and 2010 NSR PM-2.5 final rules would have adverse impacts on public health and general welfare in the State and necessitates the adoption of an emergency rule by the Department. Similarly, failure to adopt conforming provisions of the GHG Tailoring Rule as a matter of State law by January 2, 2011 would have adverse impacts on the State's general welfare, and necessitates the adoption of an emergency rule by the Department.

With regard to the first component of the instant action, NSR is a critical tool in meeting the Legislature's air quality objectives and ensuring that healthful air quality is preserved in areas of the State that meet the National Ambient Air Quality Standards ("NAAQS") for PM-2.5 and does not further degrade but actually improves in areas of the State which currently are not in attainment of the PM-2.5 NAAQS. Since the State of New York currently has areas that are designated nonattainment for PM-2.5, the Department must have a nonattainment NSR ("NNSR") program that meets the requirements of Part D of Title I of the Clean Air Act ("CAA") in order to adopt and implement permit programs for the construction, modification and operation of major stationary sources in nonattainment areas of the State.

Subsequent to the promulgation of NAAQS for PM-2.5, EPA designated the New York City metropolitan area as nonattainment for the PM-2.5 standard, 70 FR 944, January 5, 2005. NNSR is now required for new major facilities and major modifications to existing facilities that emit PM-2.5 in significant amounts in the PM-2.5 nonattainment area. NNSR requires that every new major facility and major modification at existing facilities in the PM-2.5 nonattainment area control emissions of direct PM-2.5 through the requirement that such sources achieve Lowest Achievable Emission Rate ("LAER") and obtain emission offsets. On May 16, 2008 and October 20, 2010, EPA published its final rules governing the implementation of the NSR program for PM-2.5. EPA's final rule requires, among other things, that permits address directly emitted PM-2.5 as well as pollutants responsible for secondary formation of PM-2.5, referred to as precursors.

With regard to the second component of the instant action, EPA has

recently taken multiple actions regarding the regulation of greenhouse gases ("GHGs") under the CAA: (1) the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 FR 66496 (December 15, 2009) ("Endangerment Finding"); (2) the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FR 25324 (May 7, 2010) ("Tailpipe Rule"); and (3) the Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 FR 17004 (April 2, 2010) ("Trigger Rule"). Taken together, these three EPA actions and interpretations will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's Prevention of Significant Deterioration ("PSD") and Title V permitting programs.

Also, since EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule make GHGs subject to regulation under the CAA, and because current State law uses the same relevant language as federal law, GHGs will automatically become subject to regulation as a matter of State law on January 2, 2011. Therefore, it is necessary to clarify that GHGs are required to be addressed as a matter of federal law and as a result of EPA's actions, rather than as a result of this instant action. However, this action is necessary in order to clarify and conform State law to federal law as it relates to EPA's actions to address GHG regulation under its GHG Tailoring Rule, and therein revise the relevant State applicability thresholds for GHGs under the Department's PSD and Title V programs.

On June 3, 2010, EPA published its GHG Tailoring Rule in order to address impacts of GHGs becoming subject to regulation under the CAA as of January 2, 2011. According to EPA, the current statutory mass-based applicability thresholds in the CAA, of 100 or 250 tons per year (tpy), could subject a vast number of small GHG emission sources to PSD and Title V permitting program requirements. This would create a significant burden for smaller sources, many of which would be newly subject to PSD and Title V permitting requirements, as well as cause state and local permitting authorities to be inundated with permitting review. This impact is the result of the fact that the current applicability thresholds for those programs, while appropriate for traditional pollutants such as SO₂ and NO_x, are not necessarily feasible for GHGs since GHGs are emitted in much higher volumes than traditional pollutants. Because of this, EPA promulgated the GHG Tailoring Rule which "tailors" the applicability thresholds for GHGs in order to exempt small sources from being newly subject to PSD or Title V permitting program requirements. As stated in the foregoing, since existing State regulations largely track the statutory text of the CAA in terms of the relevant applicability thresholds, smaller sources in New York will be similarly impacted. Thus, irrespective of whether GHG thresholds are tailored under the federal GHG Tailoring Rule, a vast number of small GHG emission sources in New York may likewise become subject to State PSD and Title V requirements as a matter of State law on January 2, 2011.

While the Department intends to follow EPA's approach under the federal GHG Tailoring Rule, the Department needs to immediately incorporate EPA's tailored applicability thresholds into State regulations before January 2, 2011. This is necessary in order to conform State regulations to federal law as it relates to EPA's GHG Tailoring Rule, and to make clear that small sources in the State with GHG emissions below the tailored thresholds of the GHG Tailoring Rule will not be newly subject to the PSD or Title V permitting programs. Without the GHG Tailoring Rule and this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit or have the potential to emit GHGs at or above the CAA statutory thresholds of 100 or 250 tpy on or after January 2, 2011. Absent a State GHG tailoring rule, numerous smaller sources in New York such as schools, restaurants, and small commercial facilities may be negatively impacted by EPA's actions to regulate GHGs.

ADVERSE IMPACTS ON PUBLIC HEALTH

Particulate matter is a generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes. EPA first established a NAAQS for PM in 1971 and has since conducted several periodic

reviews and revisions to establish both health-based (primary) and welfare-based (secondary) standards.

The health effects associated with exposure to PM-2.5 are significant. Epidemiological studies have shown a significant correlation between elevated PM-2.5 levels and premature mortality. Particulate matter, especially fine particles, contains microscopic solids or liquid droplets that can lodge deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of respiratory and cardiovascular problems including: increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing, for example; decreased lung function; aggravated asthma; development of chronic bronchitis; irregular heartbeat; nonfatal heart attacks; and premature death in people with heart or lung disease. People with heart or lung diseases, children and older adults are the most likely to be affected by particle pollution exposure. However, even healthy people may experience temporary symptoms from exposure to elevated levels of particle pollution.

Based on the foregoing, the failure to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules may have far-reaching consequences that will adversely impact public health. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules is necessary in order to preserve public health in New York State.

ADVERSE IMPACTS ON THE GENERAL WELFARE

In addition to the adverse public health impacts referenced above due to the State's failure to adopt and implement EPA's 2008 and 2010 NSR final rules incorporating health-based air quality standards for PM-2.5, there may also be significant impacts on the public welfare. New York currently has a PM-2.5 nonattainment area requiring the submittal of a State Implementation Plan ("SIP") revision in accordance with CAA requirements. As a result, the Department is required to submit to EPA a revised SIP incorporating the 2008 federal PM-2.5 NSR requirements prior to May 16, 2011. Since the CAA authorizes the EPA to impose significant sanctions for failure to submit a SIP or failure to implement a federal plan, including the withdrawal of federal highway funds and the imposition of two to one ("2:1") emission offset ratios to applicable new and modified sources in the State [CAA Section 179, 42 USC Section 7509], failure to submit a revised SIP by the May 16, 2011 deadline could have far reaching consequences which may negatively impact the public welfare. For example, the stricter emissions offset ratios will impose higher costs on State emission sources or, in some cases, possibly deter sources from commencing any new construction or essential modifications. These sanctions, along with the State's lack of authorization to issue permits for new and modified sources, could have a paralyzing effect on State commerce, significantly raising the cost of doing business and effectuating a virtual ban on construction in the State. In addition, the CAA authorizes EPA to withhold funding for certain state air pollution and planning control programs and take control of a state's air permitting programs under a Federal Implementation Plan (FIP).

Based on the foregoing, the failure to submit a revised SIP in accordance with the federal NSR rule for PM-2.5 may have far-reaching consequences that will adversely impact the general welfare. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules, and by May 16, 2011 for purposes of the 2008 NSR final rule, is necessary in order to preserve the general welfare in New York State.

Similarly, the State's failure to implement, by January 2, 2011, revised applicability thresholds which conform to EPA's GHG Tailoring Rule would have significant adverse impacts on the general welfare. As stated in the foregoing, regardless of this action, as of January 2, 2011, the Department will be required to address GHG emissions in its PSD and Title V permitting programs as a result of EPA's actions to regulate GHGs. EPA's GHG Tailoring Rule, which tailors the applicability thresholds under the Title V and PSD programs, is aimed at reducing the anticipated impact on smaller sources and on state and local permitting authorities as a matter of federal law. This action is necessary to clarify and conform State

regulations to federal law along with the relevant applicability thresholds as a matter of State law.

Without this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit more than 100 or 250 tpy of GHGs beginning on January 2, 2011. As stated in the foregoing, this is because the State's existing regulations largely track the statutory text in terms of the relevant applicability thresholds. This would result in significant adverse impacts on the general welfare for two primary reasons: (1) a vast number of small stationary sources of GHG emissions in the State would be newly required to comply with significant PSD and Title V operating permit requirements, imposing additional costs on such sources, and resulting in adverse economic impacts; and (2) the Department's PSD and Title V permitting programs would be overwhelmed by the anticipated administrative burden, severely impairing the administrative functioning of these programs, creating significant permitting delays, and resulting in significant adverse economic impact on all sources in the State that require operating permits.

If, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, a significant burden would be placed on smaller sources of GHG emissions in the State to comply with PSD or Title V operating permit requirements which would have a significant adverse impact on the general welfare of the State. The statutory applicability thresholds would newly subject a vast number of small GHG emission sources, not traditionally regulated under the CAA, to these permitting program requirements. For purposes of PSD sources that fall within the 250 tpy source categories, the Department has determined that the following source types may be impacted by EPA's regulation of GHGs: gas-fired boilers over 485,000 Btu/hr; oil-fired boilers over 350,000 Btu/hr; and wood-fired boilers over 220,000 Btu/hr. For Title V sources and PSD sources that fall within the existing 100 tpy source categories, GHG regulation would impact: gas-fired boilers over 194,000 Btu/hr; oil-fired boilers over 143,000 Btu/hr; and wood-fired boilers over 89,000 Btu/hr. Based on these projections, most single family residences would not be affected. However, a significant number of facilities that emit GHGs in quantities greater than the existing thresholds, but have never before been subject to either PSD or Title V permitting requirements, would now have to address GHGs under the state's PSD or Title V permitting programs, including many schools, auto-body garages, churches, multi-family residential buildings or dwellings, warehouses, and shopping centers. These smaller sources may be unduly burdened by the cost of new regulatory requirements, particularly individualized technology control requirements under the PSD program and complex permitting review requirements under Title V. This substantial cost on a vast number of new smaller sources would have a significant adverse impact on the State's economy.

Also, if, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, the administrative burden on the Department would be overwhelming. EPA estimates that under the current 100 and 250 tpy threshold levels, nearly 82,000 projects per year would become subject to PSD. 75 FR 31514 at 31538. This would result in an estimated \$1.5 billion per year in PSD permitting cost, a 130 times increase in current annual burden hours for permitting authorities nationwide, and an increase in permit processing time from one to three years. *Id.* at 31539. For Title V purposes, EPA estimates that six million sources, under the current 100 tpy threshold level, would need Title V operating permits nationwide, representing for permitting authorities an additional 1.4 billion in work hours, an annual cost increase of \$21 billion, and an increase in permit processing time from six months to 10 years. *Id.* at 31539-31540. In addition, EPA notes that many permitting authorities will need up to two years to hire the necessary staff to handle a 10-fold increase in PSD permits, a 40-fold increase in Title V permits, and that 90 percent of staff would need additional training related to the permitting of GHG sources.

The federal requirement to review and issue a vast number of new CAA operating permits would represent a substantial administrative burden for the Department. This substantial increase would inevitably overwhelm the resources of the Department's permitting program. As

a result, it would create a significant permitting backlog, resulting in extensive delays in permit issuance. Under such a scenario, new sources in the State would not be able to begin construction, nor would existing sources be able to make needed modifications, without the necessary PSD review and issuance of a Title V operating permit from the Department. Similarly, a source would not be able to operate in the State without a Title V permit from the Department. If the Department is unable to timely issue the necessary permits, many new projects may be halted for a significant period of time. Thus, particularly given the vast number of smaller sources that would be newly subject to these requirements, a substantial delay in permitting issuance would result in an adverse economic impact to the State.

Based on the foregoing, the failure to implement tailored applicability thresholds for GHGs under the State's PSD and Title V permitting programs as a matter of State law by January 2, 2011 would have significant adverse impacts on the State's permitting programs, numerous smaller sources, and the general economy. Therefore, an emergency rulemaking to incorporate key provisions of EPA's GHG Tailoring Rule prior to January 2, 2011 is necessary in order to preserve the general welfare in New York State.

CONCLUSIONS

The normal rulemaking process consists of several rulemaking requirements under SAPA. While the Department prefers to submit a rule through the normal State rulemaking process, compliance with the normal rulemaking requirements would be contrary to public interest since, as explained in the foregoing, the failure to implement the 2008 and 2010 federal NSR PM-2.5 final rules may unnecessarily increase the risk to public health in this State. Also, the failure to submit a revised SIP for purposes of the 2008 federal NSR PM-2.5 final rule prior to the federal deadline of May 16, 2011, and the failure to implement the GHG Tailoring Rule as a matter of State law by January 2, 2011 may have significant adverse impacts on the State's general welfare.

Subject: New Source Review requirements for proposed new major facilities and major modifications to existing facilities.

Purpose: To comply with 2008 and 2010 Federal NSR rules, correct typographical errors, and clarify existing rule language.

Substance of emergency rule: The Department of Environmental Conservation (Department) is proposing to amend Parts 200, 201, and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and "New Source Review for New and Modified Facilities" respectively.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 and add definitions for greenhouse gases and CO₂ equivalent. The definition of potential to emit will now state that secondary emissions are not to be included when calculating an emissions source's potential to emit. The definition of PM-2.5 will no longer refer to Appendix L of Part 50 of the Code of Federal Regulations and will now state that PM-2.5 is the sum of filterable PM-2.5 and material that condenses after exiting the stack forming solid or liquid particulates. Greenhouse gases are defined as the aggregate group of carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The definition of CO₂ equivalent states that each of the six greenhouse gases are multiplied by their global warming potential and summed to obtain emissions in terms of CO₂ equivalents.

The Part 201 amendments revise the definition of major stationary source or major source or major facility to add a CO₂ equivalent based greenhouse gas emission threshold. In addition to the current mass based thresholds applicable to greenhouse gases, the proposed revisions establish a CO₂ equivalent threshold of 100,000 tons per year for the purposes of determining if a stationary source, source, or facility is major. The definition is also revised to state that 201-2.1(b)(21)(iii) is a "Source Category List" and removes municipal waste landfills from the list.

Existing Subpart 231-2 will be revised to insert "February 19, 2009" in place of "the effective date of Subparts 231-3 through 231-13" in the title of 231-2.

Existing Subpart 231-3 will be revised by changing the title of 231-3.2 and stating in sections 231-3.2 and 3.6 that "complete applica-

tion" is referring to its definition under section 621.2. Section 231-3.3 will be removed and subsequent sections renumbered.

Existing Subpart 231-4 will be revised by adding the definition of calendar year and renumbering subsequent paragraphs, alphabetically. The definition of contemporaneous will be revised to state that it means different periods of time depending on attainment status of the location. The definitions of baseline area, major facility baseline date, and minor facility baseline date will be revised to include PM-2.5. The definition of nonattainment contaminant will be revised to include PM-2.5 precursors in the PM-2.5 nonattainment area.

Existing Subparts 231-5 and 231-6 will be revised to add regulation of PM-2.5 precursors. As a result, SO₂ will be regulated as a nonattainment contaminant in the PM-2.5 nonattainment area. Interpollutant trading ratios will also be added for PM-2.5 precursors so that direct emissions of PM-2.5 can be offset by reductions in PM-2.5 precursor emissions and PM-2.5 precursors can be offset by reductions in direct PM-2.5 emissions.

Existing Subpart 231-7 will be revised to reference Table 8 of 231-13 in 231-7.4(f)(6) for SO₂ variances.

Existing Subpart 231-8 will be revised to provide an example that shows only the same class of regulated NSR contaminant can be used for netting and reference Table 8 of 231-13 in 231-8.5(f)(6) for SO₂ variances.

Existing Subpart 231-9 will be revised to clarify language and allow CEMS to use performance specifications in 40 CFR 75.

Existing Subpart 231-10 will be revised to state that emission reduction credits (ERCs) must be the same type of regulated NSR contaminant for the purposes of netting. Subdivisions are added to allow interpollutant trading and to state that if a contaminant is regulated as a precursor under multiple programs only one set of offsets is required. The section titled mobile source and demand side management ERCs will be renamed to ERCs for emission sources not subject to Part 201.

Existing Subpart 231-11 will be revised to clarify sections in the 231-11.2 reasonable possibility provisions.

Existing Subpart 231-12 will be revised to include PSD increments for PM-2.5, significant impact levels for PM-2.5, significant monitoring concentration for PM-2.5, and reordering paragraphs 231-12.2(c)(2) and (3).

Existing Subpart 231-13, table 4, will be revised to include significant project thresholds, significant net emission increase thresholds, and offset ratios for PM-2.5 precursors. Table 5 of Subpart 231-13 will be revised to add greenhouse gases to the major facility thresholds for attainment and unclassified areas, and table 6 will be revised to add significant project thresholds and significant net emission increase thresholds for attainment and unclassified areas. The source category list will be removed and in its place will be a table listing global warming potential values.

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 March 28, 2011.

Text of rule and any required statements and analyses may be obtained from: Robert Stanton, P.E., NYSDEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 231nsr@gw.dec.state.ny.us

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Parts 200, General Provisions, 201, Permits and Registrations and 231, New Source Review (NSR) for New and Modified Facilities. First, this proposed rule will incorporate the Environmental Protection Agency's (EPA's) May 16, 2008 NSR final rule for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5). The Department incorporated some of EPA's final PM-2.5 requirements in its February 19, 2009 revisions to its PSD and nonattainment NSR programs (6 NYCRR Part 231). This proposed rulemaking will incorporate the remaining provisions of the federal PM-2.5 final rule which were not previously included in the 2009 revision to Part 231. Second, this proposed rule will incorporate conforming provisions to EPA's June 3, 2010 NSR final rule for the regulation of

Greenhouse Gases (GHGs) under its PSD and Title V programs, referred to as the Greenhouse Gas Tailoring Rule (GHG Tailoring Rule). The proposed rule will clarify the regulation of GHGs by establishing major source applicability threshold levels for GHG emissions and other conforming changes under the State's PSD and Title V programs. Third, this proposed rule will incorporate EPA's October 20, 2010 final rule which establishes the PM-2.5 increments, significant impact levels, and significant monitoring concentration. This proposed rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

1. STATUTORY AUTHORITY

The statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103, and 71-2105, and in Sections 160-169 and 171-193 of the Federal Clean Air Act (42 USC Sections 7470-7479; 7501-7515) (Act or CAA).

2. LEGISLATIVE OBJECTIVES

The Act requires states to have a preconstruction program for new and modified major stationary sources, and an operating permit program for all major sources. This rulemaking is being undertaken to satisfy New York's obligations under the Act and also to meet the environmental quality objectives of the State. This Section discusses the legislative objectives of the rulemaking, including overview of relevant federal and State statutes and regulations.

Articles 1 and 3, of the ECL, set out the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York and provide general authority to adopt and enforce measures to do so. In addition to the general powers and duties of the Department and Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air 'quality' of New York from pollution.

In 1970, Congress amended the Act "to provide for a more effective program to improve the quality of the Nation's air." The statute directed EPA to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS.

On May 16, 2008, EPA published a final rule regarding the regulation of PM-2.5 in attainment and nonattainment areas ('see' 73 Fed Reg 28321 [2008 federal NSR rule]). The May 16, 2008 federal NSR rule included the following key provisions: PM-2.5 precursors, offset trading ratios, and a SIP submission requirement.

On October 20, 2010, EPA published a final rule regarding PM-2.5 increments, significant impact levels, and significant monitoring concentration ('see' 75 Fed Reg 64864 [October 20, 2010 federal NSR rule]). The October 20, 2010 federal NSR rule included the following key provisions: PM-2.5 increments, PM-2.5 significant impact levels, PM-2.5 significant monitoring concentration, and a SIP submission requirement.

On June 3, 2010, EPA published a final NSR rule tailoring the applicability criteria that determines which stationary sources and modification projects become subject to permitting requirements for GHG emissions under the PSD and Title V operating permit (Title V) programs of the CAA ('see' 75 Fed Reg 31514 [GHG Tailoring Rule]). The GHG Tailoring Rule included key provisions regarding the list of GHGs regulated, the permitting metric used, and the permitting applicability thresholds. In response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA has taken several actions that, taken together, will result in GHGs being "subject to regulation" under the Act as of January 2, 2011. This will occur regardless of the GHG Tailoring Rule or this rulemaking. The GHG component of this rulemaking is necessary because of a number of actions taken by EPA regarding the regulation of GHGs under the CAA. This rulemaking will clarify the applicability thresholds for GHGs under the State's PSD and Title V permitting programs, in order to conform such thresholds to those set forth in the federal GHG Tailoring Rule.

3. NEEDS AND BENEFITS

The Department is undertaking this rulemaking to comply with the May 16, 2008, the June 3, 2010, and the October 20, 2010 federal NSR rules promulgated by EPA, for the regulation of PM-2.5 and GHGs. The May 16, 2008 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the May 16, 2008 federal NSR rule and submit the revisions to EPA for approval into the SIP. The GHG Tailoring Rule modified the PSD regulations with respect to GHGs at 51.166 and 52.21; the Title V regulations at 70.2, 70.12, 71.2 and 71.13; and requires states with SIP approved NSR programs to revise their regulations in accordance with the GHG Tailoring Rule and submit the revisions to EPA for approval into the SIP. The October 20, 2010 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the October 20, 2010 federal NSR rule and submit the revisions to EPA for approval into the SIP.

On December 15, 2009, EPA published its Endangerment Finding stating that GHGs contribute to climate change and are a threat to public health and the welfare of current and future generations. 'See', 74 Fed. Reg. 66,496. According to EPA, the combination of six well-mixed GHGs found in the Earth's atmosphere - carbon dioxide (CO₂); methane (CH₄); nitrous oxide (N₂O); hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulfur hexafluoride (SF₆) - form the "air pollutant" that may be subject to regulation under the CAA. 'Id'.

Following the Endangerment Finding, EPA finalized a rule establishing emission standards for GHGs from passenger cars and light-duty trucks, starting with model year 2012 vehicles. 'See' 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"). EPA also issued an interpretation that a pollutant is "subject to regulation" if it is subject to a CAA requirement establishing "actual control of emissions." 75 Fed. Reg. 17,004, 17,006 (April 2, 2010) ("Trigger Rule"). Taken together, the Endangerment Finding, Tailpipe Rule, and Trigger Rule will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's PSD and Title V permitting programs, regardless of this rulemaking.

Since many states, including New York, have incorporated identical or federally-conforming provisions into their state PSD and Title V programs, GHGs will also need to be addressed as a matter of State law. However, without this rulemaking, the literal application of the current thresholds under the State's PSD and Title V provisions will have the same adverse impact on State stationary sources and the State's permitting programs as described in the federal GHG Tailoring Rule. This means that, without this rulemaking to clarify and tailor the existing applicability thresholds in a similar manner as the federal GHG Tailoring Rule, a vast number of newly regulated facilities within the State would be required to comply with the State's existing PSD and Title V program requirements as of January 2, 2011.

Once GHGs become subject to regulation under the CAA, necessitating the review and processing of possibly thousands of new permits under the State's PSD or Title V permitting programs, the Department's ability to maintain these programs under the existing thresholds applicable to GHGs will be significantly impaired. This proposed rule incorporates and otherwise conforms to the key provisions of the federal GHG Tailoring Rule, including provisions to "tailor" the existing applicability thresholds under the PSD and Title V permitting programs, in order to reduce the anticipated burdens on newly regulated facilities in the state and to alleviate the projected impairment of the state's PSD and Title V programs.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 as well as add definitions for GHG and CO₂ equivalent (CO₂e). The definition of potential to emit will be changed to specify that secondary emissions are not included in a facility's potential to emit. The definitions of PM-10 and PM-2.5 will now state that condensable emissions are included.

The definition of major stationary source or major source or major

facility in Part 201 will be modified for GHGs to clearly establish its threshold at 100,000 tpy CO₂e in addition to maintaining the current mass based emission thresholds.

The Part 231 amendments will include the remaining provisions from EPA's May 16, 2008 PM-2.5 rule and include provisions for regulating GHGs under PSD. Precursors of PM-2.5, SO₂, and NO_x, have been added as nonattainment contaminants in the PM-2.5 nonattainment area. New York State has determined that emissions of VOCs and ammonia should not be included as PM-2.5 precursors. Interpollutant trading ratios have been added for PM-2.5 precursors by which direct emissions of PM-2.5 can be offset by reductions of SO₂ and/or NO_x. For GHGs the major facility threshold and significant project/significant net emission increase threshold have been clearly established as 100,000 tpy CO₂e and 75,000 tpy CO₂e, respectively, while maintaining the current mass based thresholds. A table has been added to 231-13 that lists the global warming potential (GWP) of the six individual gases that comprise GHGs and references the table in the federal GHG Mandatory Reporting Rule. For PSD and Title V applicability, a source's GHG emissions must equal or exceed both the mass based and CO₂e based emission thresholds. In accordance with the October 20, 2010 federal NSR rule PM-2.5 increments, SILs, and SMC have been added to their respective tables in Part 231.

These amendments will also correct existing typographical errors identified after the previous rulemaking (February 19, 2009) was completed and clarify sections of existing Parts 200, 201, and 231.

4. COSTS

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 related to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO_x as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to 1 while the ratio is 1 to 1 from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tpy instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHG's "subject to regulation" as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule, which will result in GHGs becoming subject to regulation under the CAA on January 2, 2011. One of the primary purposes of the GHG component of this rulemaking is to alleviate any such new costs by conforming State regulations to the federal GHG Tailoring Rule.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal. As stated previously, the costs associated with complying with PSD and Title V permitting requirements for GHGs are not directly attributable to these proposed amendments. Instead, any such costs are attributable to EPA's actions to regulate GHGs under the CAA.

5. PAPERWORK

The proposed amendments to Part 231 are not expected to entail any significant additional paperwork for the Department, industry, or State and local governments beyond that which is already required to comply with the Department's existing permitting program under Part 201-6 and existing NSR regulations under Part 231.

6. STATE AND LOCAL GOVERNMENT MANDATES

The adoption of the proposed amendments to Part 231 are not expected to result in any additional burdens on industry, State, or local governments beyond those currently incurred to comply with the requirements of the existing NSR process under Part 201-6, and Part 231. The proposed amendments do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of Part 231.

7. DUPLICATION

This proposal is not intended to duplicate any other federal or State regulations or statutes. The proposed amendments to Part 231 will ultimately conform the regulation to the CAA.

8. ALTERNATIVES

1. Take No Action.

The State would be in violation of federal law if no action is undertaken. New York State is required to have a SIP approved permitting program for PM-2.5 for NNSR by May 16, 2011. As for GHGs, absent the relief provided for GHG emission sources and state permitting authorities under the federal GHG Tailoring Rule, the permitting thresholds for GHGs would be set at 100 tpy and 250 tpy under the PSD program and 100 tpy under the Title V program. Under these thresholds, it is anticipated that a massive number of smaller sources, including farms, schools, and apartment buildings, would be required to comply with state PSD and Title V program requirements. Many of these sources have never had to address these types of requirements since most of these sources are too small to meet the applicability thresholds for the traditional pollutants, such as SO_x and NO_x, or have been considered exempted activities under current law. Also, as EPA recognized in its GHG Tailoring Rule, these newly subject sources of GHG emissions would undoubtedly inundate and overwhelm state permitting authorities and likely result in significant processing delays, as well as a substantial burden on the state's permitting system in general. While the existing Part 231 provisions allow for the regulation of GHGs consistent with the federal GHG Tailoring

Rule, the proposed rulemaking will clarify the new Part 231 GHG requirements for the regulated community and conform Part 231 to the federal GHG Tailoring Rule in order to reduce the anticipated burden on newly subjected sources and the State's PSD and Title V permitting programs.

9. FEDERAL STANDARDS

The proposed amendments to Part 231 are consistent with federal NSR standards.

10. COMPLIANCE SCHEDULE

The proposed amendments do not involve the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the State Register, anticipated to be in May 2011. Current permit renewal schedules for regulated industries will continue and provisions of this regulation will be incorporated at the time of permit renewal. Permits for new facilities and permit modifications for existing facilities will continue to be addressed upon submittal of a permit application by the facility, and subsequent review of such application by the Department.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide. The proposed Part 231 greenhouse gas (GHG) applicability thresholds for facilities in New York State are high enough so that it is unlikely that any small business or local government that owns or operates a facility would be newly subject to the requirements of Part 231. The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule (75 Fed Reg 31514 [GHG Tailoring Rule]) modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply

exclusively to small businesses or local governments. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. Accordingly, these requirements are not anticipated to place any undue burden of compliance on small businesses and local governments. This proposed rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

PROFESSIONAL SERVICES:

The professional services for any small business or local government that is subject to Part 231 are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements. The need for consulting engineers to address NSR applicability and permitting requirements for any new major facility or major modification proposed by a small business or local government will continue to exist.

COMPLIANCE COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO_x as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ('See', Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure that only the large-

est sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

It should be noted that this proposal does not provide for a six-month phase-in schedule for GHG-only sources as provided under the federal GHG Tailoring Rule. Although the proposed revisions are stricter than the federal GHG Tailoring Rule, the Department does not anticipate a need for a phase-in period. The Department anticipates that any proposed projects that exceed the GHG thresholds, in the first six months of rule applicability, will be subject to PSD permitting anyway as a result of emissions of non-GHG pollutants. Therefore, any cost burdens on newly subjected sources during the first six months, if any, are anticipated to be minimal.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by state and local governments.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on any small business or local government. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds and it is not anticipated that many facilities will be newly subject to Title V and PSD as a result of the regulation of GHGs.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed revisions do not substantially alter the requirements for subject facilities as compared to those requirements that currently exist. The revisions leave intact the major NSR requirements for application of LAER or BACT as appropriate, modeling, and emission offsets. Therefore, the Department believes there are no additional economic or technological feasibility issues to be addressed by any

small business or local government that may be subject to the proposed rulemaking.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

Rural areas are defined as rural counties in New York State that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide and all rural areas of New York State will be affected.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply exclusively to rural areas of the State. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements.

COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required

to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO₂ as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ('See', Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure that only the largest sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

It should be noted that this proposal does not provide for a six-month phase-in schedule for GHG-only sources as provided under the federal GHG Tailoring Rule. Although the proposed revisions are stricter than the federal GHG Tailoring Rule, the Department does not anticipate a need for a phase-in period. The Department anticipates that any proposed projects that exceed the GHG thresholds, in the first six months of rule applicability, will be subject to PSD permitting anyway as a result of emissions of non-GHG pollutants. Therefore, any cost burdens on newly subjected sources during the first six months, if any, are anticipated to be minimal.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current

thresholds. Nationwide, EPA estimates that approximately six million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by rural areas of the State.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on rural areas. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds. It is not anticipated that many facilities will be newly subject to Title V or PSD as a result of the regulation of GHGs.

RURAL AREA PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Residents of rural areas of the State will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Job Impact Statement

NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking revisions will apply statewide. The amendments to the regulations are not expected to negatively impact jobs and employment opportunities in New York State.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. Both of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at

increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:

Due to the nature of the proposed amendments to Part 231, as discussed above, no measurable negative effect on the number of jobs or employment opportunities in any specific job category is anticipated. There may be some job opportunities for persons providing consulting services and/or manufacturers of pollution control technology in relation to the new requirements.

REGIONS OF ADVERSE IMPACT:

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. The existing NSR requirements are not being substantially changed from those that currently exist.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or promote the development of any significant new employment opportunities. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors, increments, significant impact levels, significant monitoring concentration, and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller sources with respect to GHGs. The current statutory emission thresholds (mass based) for Title V applicability of 100 tons per year (tpy), and PSD applicability of 100 tpy and 250 tpy are "tailored" for GHG emissions under this rulemaking. For purposes of Title V applicability, in addition to the current mass based threshold, this rulemaking establishes a GHG carbon dioxide equivalent (CO₂e) threshold of 100,000 tpy. For purposes of PSD applicability, in addition to the current mass based thresholds, this rulemaking establishes a GHG CO₂e major facility threshold of 100,000 tpy and a CO₂e major modification threshold for existing major facilities of 75,000 tpy. As a result of the increased thresholds proposed in this rulemaking, it is not anticipated that many facilities will be newly subject to Title V and PSD program requirements as a result of EPA's actions to regulate GHGs under the Clean Air Act.

SELF-EMPLOYMENT OPPORTUNITIES:

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

NOTICE OF ADOPTION

Outdoor Wood Boilers Used to Heat Homes and Commercial Establishments

I.D. No. ENV-16-10-00035-A

Filing No. 1354

Filing Date: 2010-12-29

Effective Date: 30 days after filing

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

Action taken: Amendment of Part 200; and addition of Part 247 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101,

3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: Outdoor wood boilers used to heat homes and commercial establishments.

Purpose: Particulate emission standards and engineering controls for new outdoor wood boilers.

Substance of final rule: The Department of Environmental Conservation (Department) proposes to adopt 6 NYCRR Part 247, Outdoor Wood Boilers, and revise 6 NYCRR Part 200, General Provisions, to conform to the new rule. Outdoor wood boilers (OWBs) are defined in Part 247 as fuel burning devices (1) designed to burn wood or other fuels; (2) that the manufacturer specifies for outdoor installation or installation in structures not normally occupied by humans; and (3) that are used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device.

Definitions and General Provisions

Definitions of terms used in Part 247 are presented in Section 247.2. An OWB commencing operation on or after April 15, 2011 is defined as a 'new' OWB. The term 'commence operation' is defined as the initial start-up of the combustion chamber of an OWB after all piping and electrical connections between the OWB and the structure(s) it serves have been completed. New OWBs are further classified based upon the useful heat generated in the unit. Residential-size new OWBs are units with a thermal output rating of 250,000 British thermal units per hour (Btu/h) or less. Commercial-size new OWBs are units with a thermal output rating greater than 250,000 Btu/h.

A list of fuels which may be burned in OWBs is contained in Section 247.4. Seasoned clean wood may be burned in a OWB. 'Clean wood' is defined in section 247.2 as wood that has not been painted, stained, or treated with a coating, glue or preservative. In addition, natural gas and heating oil that meets the sulfur content limits set forth in Subpart 225-1, and non-glossy, non-colored papers, including newspaper, may be used as starter fuels. The Department may approve additional fuels for specific models of new OWBs provided that the models have been tested via United States Environmental Protection Agency (EPA) Test Method 28-OWHH with the fuels in question. A list of prohibited fuels is contained in subdivision 247.3(b). The list of prohibited fuels includes, but is not limited to, garbage, yard waste, household chemicals and animal carcasses.

Subdivision 247.3(c) prohibits the operation of any OWB in such a manner as to cause or allow emissions from such OWB that are injurious to human, plant or animal life or which unreasonably interfere with the comfortable enjoyment of life or property. Examples of situations that would trigger subdivision 247.3(c) include, but are not limited to:

- activating smoke detectors in neighboring structures;
- impairing visibility on a public highway; or
- causing a visible plume migrating from an OWB and contacting a building on an adjacent property.

Subdivision 247.3(d) prohibits the operation of any OWB in such a manner as to create a smoke plume with an opacity of 20 percent or greater (six minute mean) as determined via EPA Reference Method 9 (or equivalent).

Requirements applicable to New OWBs

The particulate emission limits, stack height and setback requirements for residential-size new OWBs are set forth in Section 247.5. Residential-size new OWBs will be subject to a weighted average particulate emission limit of 0.32 pounds per million British thermal units (mmBtu) heat output. In addition, the particulate emission rate for any test run conducted pursuant to Test Method 28-OWHH may not exceed 15.0 g/h when the burn rate is 1.5 kilograms per hour (kg/h) or less and 18.0 g/h when the burn rate is greater than 1.5 kg/h. Further, residential-size new OWBs must be located 100 feet or more from the nearest property boundary line (or 100 feet or more from the nearest residence not served by the OWB if the OWB is sited on contiguous agricultural lands of 5 or more acres) and must be equipped with a permanent stack extending a minimum of 18 feet above ground level. Notwithstanding the foregoing, the Department may require that the permanent stack extend up to two feet above the peak of any roof structure within 150 feet of the OWB when necessary to adequately disperse smoke emitted from an outdoor wood boiler.

Commercial-size new OWBs (Section 247.6) will be subject to a weighted average particulate emission limit of 0.32 pounds per million mmBtu heat output. In addition, the particulate emission rate for any test run conducted pursuant to Test Method 28-OWHH may not exceed 20.0 g/h. A commercial-size new OWB must be equipped with a permanent stack extending a minimum of 18 feet above ground level. Notwithstanding the foregoing, the Department may require that the permanent stack extend up to two feet above the peak of any roof structure within 150 feet of the OWB when necessary to adequately disperse smoke emitted from an outdoor wood boiler. Finally, a commercial-size new OWB must be located 200 feet or more from the nearest property boundary line, 300 feet

or more from the nearest residential property boundary line, and 1000 feet or more from a school. Notwithstanding the above, a commercial-size new outdoor wood boiler installed on contiguous agricultural lands larger than five acres must be sited 300 feet or more from the nearest residence not served by the outdoor wood boiler and 1000 feet or more from a school.

Requirements that Apply to Manufacturers

Sections 247.7 and 247.8 contain provisions that apply to manufacturers of new OWBs. A permanent label (Section 247.7) must be affixed to all new OWBs. The label must be made of a material that is sufficiently durable to last the lifetime of the new OWB and must contain the following information:

- a. name and address of the manufacturer;
- b. date the new OWB was manufactured;
- c. model name and number;
- d. serial number;
- e. thermal output rating in Btu/h; and
- f. certified particulate emission rate (per Section 247-1.8).

Beginning April 15, 2011, all new OWBs must be of a model certified by the Department. A model is defined in Section 247.2 as all new OWBs manufactured by a single manufacturer that are similar in all material and design respects. The certification process is set forth in Section 247.8.

Two copies of the certification application must be submitted to the Department. The following information must be contained in a manufacturer's application for certification of a model as set forth in subdivision 247.8(c):

- a. name and address of the manufacturer, model name and number, serial number, date of manufacture and the thermal output rating, in Btu/h, of the new outdoor wood boiler tested;
- b. four individual color photographs of the tested unit showing the front, back and both sides of the unit;
- c. engineering drawings and specifications for each of the following components:
 1. firebox including a secondary combustion chamber;
 2. air induction systems;
 3. baffles;
 4. refractory and insulation materials;
 5. catalysts;
 6. catalyst bypass mechanisms;
 7. flue gas exit;
 8. door and catalyst bypass gaskets;
 9. outer shielding and coverings;
 10. fuel feed system; and
 11. blower motors and fan blade size.
- d. final test report prepared by the testing laboratory; and
- e. a copy of the operation and maintenance instructions.

In order for a model to be certified, the particulate emission rate must be determined by a test laboratory via Test Method 28-OWHH or other test method approved in writing by the Department. A test laboratory must be accredited by the EPA for testing wood-burning residential space heaters in accordance with 40 CFR 60 Subpart AAA, Section 60.535 or another organization approved by the Department. A test laboratory must have no conflict of interest or financial gain in the outcome of the testing of new OWBs.

The Department shall issue a certificate of compliance if the application is deemed complete and the model is determined to be compliant with the particulate emission limits set forth in Section 247.5 or Section 247.6 (as appropriate). The certificate of compliance will be valid for five years and may be renewed by the manufacturer. If a manufacturer makes a change in the design of a model resulting in a change in the thermal output rating of the model, that change constitutes the creation of a new model.

Requirements that Apply to Distributors

Section 247.9 applies to distributors. The term 'distributor' is defined in Section 247.2 as any person who sells or leases a new OWB to an end user. Distributors are required to provide a prospective buyer or lessee of a new OWB with a 'Notice to Buyers' (Notice). The following must be included in the Notice:

- a. an acknowledgement that the buyer or lessee was provided a copy of Part 247;
- b. a list of fuels that may be burned in the OWB as set forth in paragraph 247.8(d)(1) of Part 247; and
- c. a statement that even if the requirements set forth in Part 247 are met, there may be conditions or locations in which the use of a new outdoor wood boiler unreasonably interferes with another person's use or enjoyment of property or even damage human health, and if such a situation occurs the owner or lessee of the new outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.

The Notice must be signed and dated by both the buyer (or lessee) and the distributor when the sale (or lease) of the new OWB is completed. In addition, the following information must be added to the Notice:

- a. name and address of the owner (or lessee) of the new OWB;
- b. street address where the OWB was installed (if different from item (a) above);
- c. name of the manufacturer, model and date of manufacture of the new OWB;
- d. height of the permanent stack for the new OWB; and
- e. distance to the nearest property boundary line or residence not served by the OWB, as appropriate.

The distributor must submit the completed Notice to the Department's regional office for the area where the OWB is installed within seven (7) days of making delivery of the new OWB into the possession of the buyer or lessee.

Severability Clause

Section 247.10 contains a severability clause stating that in the event any provision of Part 247 is held to be invalid, the remainder of Part 247 shall continue in full force and effect.

Part 200 - General Provisions

Section 200.9 will be amended to incorporate by reference EPA Test Method 28-OWHH and Reference Method 9. Further, test laboratories that conduct the Test Method 28-OWHH testing must be accredited by EPA pursuant to Section 60.535. Therefore, the Department is incorporating Section 60.535 by reference in this regulation.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 247.1, 247.2(b)(7), (8), (9), (10), (11), (12), (13), (14), (15), (16), 247.5(b), (c), 247.6(c), (d), 247.9(b)(1), 247.10(a), (b)(1), (2), (3), (4), (c)(1), (2), (3) and 247.11.

Text of rule and any required statements and analyses may be obtained from: John Barnes, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: airregs@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule was approved by the Environmental Board.

Summary of Revised Regulatory Impact Statement

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations.

Outdoor wood-fired boilers are fuel burning devices (1) designed to burn wood or other fuels; (2) that the manufacturer specifies for outdoor installation or installation in structures not normally occupied by humans; and (3) that are used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device. A typical unit looks like a small metal storage shed with a stack. Outdoor wood boilers can also be used to heat swimming pools.

The Department is proposing operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards, and stack height and setback requirements are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

Needs and Benefits

Outdoor wood boilers have become more popular in recent years as a means to reduce home energy costs. In New York State, OWB sales increased from 606 units in 1999 to an estimated 2,640 units in 2007¹. The increased use of OWBs has resulted in numerous complaints filed by neighbors of OWB owners. Complaints have been filed with the Department, the New York State Department of Health, the Office of the Attorney General and local municipalities, many of which have adopted ordinances to regulate OWBs.

During the winter months, the Department's regional offices receive numerous complaints regarding smoke from OWBs. Some complaints are filed during the summer months as well since some OWBs are used to heat swimming pools and provide hot water for the residences they serve. At this time, the Department uses the provisions in Part 211, "General Prohibitions", to initiate an enforcement action against the owner/operator of an OWB subject to a complaint(s). In order to prosecute an enforcement action under Part 211, Department staff must observe an opacity violation via EPA Federal Reference Method 9 or document conditions that clearly "interfere with the comfortable enjoyment of life or property." Department staff must be present when the OWB is operating to meet the heat demand of the building it services and under the proper daylight conditions in order to conduct a Method 9 analysis. Due to the cyclical nature of the operation of an OWB, collecting evidence for an enforcement action is a labor-intensive activity. A regulation detailing the compli-

ance requirements that owners/operators must meet is necessary in order for Department staff to effectually resolve nuisance complaints.

In general, the Department continues to support the use of renewable resources such as wood, and the proposed rule will allow the continued use of OWBs while minimizing the environmental impacts. The primary benefit of the proposed rule, if promulgated, would be a significant improvement in the quality of life for those impacted by a plume from a neighbor's OWB. This will be accomplished by reducing the potential exposures to wood smoke, thus mitigating both the public nuisance and adverse health effects that have led to the complaints filed with government agencies. In addition, the promulgation of Part 247 would give the Department a tool to effectually resolve complaints. These benefits will be achieved by implementing the provisions described in the following five sections.

1. General Provisions

Only seasoned clean wood² and wood pellets made from clean wood may be burned in an OWB. Natural gas, heating oil that complies with the fuel sulfur limits set forth in Subpart 225-1 and non-glossy, non-colored paper, including newspaper, may be used as starter fuels if so recommended by the manufacturer. A list of prohibited fuels is incorporated into Section 247.3. The list of prohibited fuels includes garbage, household chemicals, plastics, plywood and coal³ and is incorporated into the rule to provide guidance to OWB operators.

A nuisance provision is included in Part 247 which prohibits the operation of an OWB in a manner that may cause injury or damage to human life or which unreasonably interferes with another person's enjoyment of life or property. Examples of situations where this provision would apply are set forth in Section 247.3. However, this list is not intended to be exhaustive and other situations may trigger the nuisance provision. This provision is designed to make it easier for the Department to resolve complaints regarding the operation of an OWB.

No OWB may be operated in a manner that causes a plume with an opacity greater than 20 percent (six minute mean) as determined using EPA Reference Method 9 (or equivalent). An opacity reading greater than this standard may be an indication that an OWB is not being operated properly (e.g., improper fuel(s) being used). This provision is included in Part 247 to give the Department another tool to effectually resolve complaint situations.

2. Requirements for New OWBs

New OWBs, defined as those units that commence operation on or after April 15, 2011, must be equipped with a permanent stack extending not less than 18 feet above grade. The Department may require that the stack height extend up to two feet above the roof peak of any structure located within 150 feet of the OWB when necessary to adequately disperse smoke emitted from an outdoor wood boiler. In addition, based upon location-specific factors such as the height of nearby buildings, terrain, etc., the permanent stack may need to be taller than 18 feet in order to avoid creating nuisance conditions. In the proposed rule, the stack height requirement was a minimum of two feet above the peak of any roof structure located within 150 feet of an OWB and no less than 18 feet above ground level. The Department revised the stack height requirement to be a minimum of 18 feet above ground level. In addition, a stack may need to extend 2 feet higher than the peak of any roof structure within 150 feet of an OWB in order to address nuisance conditions. This revision will allow the Department, on a case-by-case basis, to require a stack height up to two feet above the roof peak when necessary to adequately disperse smoke. This provision will further enhance the Department's enforcement tools under the nuisance provisions.

There are two classifications of new OWBs in Part 247. Units with thermal output ratings of 250,000 British thermal units per hour (Btu/h) or less are classified as 'residential-size' OWBs. Units with thermal output ratings greater than 250,000 Btu/h are classified as 'commercial-size' OWBs. New residential-size OWBs must meet a weighted average particulate matter emission limit of 0.32 pounds per million Btu heat output. The particulate matter emission rate for any burn category with a burn rate less than or equal to 1.5 kilograms per hour (kg/h) may not exceed 15.0 g/h. The particulate matter emission rate for any burn category with a burn rate greater than 1.5 kg/h may not exceed 18.0 g/h. New commercial-size OWBs must meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output. In addition, the particulate emission rate for any one burn category may not exceed 20.0 g/h. These emission standards are comparable to the standards promulgated by the states of Vermont, Massachusetts and Maine and the standards proposed by the state of Pennsylvania.

Setback requirements are set forth in Part 247 for new OWBs. A new residential-size OWB must be located 100 feet or more from the nearest property boundary line. A new commercial-size OWB must be located 200 feet or more from the nearest property boundary line, 300 feet or more from the nearest property boundary line of a residentially zoned property and 1000 feet or more from a school. There are exceptions incorporated

into Part 247 whereby the setbacks may be based upon the distance to the nearest residence not served by the OWB if an OWB is sited on contiguous agricultural lands of five or more acres.

3. Requirements that Apply to Manufacturers

There are two provisions in Part 247 that apply to OWB manufacturers. Manufacturers are responsible for applying for a certificate of compliance for each model line they plan to sell in New York. Second, manufacturers are responsible for affixing a permanent label on each OWB to be sold in New York. The following information must be included on the permanent label is set forth in Section 247.7:

- a. name and address of the manufacturer;
- b. date the OWB was manufactured;
- c. model name and number;
- d. serial number;
- e. thermal output rating of the OWB in British thermal units per hour; and
- f. certified particulate emission rate.

These provisions are included in Part 247 to help ensure that only certified OWBs are sold in New York from April 15, 2011 forward.

4. Requirements that Apply to Distributors

Distributors must provide a 'Notice to Buyers' (Notice) to prospective buyers or lessees of OWBs. The following must be included in the Notice:

- a. an acknowledgement that the buyer or lessee was provided with a copy of Part 247;
- b. a list of the fuels that may be burned in the OWB as set forth in the certificate of compliance issued to the manufacturer; and
- c. a statement that even if the requirements set forth in Part 247 are met, there may be conditions or locations in which the use of an OWB unreasonably interferes with another person's use or enjoyment of property or even damage human health, and if such a situation occurs the owner or lessee of the outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.

The Notice must be signed by the distributor and buyer (or lessee) when the sale (or lease) is completed. At that time, the following information must be incorporated into the Notice:

- a. name and address of the owner or lessee of the OWB;
- b. street address where the OWB was installed (if different from item (a) above);
- c. name of manufacturer, model line and date of manufacture of the OWB;
- d. height of the permanent stack for the OWB; and
- e. distance from the OWB to the nearest property boundary line or residence not served by an OWB, as appropriate.

In the proposed rule, the Department included a requirement that a distributor also provide the height of the peak of the highest roof structure within 150 feet of a new OWB. This requirement was removed from Part 247 due to changes made to the stack height requirements. The rule now requires a stack height extending up to two feet above the roof peak of any structure located within 150 feet of the OWB only if the Department determines that it is necessary to adequately disperse smoke emitted from an OWB. Since this determination will be made on a case-by-case basis, it is not necessary for the distributor to include in the Notice a determination of the height of roof structures within 150 feet.

The distributor must submit the completed Notice to the Regional Air Pollution Control Engineer for the location where the OWB was installed within seven (7) days of making delivery of the new OWB to the buyer or lessee. These provisions are included in Part 247 to help ensure that only certified OWBs are sold in New York beginning on April 15, 2011 and that the stack height and setback requirements for new OWBs are met.

Costs

Manufacturers will incur research and development costs to develop new OWBs that can meet the emission limits set forth in Part 247. In order for a new OWB model line to be certified under Part 247, it must be tested per the protocols of Method 28-OWHH by an independent laboratory. The cost to manufacturers to have units tested is approximately \$15,000 to \$20,000 per certification test. Most New England states are in the process of promulgating rules similar to Part 247. Therefore, the costs for manufacturers to comply with Part 247 will be the same as the costs to comply with OWB regulations promulgated in other northeastern states. As a result, the cost of new OWBs in New York is expected to be commensurate with other northeastern states.

All new OWBs will be subject to an eighteen-foot minimum stack height requirement. The estimated cost for stack extensions is \$200 for each four foot section. A typical cost for extending an OWB stack is expected to be \$600 plus installation costs.

Paperwork

All new OWBs must be of a model certified by the Department. Every five years, manufacturers will need to apply for certification for each model they want to sell in New York. The Department will develop an ap-

plication form which manufacturers will need to complete and submit with a certification package. The information that must be included in each application package is set forth in Section 247.8.

The distributor and owner (or lessee) of a new OWB must sign and date a "Notice to Buyers" (Notice) form supplied by the distributor. The original copy of the signed Notice must be submitted to the appropriate regional office within seven (7) days of delivery of the OWB to the owner/operator. The information that must be included in the Notice is specified in Section 247.9.

¹ "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., p. 4 (March 2008).

² The term 'clean wood' is defined in Section 247.2 as wood that has not been painted, stained or treated with any other coatings, glues or preservatives, including, but not limited to, chromated copper arsenate, creosote, alkaline copper quaternary, copper azole or pentachlorophenol.

³ See Section 247.3(b) for the complete list of prohibited fuels. This list should not be considered the complete list of prohibited fuels since any fuel not authorized under Section 247.4 (Approved Fuels) will be considered a prohibited fuel.

Revised Regulatory Flexibility Analysis

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. Part 247 is intended to regulate OWBs at the statewide level under the jurisdiction of the Department of Environmental Conservation (Department) and remove the regulatory burden from municipal governments.

The Department is proposing operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards and stack height and setback requirements are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS

The greatest impacts of the provisions in Part 247 will be felt by manufacturers of new OWBs. The Department anticipates that the statewide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

There are more than 20 OWB manufacturers in the United States and Canada¹. Most OWB manufacturers will need to redesign their models in order to comply with the particulate emission standards set forth in Sections 247.5 and 247.6. Manufacturers that develop model lines that meet the particulate emission standards for new OWBs will be able to compete in the New York market after the new requirements take effect on April 15, 2011. Manufacturers that do not develop model lines that meet the particulate emission standards for new OWBs will not be able to compete in the New York market.

Distributors working with manufacturers that develop models certified under Part 247 will be able to continue doing business in New York April 15, 2011 and beyond so long as they only sell models that comply with Part 247.

COMPLIANCE REQUIREMENTS

Part 247 sets forth compliance requirements that apply to OWB owners, manufacturers and distributors of new OWBs. A new OWB is defined as one that commences operation on or after April 15, 2011. The requirements that will apply to small businesses, specifically manufacturers and distributors, are discussed in the following two sections. There are no compliance requirements set forth in Part 247 that will specifically apply to local governments. The compliance requirements for OWBs in use as of the effective date of Part 247 do not impact manufacturers or distributors and are further discussed in the Rural Area Flexibility Analysis.

Requirements for Manufacturers

Sections 247.7 and 247.8 contain provisions that apply to OWB manufacturers. A permanent label (Section 247.7) must be affixed to all new OWBs. The label must be made of a material that is sufficiently durable to last the lifetime of the OWB and must contain the following information:

- name and address of the manufacturer;
- date the OWB was manufactured;
- model name and number;
- serial number;
- thermal output rating in Btu/h; and
- certified particulate emission rate (per Section 247.8).

Effective April 15, 2011, all new OWBs sold in New York must be of a model certified by the Department. A model is defined in Section 247.2 as all new OWBs manufactured by a single manufacturer that are similar in all material and design respects. The certification process is set forth in Section 247.8.

Two copies of the certification application must be submitted to the Department. The following information must be contained in a manufacturer's application for certification of a model as set forth in paragraph 247.8:

- name and address of the manufacturer, the model name and number, serial number, date of manufacture and the thermal output rating, in Btu/h, of the outdoor wood boiler tested;
- four color photographs of the tested unit showing the front, back and both sides of the unit;
- engineering drawings and specifications for each of the following components:
 - firebox including a secondary combustion chamber;
 - air induction systems;
 - baffles;
 - refractory and insulation materials;
 - catalysts;
 - catalyst bypass mechanisms;
 - flue gas exit;
 - door and catalyst bypass gaskets;
 - outer shielding and coverings;
 - fuel feed system; and
 - blower motors and fan blade size.
- final test report prepared by the testing laboratory; and
- a copy of the operation and maintenance instructions.

In order for a model to be certified, the particulate emission rate must be determined by a test laboratory using Test Method 28-OWHH, which was developed by the EPA. Alternative methods may be used upon the written approval of the Department. A test laboratory must be accredited by the EPA for testing wood-burning residential space heaters in accordance with 40 CFR 60 Subpart AAA, Section 60.535 or another organization approved by the Department. A test laboratory must have no conflict of interest or financial gain in the outcome of the testing of OWBs.

The Department will issue a certificate of compliance if the application is deemed complete and the model is determined to be compliant with the particulate emission limits set forth in Section 247.5 or Section 247.6 (as appropriate). The certificate of compliance will be valid for five years. A change in the design of a model resulting in a change in the thermal output rating of the model constitutes the creation of a new model.

Requirements for Distributors

Section 247.9 applies to distributors. The term 'distributor' is defined in Section 247.2 as any person who sells or leases an OWB to an end user. Distributors are required to provide a prospective buyer or lessee of an OWB with a 'Notice to Buyers' (Notice). The following must be included in the Notice:

- an acknowledgement that the buyer or lessee was provided a copy of Part 247;
 - a list of the fuels that may be burned in the OWB as set forth in the certificate of compliance issued to the manufacturer; and
 - a statement that even if the requirements set forth in Part 247 are met there may be conditions or locations in which the use of an outdoor wood boiler unreasonably interferes with another person's use or enjoyment of property or even damage human health and if such a situation occurs the owner or lessee of the outdoor wood boiler causing the situation may be subject to sanctions that can include a requirement to remove the device at their own expense as well as any other penalty allowed by law.
- The Notice must be signed and dated by the buyer (or lessee) and the distributor when the sale (or lease) of the OWB is completed. In addition, the following information must be added to the Notice:
- name and address of the owner (or lessee) of the OWB;
 - street address where the OWB was installed (if different from item (a) above);
 - name of the manufacturer, model and date of manufacture of the OWB;
 - height of the permanent stack for the OWB; and
 - distance from the OWB to the nearest property boundary line or the nearest residence not served by an OWB, as appropriate.

In the proposed rule, the Department included a requirement that a distributor also provide the height of the peak of the highest roof structure within 150 of a new OWB. This requirement was removed from Part 247 due to changes made to the stack height requirements. The rule now requires a stack height extending up to two feet above the roof peak of any structure located within 150 feet of the OWB only if the Department determines that it is necessary to adequately disperse smoke emitted from an OWB. Since this determination will be made on a case-by-case basis, it is not necessary for the distributor to include in the Notice a determination of the height of roof structures within 150 feet.

The distributor must submit the completed Notice to the Department's regional office for the location where the OWB is installed within seven (7) days of making delivery of the OWB into the possession of the buyer (lessee).

PROFESSIONAL SERVICES

Manufacturers must have a model line tested by an independent test laboratory in order to generate the emissions data that need to be included in a certification application.

COMPLIANCE COSTS

All new OWBs must be equipped with a permanent stack extending at least 18 feet above ground level. Stack extensions will need to be installed on most OWBs. The estimated cost for stack extensions is \$200 for each four foot section². A typical cost for extending an OWB stack is expected to be \$600 but could be more if a stack needs to be higher than 18 feet high in order to avoid creating a nuisance condition.

Manufacturers will incur research and development costs to develop new OWBs that can meet the particulate emission limits set forth in Part 247. In order for a new OWB model line to be certified under Section 247.8, it must be tested per the protocols of Method 28-OWHH by an independent laboratory. The cost to manufacturers to have units tested is approximately \$15,000 to \$20,000 per certification test. New York State is not the only state promulgating emission standards for new OWBs. Most New England states have promulgated rules similar to Part 247. Therefore, the costs to comply with Part 247 will be similar to those in the New England states with OWB regulations. As a result, the cost of new OWBs in New York is expected to be commensurate with such costs in other northeastern states.

Distributors who purchased OWBs wholesale from manufacturers will not be able to sell non-compliant OWBs after April 14, 2011. Therefore, any unsold inventory of non-compliant OWBs would need to be sold to distributors in other states, sold back to the manufacturers or taken as a business loss.

MINIMIZING ADVERSE IMPACT

Part 247 is based upon a model rule developed by the Northeast States for Coordinated Air Use Management (NESCAUM) in January 2007. This model rule was developed as a guide for member states³ as they draft their OWB regulations.

One of the key aspects of the NESCAUM model rule is that new OWB models must be certified by the state environmental agency. There are recertification and quality assurance provisions in the model rule along with a requirement that a model be recertified if a design change is made. In Part 247, the certification of a model is valid for five years. Manufacturers may make minor changes to their models without the expense of recertifying the model as long as the thermal output rating of the model does not change. In this way, a manufacturer does not have to submit design specification changes to the Department to determine if the model needs to be recertified.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

Department staff met with representatives of OWB manufacturers on June 15, 2007, April 16, 2009 and December 2, 2009. A copy of the draft rule was sent to stakeholders on November 14, 2007 and a stakeholder meeting was held on November 29, 2007 in Albany.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

As of September 2010, there are at least 19 models that have qualified under Phase 2 of the USEPA's voluntary program and that may meet the proposed PM limits for new residential OWBs. The Department has not reviewed the test reports prepared by independent test laboratories and other documentation for these models. The EPA has reviewed the test reports and determined that the models meet the requirements of the EPA's Outdoor Wood-fired Hydronic Heaters Program (see www.epa.gov/woodheaters/models.htm).

¹ "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., pp. 31-32 (Oct. 2005).

² www.VentingPipe.com. Part number 9607. Downloaded September 12, 2007.

³ The NESCAUM member states are New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine.

Revised Rural Area Flexibility Analysis

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. The Department anticipates that the state-wide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

The Department is proposing operational requirements, such as specifying which fuels may or may not be used, that will apply to all OWBs. Particulate emission standards and stack height and setback requirements are proposed for new OWBs. The process by which manufacturers may apply to certify new OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors are also set forth in the proposed rule. The term 'distributor' is defined in Part 247 as one who sells or leases outdoor wood boilers to end users.

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

Part 247 will apply statewide. The Department and other governmental agencies¹ have received numerous complaints regarding smoke emissions from OWBs. Outdoor wood boilers have become more popular in recent years as a means to reduce home energy costs. In New York State, OWB sales increased from 606 units in 1999 to an estimated 2,640 units in 2007².

COMPLIANCE REQUIREMENTS

The compliance requirements for new OWBs are set forth in Part 247. Outdoor wood boilers that commence operation on or after April 15, 2011 are considered new OWBs. The requirements that apply to manufacturers and distributors of new OWBs in rural areas are presented in the "Regulatory Flexibility Analysis for Small Businesses and Local Governments" for this rulemaking.

The compliance requirements that apply to end users of OWBs are presented in the following three sections.

General Provisions

The approved fuels that may be burned in an OWB are listed in Section 247.4. Seasoned clean wood³ and wood pellets made from clean wood may be burned in an OWB. Natural gas, heating oil that complies with the fuel sulfur limits set forth in Subpart 225-1 and non-glossy, non-colored paper, including newspaper, may be used as starter fuels⁴.

A list of prohibited fuels is included in Section 247.3 as guidance to OWB operators. The list of prohibited fuels includes, but is not limited to, garbage, household chemicals, plastics, plywood and coal⁵.

A nuisance provision is included in Section 247.3 which prohibits the operation of an OWB in a manner that may cause injury or damage to human life or which unreasonably interferes with another person's enjoyment of life or property. Examples of situations where this provision would apply are set forth in Part 247(see subdivision 247.3(c)). However, this list is not intended to be exhaustive and other situations may trigger the nuisance provision. This provision is designed to make it easier for the Department to resolve complaints regarding the operation of an OWB.

No OWB may be operated in a manner that causes a plume with an opacity greater than 20 percent (six minute mean) as determined using EPA Reference Method 9 (or equivalent). An opacity reading greater than this standard may be an indication that an OWB is not being operated properly (e.g., improper fuel(s) being used). This provision is included in Part 247 to give the Department another tool to effectually resolve complaint situations.

New OWBs

There are two classifications of new OWBs in Part 247. Units with thermal output ratings of 250,000 British thermal units per hour (Btu/h) or less are classified as 'residential-size' OWBs. Units with thermal output ratings greater than 250,000 Btu/h are classified as 'commercial-size' OWBs. All new OWBs must be equipped with permanent stacks extending a minimum of 18 feet above ground level. The Department may require that the stack height extend up to two feet above the roof peak of any structure located within 150 feet of the OWB when necessary to adequately disperse smoke emitted from an outdoor wood boiler. In the proposed rule, the stack height requirement was a minimum of two feet above the peak of any roof structure located within 150 feet of an OWB and no less than 18 feet above ground level. The Department revised the stack height requirement to be a minimum of 18 feet above ground level. In addition, a stack may need to extend two feet higher than the peak of any roof structure within 150 feet of an OWB in order to address nuisance conditions. This revision will allow the Department, on a case-by-case basis, to require a stack height up to two feet above the roof peak when necessary to adequately disperse smoke. This provision will further enhance the Department's enforcement tools under the nuisance provisions. The particulate emission limits are slightly different for each classification.

New residential-size OWBs must meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output as determined using Test Method 28-OWHH. The particulate matter emission rate for any burn category with a burn rate less than or equal to 1.5 kilograms per hour (kg/h) may not exceed 15.0 g/h⁶. The particulate matter emission rate for any burn category with a burn rate greater than 1.5 kg/h may not exceed 18.0 g/h. These emission standards are analogous to the EPA's standards for indoor woodstoves (40 CFR 60 Subpart AAA). New commercial-size OWBs must also meet a weighted average particulate emission limit of 0.32 pounds per million Btu heat output, but the particulate emission rate for any one burn category may not exceed 20.0 g/h.

A new residential-size OWB must be located 100 feet or more from the nearest property boundary line. A new commercial-size OWB must be located 200 feet or more from the nearest property boundary line and 300 feet or more from the nearest property boundary line of a residentially zoned property and 1000 feet or more from the nearest school. There are exceptions incorporated into Part 247 whereby the setbacks may be based upon the distance to the nearest residence not served by the OWB if an OWB is sited on contiguous agricultural lands of five or more acres.

COSTS

All new OWBs will be subject to an eighteen-foot minimum stack height requirement. The estimated cost for stack extensions is \$200 for each four foot section. A typical cost for extending an OWB stack is expected to be \$600 plus installation costs.

MINIMIZING ADVERSE IMPACTS

Setback requirements for new OWBs installed on contiguous agricultural lands of five acres or more may be based upon the distance from an OWB to the nearest residence not served by the OWB. This applies to the 100-foot setback for residential-sized OWBs and the 300-foot setback for commercial-sized OWBs. This exception was incorporated into the rule to give farmers more flexibility for installing OWBs based on comments received by the Department stating that farm houses in rural areas are generally not sited close to one another but may be sited near a roadway or other property boundary line. Commenters also noted that farmers may own one or more adjoining properties that create the property boundary line.

RURAL AREA PARTICIPATION

The Department conducted a stakeholder meeting on November 29, 2007. Among the stakeholders that attended were representatives of the New York Farm Bureau and the Empire State Forest Products Association. In addition, the Department held several public hearings on Part 247 throughout the state, many of which were located in rural areas.

¹ The New York State Department of Health, the Office of the Attorney General and municipal governments have received complaints regarding smoke emanating from OWBs.

² "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State," Judith Schreiber et. al., p. 4 (March 2008).

³ The term 'clean wood' is defined in Part 247 as wood that has not been painted, stained or treated with any other coatings, glues or preservatives, including, but not limited to, chromated copper arsenate, creosote, alkaline copper quaternary, copper azole or pentachlorophenol.

⁴ The Department may approve the use of additional fuels on a model-by-model basis if data becomes available showing that the emission limits set forth in Part 247 can be met.

⁵ See Section 247.3(b) for the complete list of prohibited fuels. This list should not be considered the complete list of prohibited fuels since any fuel not authorized under Section 247.4 (Approved Fuels) will be considered a prohibited fuel.

⁶ A discussion regarding Test Method 28-OWHH and the burn categories is presented in the "Regulatory Impact Statement" for this rulemaking.

Revised Job Impact Statement

The purpose of Part 247 is to establish regulatory requirements for outdoor wood boilers (OWBs), most of which are not subject to any current federal or state regulations. These sources may currently be subject to municipal ordinances which have been adopted in some areas due to the lack of federal or state regulations. These ordinances were generally adopted to address complaints received by municipal governments from residents living in the vicinity of OWBs. The Department anticipates that the state-wide standards for OWBs contained in Part 247 will provide support and consistency to local governments that have been struggling with this issue.

The Department is proposing to establish particulate emission limits and stack height and setback requirements for new OWBs (units commencing operation on or after April 15, 2011). Operational requirements that will apply to all OWBs are incorporated into the proposed rule. The process by which manufacturers may apply to certify their OWB models for sale in New York is set forth in the proposed rule. The requirements that will apply to distributors¹ are also set forth in the proposed rule.

NATURE OF IMPACT

Most OWB manufacturers will need to redesign their models in order to comply with the particulate matter emission standards set forth in Sections 247.5 and 247.6. In the opinion of the Department, the technology exists for manufacturers to develop compliant OWB models². Manufacturers that develop model lines that meet the particulate emission standards for new OWBs will be able to compete in the New York market after the new requirements take effect on April 15, 2011. Manufacturers that do not develop model lines that meet the particulate emission standards for new OWBs will not be able to compete in the New York market.

OWB manufacturers have been aware of the Department's Part 247

rulemaking effort since 2007. Several New England states have adopted emission standards similar to those included in Part 247. The rule allows a limited sell-through period, until April 14, 2011, for distributors to sell existing stock. Therefore, in the opinion of the Department, no additional time is necessary to sell non-conforming OWBs.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The jobs and employment opportunities affected by this rulemaking are those associated with manufacturers and distributors of OWBs in New York. There are more than 20 OWB manufacturers in the United States and Canada³. The number of distributors in New York is not known. The Department anticipates that the net effect on employment opportunities will be small since the technology needed to meet the particulate emission limits existed as of May 2008.

REGIONS OF ADVERSE IMPACT

Part 247 will apply state-wide. All OWB manufacturers and distributors in New York will be required to comply with the proposed regulations, if adopted.

MINIMIZING ADVERSE IMPACT

The proposed particulate emission limits for new OWBs can be met with current technology.

SELF-EMPLOYMENT OPPORTUNITIES

The net effect on business opportunities for self-employment (distributors or OWB installers) is expected to be small because OWBs may continue to be sold and installed in New York under the proposed regulations after April 15, 2011, so long as the OWBs meet the requirements of this proposal.

¹ The term 'distributor' is defined in Part 247 as any person who sells or leases new OWBs to end users.

² As of December 2, 2009, there are ten models which may meet the proposed particulate matter limits for new residential OWBs. The Department has not reviewed the test reports prepared by the independent test laboratories and other documentation for these models. The United States Environmental Protection Agency (EPA) has reviewed the test reports and determined that these models meet the requirements of the EPA's Outdoor Wood-fired Hydronic Heaters Program (see www.epa.gov/woodheaters/models.htm).

³ Schreiber, Judith et. al., "Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State", October 2005, pages 31-32.

Assessment of Public Comment

Comments received from April 21, 2010 through 5:00 P.M., July 2, 2010

A total of 483 distinct comments were submitted by the public in response to the Department's proposed rule for regulating outdoor wood boilers (Part 247). The purpose of this summary is to highlight the key issues raised by the public and the Department's response to those issues. The remainder of this document is divided into seven sections. General comments regarding the rule are discussed in Section 1. The three major areas addressed by commenters were the phase out and seasonal use restrictions for existing outdoor wood boilers (OWBs) and the stack height provisions applicable to both new and existing OWBs. The comments received on those three issues are discussed in Sections 2, 3, and 4, respectively. Issues relating to the setback requirements and emission limits for new OWBs are discussed in Sections 5 and 6. Finally, comments pertaining to enforcement issues are discussed in Section 7.

Section 1 - General Comments

General comments in favor of the rule fell into four categories. These comments included support of regulating OWBs and support of regulation in order to protect the rights of those living near an OWB to enjoy their property or for the health of their families. Other commenters supported regulating OWBs to reduce conflicts with neighbors and the likelihood and expense of litigation. The Department thanked these commenters for their support of Part 247. Some commenters stated their support of a state-wide rule due to inadequate or lack of local ordinances or the lax enforcement of local ordinances. The Department thanked those commenters for their support of the rule and agreed that state-wide standards must be established in order to reduce the impacts of pollution from OWBs.

Comments dealing with general opposition to the rule also fell into several categories. The Department disagrees with those commenters and reiterated the reasons for regulating OWBs which were outlined in the Regulatory Impact Statement (RIS). In addition, some commenters advocated that OWBs be regulated by local governments. The Department is aware of situations where people have unsuccessfully sought local ordinances for regulating OWBs and anticipates that the state-wide standards contained in Part 247 will provide support and consistency to local governments that have been struggling with how to regulate OWBs.

Section 2 - Phase Out Provisions

The Department received more comments regarding the phase out provisions for existing OWBs included in Section 247.10 than any other aspect of the proposed rule. Although some commenters were in favor of the phase out provisions as proposed or with some modification, the vast majority of the commenters addressing this issue were opposed to the phase out provision. While the comments in opposition to the phase out provisions varied slightly, they consisted of one or more of the following statements: cannot afford to replace an existing OWB; cannot afford an alternative fuel source; the expected lifetime of an OWB is greater than ten years; other appliances and vehicles are not required to be taken out of service after the warranty period expires; existing OWBs were purchased legally and in good faith; and no other state has required the phase out of existing OWBs. Some commenters inquired if the phase out of existing OWBs would be accompanied with some type of re-imbursement program.

After careful consideration, the Department has decided to revisit this issue. Therefore, at this time, the Department will not finalize this portion of Part 247 relating specifically to the phase out of existing OWBs.

Section 3 - Seasonal Use Restrictions

The comments received concerning the seasonal use restrictions were mixed. Some commenters supported the proposed seasonal restrictions while others were opposed to the provisions altogether. Several commenters suggested seasonal restrictions that were longer or shorter than the provisions in the proposed rule. After careful consideration, the Department has decided to revisit this issue. Therefore, at this time, the Department will not finalize this portion of Part 247 relating specifically to the seasonal use restrictions for existing OWBs.

Section 4 - Stack Height Provisions

While some commenters supported the proposed provisions and some supported an 18-foot minimum stack height, most commenters were opposed to the proposed stack height provisions. Statements in opposition included one or more of the following: cost; engineering and safety concerns; aesthetics; and that the higher stacks will cause existing OWBs to operate differently. Some commenters suggested that stack height be determined on a case-by-case basis in order to remedy legitimate nuisance situations. Other commenters advocated that stack height requirements be established by local governments.

In response to comments concerning the stack height requirements, the Department acknowledged that the vast majority of comments were in opposition to the proposed provisions. Most of the objections came from form letters developed by OWB manufacturers and the New York Farm Bureau (NYFB). Such objections were surprising considering the OWB manufacturers' and NYFB's roles in suggesting the stack height provisions included in the proposed rule.

The Hearth Patio & Barbeque Association's (HPBA) OWB Caucus and the NYFB advocated during the stakeholder process that the Department change the minimum stack height requirements from a minimum of 18 feet above ground level to "two feet higher than the height of adjacent structures."

After reviewing public comments on this matter, the Department has modified the minimum stack height requirements by removing the extra stack height requirements suggested by the HPBA and NYFB. Furthermore, the Department has decided to require stack height requirements only for new OWBs at this time. The Department will revisit this issue in the future with respect to existing OWBs. Therefore, at this time, the Department will not finalize this portion of Part 247 relating specifically to the stack height requirements for existing OWBs.

The final rule requires a minimum stack height of 18 feet for new OWBs. There may be cases where a stack will need to be higher than 18 feet above ground level and those determinations will be made on a case-by-case basis. In those cases, a stack height extending up to two feet above the roof peak of any structure located within 150 feet of the OWB is now only required if the Department determines that it is necessary to adequately disperse smoke emitted from an OWB. This will help alleviate nuisance conditions on a case-by-case basis and account for any relevant conditions, such as nearby barns and silos.

Section 5 - Setback Requirements

Several commenters supported setback requirements in general or the specific provisions in the proposed rule. The Department thanked those commenters for their comments. Some commenters advocated for minimum lot size. The Department responded that there is no minimum lot size required in Part 247. However, in order to meet the 100-foot setback for a new residential-size OWB, one would likely need at least a one-acre lot. Other commenters advocated for stricter setback requirements. The Department noted that in the model rule developed by the Northeast States for Coordinated Air Use Management (NESCAUM), there were no setback requirements for new OWBs meeting the emission limits in Part 247. Setback requirements for new OWBs are included in Part 247 to ensure that as more OWBs are installed, the plumes from these OWBs will be sufficiently dispersed prior to reaching any receptors.

Several commenters opposed setbacks for new OWBs or advocated that

setback requirements be established by local governments. The Department responded to these comments by stating that NESCAUM concluded that no setback requirements were necessary for residential-size new OWBs based upon computer modeling conducted by the Department. The Department proposed the 100-foot setbacks as an engineering control (margin of safety). The Department cannot envision every scenario regarding how a new OWB will be operated. If OWB owners operate their units in compliance with Part 247, then the Department is confident that the particulate matter (PM) levels at distances greater than 100 feet from OWBs will not cause a public health concern. The 100-foot setback in the rule likely requires a minimum parcel size of one acre. An exception is provided in Part 247 for new residential-sized OWBs installed on contiguous agricultural lands larger than five acres whereby the setback would be based on the distance to the nearest residence not served by the OWB. In such cases, it would be expected new OWBs would be spaced far enough apart such that a receptor would not be impacted by multiple OWBs. The Department is aware that even with these setback requirements there may be cases in which a nuisance situation still occurs. These situations will be dealt with on a case-by-case basis.

Section 6 - Emission Limits

Statements in support and opposition to establishing emission limits for new OWBs were submitted. The Department thanked the commenters for their comments and as stated that in the RIS, the purpose of Part 247 is to establish regulatory requirements to reduce pollution from OWBs, especially new OWBs, which are not subject to any current federal or state regulations.

Some commenters advocated that the Department adopt stricter PM emission limits such as was adopted by the State of Washington. In response, the Department stated that consideration was given to adopting a rule similar to the rule adopted by the State of Washington. As stated in the RIS, while some of the provisions of the Washington rule were incorporated into Part 247, the overall approach in that rule was rejected because the Department believes that the provisions of Part 247 would allow for the continued use of OWBs which are fired with a renewable fuel, thus reducing the State's dependence on fossil fuels.

Section 7 - Enforcement Issues

There were several comments and questions regarding how the provisions of Part 247 will be enforced. Commenters inquired as to who is authorized to enforce the provisions of the rule; whether surprise inspections will be conducted; and how complaints should be filed. The Department responded that the Department, through its Divisions of Air Resources and Law Enforcement will enforce Part 247. Complaints may be made by calling the Department's regional office for that locality.

NOTICE OF ADOPTION

Sanitary Condition of Shellfish Lands

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

Filing No. 4

Filing Date: 2011-01-03

Effective Date: 2011-01-19

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

Action taken: Amendment of Part 41 of Title 6 NYCRR.

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

Subject: Sanitary Condition of Shellfish Lands.

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

Text of final rule: 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

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

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

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

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

(‘h’) During the period December 1 - February 28, both days inclusive, all that area of East Bay, Hempstead Bay, and all other bays creeks and tributaries south of a line running southeasterly from the northwestern most point of East Island along the northern shoreline of East Island; to the northeasternmost point of land at East Island; continuing southeasterly to the southernmost point of land at Low Island at the northwestern base of the Goose Creek Bascule Bridge; continuing southerly across Goose Creek along the western side of said bascule bridge (Wantagh State Parkway-Jones Beach Causeway); to Green Island and running southerly along the western coast of Green Island to the southeasternmost point of the Sloop Channel Bridge; to the Eastern Shore of Sripe Island; running north along the northern coast of Sripe Island over the channel to the northern coast of Deep Creek Meadow to the northwesternmost point and; east of a line running northerly from the northwesternmost point at Deep Creek Meadow to the southern tip of Middle Island; and north along the western coast of Middle Island to the northwestern most tip of East Island.

Subparagraph 41.3(b)(1)(iii) through clause 41.3(b)(2)(i)(‘c’) remain unchanged.

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

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

(‘d’) All that area of Nicoll Bay lying within a 500 foot radius of the southernmost tip of the pier on the western side of Homan Creek at the Town of Islip’s Bayport Beach.

Renumbered clauses 41.3(b)(2)(i)(‘e’) through 41.3(b)(2)(i)(‘n’) remain unchanged.

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

Existing clauses 41.3(b)(5)(iv)(‘a’) and (‘b’) are repealed.

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

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

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

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

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

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

(‘d’) During the period from May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor and

tributaries lying southeast of a line extending northeasterly from the northeasternmost point of land on the peninsula located at the western side of the entrance into “Head of the Harbor” (local name), at the southern end of Three Mile Harbor and continuing to the western terminus of Breeze Hill Road, and lying north of a line extending northeasterly from the northernmost corner of the residence located at South Pond Road on the western shoreline, to the northern side of the entrance of an unnamed creek on the opposite eastern shoreline (the entrance to this creek is located approximately 350 feet northwest of the entrance to Gardiner’s Marina).

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

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

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

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

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

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

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

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

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

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

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

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

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

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 41.2 and 41.3.

Text of rule and any required statements and analyses may be obtained from: Gina Fanelli, NYSDEC, 250 N. Belle Meade Rd., East Setauket, NY 11733, (631) 444-0482, email: gmfanell@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 of Environmental Conservation.

Revised Regulatory Impact Statement

This statement explains why a revised Regulatory Impact Statement is not required to accompany this Notice of Adoption. Nonsubstantive changes

were made to text of the proposed rule to correct typographical and grammatical errors. The words “to” and “and” were added where they were unintentionally omitted. The date of February 31 was changed to February 28.

Revised Regulatory Flexibility Analysis

This statement explains why a revised Regulatory Flexibility Analysis is not required to accompany this Notice of Adoption. Nonsubstantive changes were made to text of the proposed rule to correct typographical and grammatical errors. The words “to” and “and” were added where they were unintentionally omitted. The date of February 31 was changed to February 28.

Revised Rural Area Flexibility Analysis

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

Revised Job Impact Statement

This statement explains why a revised Job Impact Statement is not required to accompany this Notice of Adoption. Nonsubstantive changes were made to text of the proposed rule to correct typographical and grammatical errors. The words “to” and “and” were added where they were unintentionally omitted. The date of February 31 was changed to February 28.

Assessment of Public Comment

The New York State Department of Environmental Conservation (DEC or department) is proposing to amend 6 NYCRR Part 41, “Sanitary Condition of Shellfish Lands” to reclassify areas that were originally designated as certified or seasonally certified for the harvest of shellfish to seasonally uncertified or uncertified year-round. The reclassifications are based on evaluations of water quality data and the determination that the affected areas do not meet the bacteriological standards for certified shellfish lands during all or part of the year.

Several comments were received from one municipality.

1. Comment: The department will make no further changes to the classification of areas within that commenter’s particular town of residence “...until after the next three year cycle of data collection was complete...” in 2013.

Department’s response: Bacteriological data are collected regularly as part of Environmental Conservation Law statutorily mandated sanitary surveys of shellfish lands in the marine district of the State. The department reviews the data on an annual basis. If an annual review indicates that water quality in an area has improved, then a new comprehensive analysis of water quality data can be performed to determine if areas meet the bacteriological criteria to support upgrading the classification of areas which were downgraded by the rule making.

2. Comment: The department used data from as long ago as 1997 to evaluate water quality for the cold weather portion of the year.

Department’s response: In compliance with requirements of the National Shellfish Sanitation Program (NSSP) and maintaining statistical validity, analyses of bacteriological data to evaluate water quality in an area must include at least 30 data points for the sampling stations in the area being evaluated. When the evaluation of the data is for only a limited portion of the year, for example November through April, then several more years worth of data are required to provide 30 data points. As new data are added, older data are dropped out of the analyses.

3. Comment: It was noted that although water quality had declined, as stated in a DEC water quality evaluation report, no new pollution sources were observed in the area since 2006.

Department’s response: Water quality is often affected by both direct and indirect non-point source runoff. Some sources that gener-

ate intermittent non-point runoff, particularly indirect sources, may not be readily observed while others may be hidden and not observed. Systematic random sampling is used to monitor water quality in areas affected by non-point sources. It is possible that changes to existing pollution sources, the introduction of new, hidden sources or other factors could have caused the level of fecal coliform bacteria in an area to increase above the acceptable level for certified shellfish harvesting areas. Additionally, runoff caused by rainfall can vary from year to year which will affect the results of bacteriological examinations of water samples. If sampling happens to be done shortly after rainfall events in a particular year, as can happen with randomly scheduled sampling, then elevated fecal coliform levels may be detected in those samples.

4. Comment: It does not seem appropriate for the department to use fecal coliform data “by default” to evaluate water quality.

Department’s response: In 2003, the department’s microbiology laboratory switched to a method for detecting coliform bacteria in water samples that yields results within 24 hours. That method only detects fecal coliform bacteria in samples, therefore, evaluations of water quality in shellfish harvesting areas must be based on that fecal coliform data. The NSSP accepts that method for detecting fecal coliform bacteria and has determined that the total and fecal coliform standards for classifying shellfish harvesting areas provide equivalent public health protection. The U.S. Food and Drug Administration has evaluated the department’s growing area classification and microbiology laboratory programs and found them to be in compliance with the requirements of the NSSP.

5. Comment: The department keeps areas within a marina seasonally uncertified for the harvest of shellfish during the summer months, even though “water quality is better.”

Department’s response: The NSSP requires that all areas within marinas with more than 10 boats be classified as uncertified (closed) for the harvest of shellfish when the boats are present, which is during the late spring, summer and early autumn months. Marine sanitation devices on boats are potential, direct sources of fecal material located in very close proximity to shellfish harvesting areas. The intermittent or occasional discharges that can come from boats in marinas or mooring areas are not readily detected by systematic random sampling which is conducted approximately every 60 days during those months when boats are present in marinas.

6. Comment: It may not be valid for the department to use data analyses that included fecal coliform data that the commenter characterized as “outliers” (elevated fecal coliform levels in a few water samples following heavy rainfall and runoff) to evaluate water quality in an area.

Department’s response: The water quality data included in the analyses for the area in question was collected using systematic random sampling. Sampling is scheduled as much as eight (8) weeks before samples are collected in an area, with no knowledge of the rainfall-runoff conditions that may affect water quality in an area when the samples are collected. To be classified as certified, water quality in an area must meet the NSSP and New York State fecal coliform standards specified in the departments regulations. Water quality in an area, as measured by fecal coliform levels in samples, must meet those standards under typical post-rainfall/runoff conditions. Variability in water quality in a harvest area that exceeds the inherent variability of the bacteriological method used to examine water samples is an indication that the area has excessively variable water quality, under typical post-rainfall conditions, that is not consistent with the safe harvest of shellfish for direct human consumption.

7. Comment: In addition to imposing additional restrictions on shellfishing in Three Mile Harbor and Hog Creek, the department has not implemented conditional shellfish harvesting programs and commercial harvesters have suffered economic losses.

Department’s response: Decisions regarding the classification of shellfishing areas as certified or uncertified that are based on the analyses of fecal coliform data are made independently from the department’s operation of conditional harvesting programs within towns. The total acreage for which classifications were downgraded in the two areas of concern to the commenter is approximately 3.1

percent (57 acres) of the total certified area (2,655 Acres) within the commenter's town. Approximately 14 acres, or 25 percent, of the total of reclassified acres will be available to commercial harvesters (baymen) during several months of the year. Annual shellfish landings data reported to the department by wholesale shellfish shippers, for a large reporting area that includes Three Mile Harbor and Hog Creek, indicate that 167 bushels of shellfish (hard clams, soft clams and oysters) were harvested in 2008 and 275 bushels of shellfish (hard clams, soft clams and oysters) were harvested in 2009, for an average of about 3 bushels per week in 2008 and about 5 bushes per week in 2009 for the entire, larger reporting area.

8. Comment: Shellfish seeding programs which have been in place for years are now at risk due to inconsistent and outdated data.

Department's response: The department does not agree that shellfish seeding programs are at risk. Seeding programs operated by an agency in the commenter's town have not been placing juvenile (seed) shellfish in the areas affected by the reclassifications. With the foreknowledge that the areas are now designated as uncertified either year-round or during a part of the year, that agency can avoid placing juvenile shellfish in those areas. The department does not agree that the data are inconsistent and outdated. The water quality data have been collected using the same sample planning method since 1997 and the NSSP requires that at least 30 data points must be included in the data set to generate statistically acceptable data analyses.

Department of Health

EMERGENCY RULE MAKING

Distributions from the Health Care Initiatives Pool for Poison Control Center Operations

I.D. No. HLT-03-11-00009-E

Filing No. 1363

Filing Date: 2010-12-31

Effective Date: 2011-01-01

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

Action taken: Amendment of section 68.6 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2500-d, 2807-j and 2807-l

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

Specific reasons underlying the finding of necessity: Section 40(e) of Part B of Chapter 109 of the Laws of 2010 authorizes the Commissioner to issue the proposed regulations on an emergency basis in order to meet the timeframes prescribed by the enacted 2010/11 New York State (NYS) Budget related to implementing a statewide consolidation of Regional Poison Control Center (RPCC) services. Section 13 of Part B of Chapter 109 of the Laws of 2010 (10th Extender Bill enacted June 7, 2010) decreased total Health Care Initiatives (HCI) Pool funding to the RPCCs and directed consolidation of PCC services down from five RPCCs statewide to two RPCCs. To implement consolidation, effective January 1, 2011, the Commissioner has removed the designation of three Centers, thereby eliminating their eligibility for HCI Pool grant funding, and designated two RPCCs (one upstate and one downstate) which remain eligible on an ongoing basis for HCI Pool grant monies. Consolidation down to two RPCCs statewide restructured the geographical service area that the surviving RPCCs are now responsible for and rendered the existing HCI Pool funding distribution methodology contained in section 68.6 of 10 NYCRR obsolete. The proposed amendment establishes a new distribution methodology that will allow for more equitable distribution of available HCI Pool funds to the remaining two RPCCs on an ongoing basis effective January 1, 2011.

Subject: Distributions from the Health Care Initiatives Pool for Poison Control Center Operations.

Purpose: Revises the methodology for distributing HCRA grant funding to Regional Poison Control Centers (RPCCs).

Text of emergency rule: Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations is REPEALED and a new Section 68.6 is added to read as follows:

Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations

(a) *The monies available for distribution from the Health Care Initiatives (HCI) Pool for poison control center operations shall be distributed on a semi-annual basis in accordance with the methodology below:*

(1) *Population density by county, as established by the latest available decennial census data for New York State (NYS) as determined by the U.S. Census Bureau, shall be the basis for allocating available HCI Pool monies for distribution to the regional poison control centers.*

(2) *Population density applicable to the total county geographic area served by each regional poison control center shall be determined and the center's percentage to total NYS population density shall be calculated.*

(3) *Available HCI Pool monies shall be distributed proportionally to each regional poison control center based on the center's percentage population density served to total NYS population density.*

(b) *The Commissioner shall consider only those applications for prospective revisions of the projected pool distributions which are in writing and are based on errors, whether mathematical or clerical, made by the department in the pool distribution calculation process. Applications made pursuant to this subdivision must be submitted within thirty days of receipt of notice of the projected pool distribution for the calendar year.*

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 March 30, 2011.

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

Regulatory Impact Statement

Statutory Authority:

The statutory authority for the regulation is contained in sections 2500-d(7), 2807-j, and 2807-l(1)(c)(iv) of the Public Health Law (PHL), which authorizes the Commissioner to make distributions from the Health Care Initiatives (HCI) Pool to the Regional Poison Control Centers (RPCCs). This HCI Pool funding is intended to assist the Centers with meeting the operational costs of providing expert poison call response and poison consultation services on a 24/7 basis to health care professionals and the public statewide.

Legislative Objectives:

The enacted 2010/11 New York State (NYS) Budget (10th Extender Bill, Section 13 of Part B of Chapter 109 of the Laws of 2010) decreased total HCI Pool funding to the RPCCs and directed consolidation of PCC services down from five RPCCs statewide to two RPCCs (one upstate and one downstate). To implement consolidation, effective January 1, 2011, the Commissioner has removed the designation of three Centers, thereby eliminating their eligibility for HCI Pool grant funding, and designated two RPCCs, one located at SUNY Syracuse University Hospital as the upstate RPCC and another located at Bellevue Hospital as the downstate RPCC, which remain eligible on an ongoing basis for HCI Pool grant monies. Consolidation down to two RPCCs restructured the geographical service area the surviving RPCCs are now responsible for and rendered the HCI Pool funding distribution methodology contained in section 68.6 of 10 NYCRR obsolete. Under the current methodology a Center's award is fixed at an amount established based on pre-HCRA (1996) operating costs. The methodology is outdated and provides no sensitivity to reflect current RPCC operations, both from a cost and a programmatic standpoint.

Needs and Benefits:

Effective January 1, 1997, the New York Prospective Hospital Reimbursement Methodology (NYPHRM) system expired and was replaced by a new system established under the Health Care Reform Act (HCRA) of 1996. HCRA substantially deregulated hospital reimbursement, allowing insurers, employers and other health care payers to freely negotiate rates of payment with hospitals, rather than base their payments as previously done on the Medicaid rates. For hospitals that sponsored PCCs, and for Emergency Room (ER) services in particular, the Medicaid ER rate included cost consideration for PCC operations. Under HCRA deregulation and effective January 1, 1997, forward, other payers were no longer obligated to recognize such PCC costs in their reimbursement rates to the sponsoring hospitals, placing financial support for this imperative public health service in jeopardy. To address this concern, enhanced funding for PCC operations was made available to the Centers through HCRA HCI Pool grant funding.

Effective January 1, 1997, forward, the HCI Pool grant amounts calculated for each PCC were determined based on each Center's ratio of projected revenue shortfall created by the expiration of the NYPHRM,

plus allocated Medicare costs, to total projected revenue shortfall. PCC cost as reported on the affiliated hospital's 1996 Institutional Cost Report was utilized as the basis for this calculation, and once established the award amount was fixed for the given PCC at the 1996 determined grant dollar amount. This methodology, in place since the implementation of the HCRA, provides no flexibility to appropriately respond to changes in PCC operations over time or to recognize the impact on operating costs of State mandated PCC restructuring, as provided for in the enacted 2010/11 State Budget.

The proposed amendment repeals the existing obsolete provisions and establishes a new distribution methodology that will allow for more equitable distribution of available HCI Pool funds, as appropriated annually by the legislative/budget process, to the remaining two RPCCs on an ongoing basis, effective January 1, 2011.

COSTS:

Costs to State Government:

There will be no additional costs to State government as a result of implementation of the regulation. To the extent that funds are appropriated annually by a given enacted State budget, the proposed amendment serves only to revise the methodology by which such appropriated Pool funds will be distributed to the RPCCs effective January 1, 2011, forward.

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties.

Costs to Local Government:

There will be no additional costs to local governments as a result of these amendments. The funds are State grants with no local district share of costs (not Medicaid funds).

Costs to the Department of Health:

There will be no additional costs to the Department of Health.

Local Government Mandates:

This regulation does not impose any program, service, duty or other responsibility on any county, city, town, village, school district, fire district or other special district.

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

An alternative was evaluated prior to the selection of the proposed distribution methodology that considered the volume of human exposure calls by county as received by the RPCCs over time. Historically, the Centers have not consistently reported such data to the Department over the past decade, particularly as it relates to county specific call volume. The Department acknowledges that the American Association of Poison Control Centers (AAPCC) owns and manages a large database on poison information and human exposure calls. However, the reports they produce are generic in nature and do not offer the requisite state specific, by county, information that would be necessary to serve as a basis for Pool fund distributions. Though customized reports are available for sale, it is unknown whether reporting to the database on all calls is a mandatory requirement of PCC nationwide or to what degree the AAPCC database is inclusive of all poison related calls/services for a given PCC/state (by county). Furthermore, any such special reports would come at a cost to the Department and may not appreciably improve decision making relative to distributing HCI Pool grant funding. Population density related to the geographic areas served by the two RPCCs, as determined by the US Census Bureau's latest decennial survey data, provides a common ground that should fairly reflect each Center's scope of obligation for poison call response (exposure calls), poison consultation services (poison information requests) and poison education responsibilities for their respective service areas.

Federal Standards:

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

Compliance Schedule:

The proposed amendment establishes a revised distribution methodology for HCI Pool grant funds. There is no period of time necessary for regulated parties to achieve compliance with the regulation.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required pursuant to Section 202-b(3)(a) of the State Administrative Procedures Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on small businesses or local governments, and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to

Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact on small businesses and local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on rural areas, and will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact rural areas.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities. The proposed regulation replaces an existing obsolete methodology for determining grant funding to Regional Poison Control Centers. The proposed regulation will have no implications for job opportunities.

**EMERGENCY
RULE MAKING**

Ambulatory Patient Groups (APGs) Payment Methodology

I.D. No. HLT-03-11-00010-E

Filing No. 1364

Filing Date: 2010-12-31

Effective Date: 2011-01-01

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

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

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

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulation on an emergency basis in order to meet the regulatory requirement found within the regulation itself to update the Ambulatory Patient Group (APG) weights at least once a year. To meet that requirement, the weights needed to be revised and published in the regulation for January 2011. Additionally, the regulation needs to reflect the many software changes made to the APG payment software, known as the APG grouper-pricer, which is a sub-component of the eMedNY Medicaid payment system. These changes include revised lists of payable and non-payable APGs. Finally, a brand new payment software enhancement, which allows a fee schedule payment for specific procedure codes based on predetermined fees and unit limits, needs to be reflected in the regulation.

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

Subject: Ambulatory Patient Groups (APGs) Payment Methodology.

Purpose: To refine the APG payment methodology.

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

86-8.1 - Scope

The proposed amendments to section 86-8.1 of Title 10 (Health) NYCRR add a new subdivision (a) paragraph (6) to establish new rates of payment for ambulatory care services for hospital -based alcoholism and drug abuse outpatient rehabilitation.

86-8.7 - APGs and relative weights

The proposed revision to section 86-8.7 of Title 10 (Health) NYCRR repeals all of section 86-8.7 effective January 1, 2011 and replaces it with a new section 86-8.7 that includes revised APG weights and procedure-based weights, and adds fee schedule payments for specific procedure codes based on predetermined fees and unit limits.

86-8.10 Exclusions from payment

The proposed revision to section 86-8.10 of Title 10 (Health) NYCRR amends subdivision (h) to remove APG 442 Class VII Combined Chemotherapy & Pharmacotherapy, APG 450 Observation, 492 Direct Admission for observation indicator, APG 500 Direct Admission for observation-obstetrical, and APG 501 Direct admission for observation-other diagnoses from the never pay APG list and adds APG 443 Class VII Chemotherapy Drugs to the never pay APG list. The proposed revision to section 86-8.10 of Title 10 (Health) NYCRR also amends subdivision (i) to remove APG 118 Nutrition therapy and adds APG 444 Class VII pharmacotherapy, 460 Class VIII combined chemotherapy and pharmacotherapy, 461 Class IX combined chemotherapy and pharmacotherapy, 462 Class X combined chemotherapy and pharmacotherapy, 463 Class XI combined chemotherapy and pharmacotherapy, and 464 Class XII combined chemotherapy and pharmacotherapy to the if stand alone do not pay list.

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 March 30, 2011.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through Ambulatory Patient Groups ("APGs"). The APGs refer to the Enhanced Ambulatory Patient Grouping classification system which is owned and maintained by 3M Health Information Systems. The Enhanced Ambulatory Group classification system and the clinical logic underlying that classification system, the EAPG software, and the Definitions Manual associated with that classification system, are all proprietary to 3M Health Information Systems. APG-based Medicaid Fee For Service payment systems have been implemented in several states including: Massachusetts, New Hampshire, and Maryland.

Needs and Benefits:

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs.

This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

These amendments include updated APG and/or procedure-based weights which will provide greater procedure level reimbursement precision and specificity, in addition to establishing an APG fee schedule for specific procedure codes. A deleted APG and three observation APGs were removed from the Never Pay APG list and a new chemotherapy drug APG was added to the Never pay list; the nutrition therapy APG was removed from the If Stand Alone Do not Pay list and new drug APGs (e.g., APG 444 Class VII pharmacotherapy, 460 Class VIII combined chemotherapy and pharmacotherapy, 461 Class IX combined chemotherapy and pharmacotherapy, 462 Class X combined chemotherapy and pharmacotherapy, 463 Class XI combined chemotherapy and pharmacotherapy, and 464 Class XII combined chemotherapy and pharmacotherapy) were added to the If Stand Alone do Not Pay list.

COSTS

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

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

Costs to Local Governments:

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

Costs to State Governments:

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

Costs to the Department of Health:

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

Local Government Mandates:

There are no local government mandates.

Paperwork:

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

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

These regulations are in conformance with Public Health Law section 2807(2-a)(e). Although the 2009 amendments to PHL 2807 (2-a) authorize the Commissioner to adopt rules to establish alternative payment methodologies or to continue to utilize existing payment methodologies where the APG is not yet appropriate or practical for certain services, the utilization of the APG methodology is in its relative infancy and is otherwise continually monitored, adjusted and evaluated for appropriateness by the Department and the providers. This rulemaking is in response to this continually evaluative process.

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

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

Compliance Requirements:

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

Professional Services:

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

Economic and Technological Feasibility:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Small Business and Local Government Participation:

Not applicable.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Opportunity for Rural Area Participation:

Not applicable.

Job Impact Statement

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

Insurance Department

**EMERGENCY
RULE MAKING**

Suitability in Annuity Transactions

I.D. No. INS-03-11-00006-E

Filing No. 1356

Filing Date: 2010-12-29

Effective Date: 2010-12-29

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

Action taken: Addition of Part 224 (Regulation 187) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 308, 309, 2110, 2123, 2208, 3209, 4226 and 4525; and art. 24

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

Specific reasons underlying the finding of necessity: This Part requires life insurance companies and fraternal benefit societies (“insurers”) to set standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of a transaction are appropriately addressed.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state’s most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

In fact, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the suitability of annuities. In an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, the Department must promulgate by December 31, 2010 a rule governing suitability, and another governing the use of senior-specific certifications and designations in the sale of life insurance and annuities. Given the state’s fiscal crisis and the low interest rate environment, which could encourage unsuitable annuity sales, the federal grant money would help fund critical efforts to protect not only senior citizens, but also all consumers purchasing annuities in New York.

For the reasons stated above, an emergency adoption of Regulation No. 187 is necessary for the general welfare of New Yorkers.

Subject: Suitability in Annuity Transactions.

Purpose: Set forth standards and procedures for recommendations to consumers with respect to annuity contracts.

Text of emergency rule: Section 224.0 Purpose.

The purpose of this Part is to require insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners’ Suitability in Annuity Transactions Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. To date, more than 30 states have implemented the NAIC Model, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York.

Section 224.1 Applicability.

This Part shall apply to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended.

Section 224.2 Exemptions.

Unless otherwise specifically included, this Part shall not apply to transactions involving:

(a) a direct response solicitation where there is no recommendation made; or

(b) a contract used to fund:

(1) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(2) a plan described by Internal Revenue Code sections 401(a), 401(k), 403(b), 408(k) or 408(p), as amended, if established or maintained by an employer;

(3) a government or church plan defined in Internal Revenue Code section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Internal Revenue Code section 457;

(4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(5) a settlement or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process.

Section 224.3 Definitions.

For the purposes of this Part:

(a) Consumer means the prospective purchaser of an annuity contract.

(b) Insurer means a life insurance company defined in Insurance Law section 107(a)(28), or a fraternal benefit society as defined in Insurance Law section 4501(a).

(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that results in a purchase or replacement of an annuity contract in accordance with that advice.

(d) Replace or Replacement means a transaction subject to Part 51 of this Title (Regulation 60) and involving an annuity contract.

(e) Suitability information means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

(1) age;

(2) annual income;

(3) financial situation and needs, including the financial resources used for the funding of the annuity;

(4) financial experience;

(5) financial objectives;

(6) intended use of the annuity;

(7) financial time horizon;

(8) existing assets, including investment and life insurance holdings;

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; and

(12) tax status.

Section 224.4 Duties of Insurers and Insurance Producers.

(a) In recommending to a consumer the purchase or replacement of an annuity contract, the insurance producer, or the insurer where no insurance producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer's investments and other insurance policies or contracts and as to the consumer's financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

(1) the consumer has been reasonably informed of various features of the annuity contract, such as the potential surrender period and surrender charge, availability of cash value, potential tax implications if the consumer sells, surrenders or annuitizes the annuity contract, death benefit, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, guaranteed interest rates, insurance and investment components, and market risk;

(2) the consumer would benefit from certain features of the annuity contract, such as tax-deferred growth, annuitization or death or living benefit;

(3) the particular annuity contract as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or replacement of the annuity contract, and riders and similar product enhancements, if any, are suitable (and in the case of a replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer's suitability information; and

(4) in the case of a replacement of an annuity contract, the replacement is suitable including taking into consideration whether:

(i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), be subject to tax implications if the consumer surrenders or borrows from the annuity contract, or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

(ii) the consumer would benefit from annuity contract enhancements and improvements; and

(iii) the consumer has had another annuity replacement, in particular, a replacement within the preceding 36 months.

(b) Prior to the recommendation of a purchase or replacement of an

annuity contract, an insurance producer, or an insurer where no insurance producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

(c) Except as provided under subdivision (d) of this section, an insurer shall not issue an annuity contract recommended to a consumer unless there is a reasonable basis to believe the annuity contract is suitable based on the consumer's suitability information.

(d)(1) Except as provided under paragraph (2) of this subdivision, neither an insurance producer, nor an insurer, shall have any obligation to a consumer under subdivision (a) or (c) of this section related to any annuity transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate material information provided by the consumer;

(iii) a consumer refuses to provide relevant suitability information and the annuity purchase or replacement is not recommended; or

(iv) a consumer decides to enter into an annuity purchase or replacement that is not based on a recommendation of the insurer or the insurance producer.

(2) An insurer's issuance of an annuity contract subject to paragraph (1) of this subdivision shall be reasonable under all the circumstances actually known to the insurer at the time the annuity contract is issued.

(e) An insurance producer or an insurer, where no insurance producer is involved, shall at the time of purchase or replacement:

(1) document any recommendation subject to subdivision (a) of this section;

(2) document the consumer's refusal to provide suitability information, if any; and

(3) document that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

(f) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and insurance producers' compliance with this Part. An insurer may contract with a third party to establish and maintain a system of supervision with respect to insurance producers.

(g) An insurer shall be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

(h) No insurance producer shall make a recommendation to a consumer to purchase an annuity contract about which the insurance producer has inadequate knowledge.

(i) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

(1) truthfully responding to an insurer's request for confirmation of suitability information;

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

Section 224.5 Insurer Responsibility.

The insurer shall take appropriate corrective action for any consumer harmed by a violation of this Part by the insurer, the insurance producer, or any third party that the insurer contracts with pursuant to subdivision (f) of section 224.4 of this Part. In determining any penalty or other disciplinary action against the insurer, the superintendent may consider as mitigation any appropriate corrective action taken by the insurer, or whether the violation was part of a pattern or practice on the part of the insurer.

Section 224.6 Recordkeeping.

All records required or maintained under this Part, whether by an insurance producer, an insurer, or other person shall be maintained in accordance with Part 243 of this Title (Regulation 152).

Section 224.7 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, except where such act or practice shall be a defined violation, as defined in section 2402(b) of the Insurance Law, and in either such case shall be a violation of section 2403 of the Insurance Law.

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 March 26, 2011.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301 308, 309, 2110, 2123, 2208, 3209, 4226, 4525, and Article 24 of the Insurance Law.

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

Section 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

Section 309 authorizes the Superintendent to make examinations into the affairs of entities doing or authorized to do insurance business in this state as often as the Superintendent deems it expedient.

Section 2110 provides grounds for the Superintendent to refuse to renew, revoke or suspend the license of an insurance producer if, after notice and hearing the licensee has violated any insurance laws or regulations.

Section 2123 prohibits an agent or representative of an insurer from making misrepresentations, misleading statements and incomplete comparisons.

Section 2208 provides that an officer or employee of a licensed insurer or a savings bank who has been certified pursuant to Article 22 is subject to section 2123 of the Insurance Law.

Section 3209 mandates disclosure requirements in the sale of life insurance, annuities, and funding agreements.

Section 4226 prohibits an authorized life, or accident and health insurer from making misrepresentations, misleading statements, and incomplete comparisons.

Section 4525 applies Articles 2, 3, and 24 of the Insurance Law, and Insurance Law Section 2110(a), (b), and (d) through (f), and Sections 2123, 3209, and 4226 to authorized fraternal benefit societies.

Article 24 regulates trade practices in the insurance industry by prohibiting practices that constitute unfair methods of competition or unfair or deceptive acts or practices.

2. Legislative objectives: The Legislature has long been concerned with the issue of suitability in sales of life insurance and annuities. Chapter 616 of the Laws of 1997, which, in part, amended Insurance Law § 308, required the Superintendent to report to the Governor, Speaker of the Assembly, and the majority leader of the Senate on the advisability of adopting a law that would prohibit an agent from recommending the purchase or replacement of any individual life insurance policy, annuity contract or funding agreement without reasonable grounds to believe that the recommendation is not unsuitable for the applicant (the "Report"). The Legislature set forth four criteria that an agent would consider in selling products, including: a consumer's financial position, the consumer's need for new or additional insurance, the goal of the consumer and the value, benefits and costs of any existing insurance.

In drafting the Report, the Department considered the legislative changes set forth in Chapter 616 of the Laws of 1997, and the Department's subsequent regulatory requirements that were designed to improve the disclosure requirements to consumers that purchased or replaced life insurance policies and annuity products. It was the Department's determination in the Report that additional time was needed to assess the efficacy of those changes.

Since the Department's Report, the purchase of annuities have become complex financial transactions resulting in a greater need for consumers to rely on professional advice and assistance in understanding available annuities and making purchase decisions. While the Financial Industry Regulatory Authority ("FINRA") regulation and standards for the sale of certain variable annuities have existed nationwide for some time, the National Association of Insurance Commissioners ("NAIC") adopted, in 2003 (and further revised in 2010), the Suitability in Annuity Transactions Model Regulation (the "NAIC Model") for all annuity transactions. To date, more than 30 states have implemented the NAIC Model. Accordingly, this Part is intended to bring these national standards for annuity contract sales to New York. In addition, in light of a low interest rate environment that encourages unsuitable annuity sales, and federal incentives to impose suitability standards, the minimum suitability standards are critical.

3. Needs and benefits: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. It regulates the activities of insurers and producers who make recommendations to consumers to purchase or replace annuity contracts to ensure that insurers and producers make suitable recommendations based on relevant information obtained from the consumers.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the recently enacted Dodd-Frank Wall Street Reform

and Consumer Protection Act of 2010 (the "Act") places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

4. Costs: Section 224.4(f) of New York Comp. Codes R. & Reg., tit. 11, Part 224 ("Regulation 187") requires an insurer to establish a supervision system designed to ensure an insurer's and its insurance producers' compliance with the provisions of Regulation 187. Additionally, § 224.4(g) requires an insurer to be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

As previously stated, the standards and procedures required by this rule are substantially similar to the standards and procedures set forth in the NAIC Model and the NASD Rule 2310. Thus, insurers selling variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers who sell fixed annuities in states where the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers should incur minimal additional costs in order to comply with the requirements of this rule.

The rule does not impose additional costs to the Insurance Department or other state government agencies or local governments.

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

6. Paperwork: The rule requires an insurance producer or an insurer to document: any recommendation subject to § 224.4(a) of Regulation 187; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation. Additionally, all records required or maintained in accordance with this rule must be maintained in accordance with Part 243 (Regulation 152).

The documentation required in this rule is substantially similar to the requirements of the aforementioned NAIC Model and NASD Rule 2310. As the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the similar provisions in other jurisdictions. As a result, minimal additional paperwork is expected to be required of most insurers in order to comply with the requirements of this rule.

7. Duplication: Sales of insurance products that are securities under federal law, such as variable annuities, are required to meet the suitability standards and procedures in the NASD Rule 2310. However, there currently exists no state or federal rule that specifically requires application of suitability standards in the sales of all annuities to New York consumers.

8. Alternatives: This rule is a modified version of the NAIC Model. NAIC Model provisions detailing the procedures and standards of the supervision system required to be established by an insurer and the insurance producer training requirements were not included in this rule.

In 2009, the Department held four public hearings throughout the state to gather information about suitability in order to ascertain whether additional oversight and regulation was needed to protect consumers when they are considering the purchase of life insurance and annuities in New York State and if so, the scope and form of such regulation. Testimony at the public hearings by the life insurance industry and agent trade associations supported adoption of a regulation setting forth standards and procedures for recommendations to consumers that was consistent with the NAIC Model.

An outreach draft of this regulation was posted on the Department's website for public comment. In addition to submitted written comments, the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, met with Department representatives to discuss the draft. Some revisions were made to the draft based on these comments and discussions. NAIFA-New York State remains concerned about producer education and training provisions in the regulation and supports the NAIC Model provisions, which permit an insurance producer to rely on insurer-provided product-specific training standards and materials to comply with the regulation.

9. Federal standards: While NASD Rule 2310 requires suitability standards to be met in the sale of insurance products which are securities under federal law, there are no minimum federal standards for the sale of fixed annuity products.

10. Compliance schedule: The regulation applies to any recommenda-

tion to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 in order to provide insurers and producers adequate time to implement the standards and procedures to comply with the requirements of the rule.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

This rule is directed to insurers and insurance producers. Most of insurance producers are small businesses within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to sell annuity contracts, none of which are local governments.

2. Compliance requirements: The affected parties are required to make suitable recommendations for the purchase or replacement of annuity contracts based on relevant information obtained from the consumers. The rule requires an insurance producer to document: any recommendation subject to Section 224.4(a) of this Part, the consumer's refusal to provide suitability information, if any, and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's recommendation. Furthermore, all records required under this rule are to be maintained in accordance with Part 243 of this Title.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: Minimum additional costs are anticipated to be incurred by regulated parties. While there may be costs associated with the compliance of this rule, these costs should be minimal.

5. Economic and technological feasibility: Although there may be minimal additional costs associated with the new rule, compliance is economically feasible for small businesses.

6. Minimizing adverse impact: There is little if no adverse economic impact on small businesses. The compliance, documentation and record-keeping requirements of this rule should have little impact on small businesses. Differing compliance or reporting requirements or timetables for small businesses were not necessary.

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule requires an insurance producer or an insurer to document: any recommendation subject to section 224.4(a) of this Part; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

All records required or maintained under this Part shall be maintained in accordance with Part 243 (Regulation 152).

3. Costs: The standards and procedures required by this rule are substantially similar to the National Association of Insurance Commissioners' "Suitability in Annuity Transactions" Model Regulation ("NAIC Model") for annuities, and the Financial Industry Regulatory Authority's current National Association of Securities Dealers ("NASD") Rule 2310 for securities. Accordingly, insurers that currently sell variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers that sell fixed annuities in states in which the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers will incur minimal additional costs in order to comply with the requirements of this rule.

4. Minimizing adverse impact: This rule applies to insurers and insurance producers that do business throughout New York State. As previously stated, the standards and procedures required by this rule are substantially similar to the NAIC Model for annuities and the NASD Rule 2310 for securities. Since the NAIC Model has been implemented in many

other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the provisions contained in this rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

EMERGENCY RULE MAKING

Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities

I.D. No. INS-03-11-00007-E

Filing No. 1357

Filing Date: 2010-12-29

Effective Date: 2010-12-29

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

Action taken: Addition of Part 225 (Regulation 199) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2103, 2104, 2110, 2403 and 4525

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

Specific reasons underlying the finding of necessity: This Part sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with a life insurance policy or annuity contract. The Part prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into thinking that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

Seniors are often misled and harmed by the use of senior-specific certifications and designations by insurance producers that imply the existence of a level of expertise and knowledge in senior matters that in fact does not exist. Misleading certifications and professional designations such as "certified elder planning specialist" and "certified senior advisor" are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients, resulting in the loss of seniors' savings, by insurance producers utilizing misleading senior-specific certifications or designations. Legislators and regulators, both federal and state, responding to such reports, have proposed and/or adopted prohibitions on the use of senior-specific designations in a misleading manner. In 2008, the National Association of Insurance Commissioners adopted a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities ("the NAIC Model"). The standards and procedures in this rule are substantially the same as those already adopted by the NAIC Model. While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides this consumer protection by prohibiting the use of misleading senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities.

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the

sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, the Department must promulgate by December 31, 2010 a rule governing the use of senior-specific certifications and designations in the sale of life insurance and annuities, and another governing suitability. Given the state's fiscal crisis and the constraints on the Department's budget, the federal grant money would fund critical efforts to protect consumers.

For the reasons stated above, emergency action is necessary for the general welfare.

Subject: Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities.

Purpose: To protect consumers from misleading use of senior-specific certifications and designations in the sale of life insurance or annuities.

Text of emergency rule: Section 225.0 Purpose.

The purpose of this Part is to set forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

Section 225.1 Applicability.

This Part shall apply to any solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract by an insurance producer.

Section 225.2 Prohibited uses of senior-specific certifications and professional designations.

(a)(1) No insurance producer shall use a senior-specific certification or professional designation that indicates or implies in such a way as to mislead a purchaser or prospective purchaser that the insurance producer has special certification or training in advising or providing services to seniors in connection with the solicitation, sale or purchase of a life insurance policy or annuity contract or in the provision of advice as to the value of or the advisability of purchasing or selling a life insurance policy or annuity contract, either directly or indirectly through publications or writings, or by issuing or promulgating analyses or reports related to a life insurance policy or annuity contract.

(2) The prohibited use of senior-specific certifications or professional designations includes use of:

(i) a certification or professional designation by an insurance producer who has not actually earned or is otherwise ineligible to use such certification or designation;

(ii) a nonexistent or self-conferred certification or professional designation;

(iii) a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the insurance producer using the certification or designation does not have; and

(iv) a certification or professional designation that was obtained from a certifying or designating organization that:

(a) is primarily engaged in the business of instruction in sales or marketing;

(b) does not have reasonable standards or procedures for assuring the competency of its certificants or designees;

(c) does not have reasonable standards or procedures for monitoring and disciplining its certificants or designees for improper or unethical conduct; or

(d) does not have reasonable continuing education requirements for its certificants or designees in order to maintain the certificate or designation.

(b) There is a rebuttable presumption that a certifying or designating organization is not disqualified solely for purposes of subdivision (a)(2)(iv) of this section when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:

(1) The American National Standards Institute (ANSI);

(2) The National Commission for Certifying Agencies; or

(3) any organization that is on the U.S. Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes."

(c) In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or providing services to seniors, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words combined with one or more words such as "certified," "registered," "chartered," "advisor," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

(d)(1) For purposes of this Part, a job title held by an insurance producer within an organization or other entity that is licensed or registered by a state or federal financial services regulatory agency shall not be deemed a certification or professional designation, unless it is used in a manner that would confuse or mislead a reasonable consumer, when the job title:

(i) indicates seniority or standing within the organization or other entity; or

(ii) specifies an individual's area of specialization within the organization or other entity.

(2) For purposes of this subdivision, financial services regulatory agency includes an agency that regulates insurers, insurance producers, broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

Section 225.3 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law and shall be a violation of section 2403 of the Insurance Law.

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 March 28, 2011.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 2103, 2104, 2403, 2110, and 4525 the Insurance Law.

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

Sections 2103 and 2104 provide the Superintendent with licensing authority over insurance agents and brokers.

Section 2110 authorizes the Superintendent to investigate and discipline those licensees.

Section 2403 prohibits any person from engaging in this state in any trade practice constituting a defined violation or a determined violation as defined in Article 24.

Section 4525 specifically subjects fraternal benefit societies to certain provisions of Article 21, as well as to any other section that specifically applies to fraternal benefit societies.

2. Legislative objectives: Various sections of the Insurance Law address advertisements, statements and representations of licensees used in the solicitation of insurance. These sections seek to protect consumers and insurers in New York by establishing prohibitions and uniform standards governing the dissemination of such information to the public. Although this regulation is directed to certain practices involving the sale of life insurance and annuity contracts, many of the provisions of the law pursuant to which this regulation is promulgated apply equally to other kinds of insurers. In addition, certain other Insurance Law provisions and regulations promulgated thereunder may have corresponding applicability to other kinds of insurance. In any case, the focus of this regulation to life insurance and annuity contracts should not be construed to imply that similar prohibitions do not apply to, or that corrective action should not be implemented for, other types of insurers or other kinds of insurance.

Further, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Act") places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. To encourage state regulation, the Act offers those state agencies with such regulations in effect federal grants to fund specified regulatory activities that provide enhanced protection of seniors in connection with the sale and marketing of financial products.

This rule sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract. It prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into believing that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

3. Needs and benefits: Seniors are often misled and harmed by insurance producers' use of senior-specific certifications and designations,

which wrongly imply the existence of expertise and knowledge of senior matters. Misleading certifications and professional designations such as “certified elder planning specialist” and “certified senior advisor” are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients by insurance producers who utilized misleading senior-specific certifications or designations, which resulted in the loss of seniors’ savings. Federal and state legislators and regulators, in responding to such reports, have proposed and adopted prohibitions on the misleading use of senior-specific designations. In 2008, the National Association of Insurance Commissioners (“NAIC”) adopted a New Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (“the NAIC Model”). While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides a consumer protection that prohibits the misleading use of senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities. In recognition of the need to provide such consumer protection, the Insurance Department is adopting the NAIC Model, with minimal modifications, as Part 225 to Title 11 NYCRR (Regulation 199).

4. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

The rule does not impose additional costs on the Insurance Department or other state government agencies or local governments.

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

6. Paperwork: The rule does not impose any reporting or recordkeeping requirements on affected insurance producers.

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

8. Alternatives: The Insurance Department considered not implementing the NAIC Model and proceeding under the Department’s more general enforcement authority under Article 24. However, because of the misleading and fraudulent marketing practices reported in recent years, the Department determined that a regulation would be the best way to address the situation.

An outreach draft of the regulation was posted on the Department’s website on October 5, 2010 for a 14-day comment period. Interested parties, such as the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, supported the adoption of this Part in written comments and/or discussions with the Insurance Department.

9. Federal standards: There are no minimum standards imposed by the federal government for the same or similar subject area.

10. Compliance schedule: Insurance producers who currently make appropriate use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract should not need to change their sales practices. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

Regulatory Flexibility Analysis

1. Small businesses: The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting or recordkeeping requirements or compliance costs on small businesses.

This rule is substantially the same as the National Association of Insurance Commissioners’ (“NAIC”) Model regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities and is directed to licensed insurance producers within New York State. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations. The rule does not impose any additional compliance requirements on insurance producers.

2. Local governments: The Insurance Department finds that this rule will not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at insurance producers, none of which are local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurance producers covered by this rule do business in every county in this state, including ru-

ral areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule prohibits the misuse of senior-specific certifications and professional designations by insurance producers in connection with the solicitation, sale, or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

The rule does not impose any reporting, recordkeeping, or professional services requirements on affected insurance producers.

3. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited directly by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

4. Minimizing adverse impact: This rule should not result in an adverse impact on rural areas.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period that commenced on October 5, 2010.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule sets forth standards to protect consumers from misleading and fraudulent sales practices with respect to the use of senior-specific certifications and professional designations by insurance producers in the solicitation, sale, or purchase of, or advice made in connection with, life insurance policies and annuity contracts.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

NOTICE OF WITHDRAWAL

Variable Life Insurance

I.D. No. INS-01-11-00011-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. INS-01-11-00011-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on January 5, 2011.

Subject: Variable life insurance.

Reason(s) for withdrawal of the proposed rule: To re-file as non-consensus rule making.

NOTICE OF ADOPTION

Workers’ Compensation Insurance - Independent Livery Driver Benefit Fund

I.D. No. INS-45-10-00005-A

Filing No. 8

Filing Date: 2011-01-04

Effective Date: 2011-01-19

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

Action taken: Amendment of Subpart 151-5 (Regulation 119) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3451

Subject: Workers’ Compensation Insurance - Independent Livery Driver Benefit Fund.

Purpose: Authorizes insurers licensed to write WC and EL insurance to provide coverage pursuant to Exec. Law Article 6-G.

Text or summary was published in the November 10, 2010 issue of the Register, I.D. No. INS-45-10-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Noncommercial Private Passenger Automobile Insurance Merit Rating Plans**I.D. No.** INS-45-10-00010-A**Filing No.** 3**Filing Date:** 2011-01-03**Effective Date:** 2011-01-19

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

Action taken: Amendment of Part 169 (Regulation 100) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2334, 2335, 2345 and 3425

Subject: Noncommercial Private Passenger Automobile Insurance Merit Rating Plans.

Purpose: The proposed rule raises the insurance premium surcharge threshold, for a motor vehicle accident, from \$1,000 to \$2,000.

Text or summary was published in the November 10, 2010 issue of the Register, I.D. No. INS-45-10-00010-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims**I.D. No.** INS-46-10-00006-A**Filing No.** 7**Filing Date:** 2011-01-04**Effective Date:** 2011-01-19

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

Action taken: Amendment of Subpart 151-4 (Regulation 119) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1303 and 4117; and Workers' Compensation Law, section 32

Subject: Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims.

Purpose: This regulation requires reserves to be established for those claims subject to reimbursement by the Special Disability Fund.

Text or summary was published in the November 17, 2010 issue of the Register, I.D. No. INS-46-10-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY
RULE MAKING**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-E**Filing No.** 1362**Filing Date:** 2010-12-30**Effective Date:** 2011-01-04

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 mandatory overtime for nurses.

Text of emergency 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, ar-

rangements 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 not require a nurse to find his or her own shift replacement or 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 only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-43-10-00003-EP, Issue of October 27, 2010. The emergency rule will expire February 27, 2011.

Text of rule and any required statements and analyses may be obtained from: Teresa Stoklosa, NYS Department of Labor, State Office Campus, Building 12, Room 508, Albany, NY 12240, (518) 457-4380, email: teresa.stoklosa@dol.ny.gov

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 log-

ging 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 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 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 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 find her own shift replacement or to self-mandate overtime is inadequate. The Department added language to Section 177.4 (c) (Nurse Coverage Plans) to require the Plan to identify the Supervisor at the health care facility who will make the final determination as to when it is necessary to utilize mandatory overtime.

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.

During rule development, several parties presented diverse comments on many issues, some of which resulted in modification of this proposal. The Department looks forward to the public comment period, which will provide the opportunity for additional regulated parties and interested parties to explain their different perspectives and share expertise in this area that would help clarify, balance and generally improve the final regulation.

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 several months which have established the requirement for Nurse Coverage Plans. The Nurse Coverage Plans were required to be established by October 13, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include 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, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care employer must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

3. Professional services:

Legal services may be required to negotiate, draft and 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.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

4. Compliance 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 nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, 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 because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. 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 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. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. 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 log, these costs may be offset through the 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. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to

nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

7. Small business and local government participation:

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, 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 of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

3. 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 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. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. 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 log, these costs may be offset through the use of a Plan in place 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.

4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

5. Rural area participation:

The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

Job Impact Statement

Health care employers 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 nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, it is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs or employment opportunities; in fact it will create more jobs.

Public Service Commission

NOTICE OF ADOPTION

Waiver of 16 NYCRR Sections 894.1 Through 894.4

I.D. No. PSC-36-10-00013-A

Filing Date: 2011-01-03

Effective Date: 2011-01-03

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

Action taken: On 12/16/10, the PSC adopted an order approving the petition of the Town of Brandon (Franklin County) for waiver of the rules contained in 16 NYCRR sections 894.1 through 894.4 as they apply to the Town's negotiation of an initial cable television franchise.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1 through 894.4.

Purpose: To approve waiver of the rules contained in 16 NYCRR sections 894.1 through 894.4 for an initial cable television franchise.

Substance of final rule: The Commission, on December 16, 2010, adopted an order approving the petition of the Town of Brandon (Franklin County) for waiver of the rules contained in 16 NYCRR § § 894.1, 894.2, 894.3, and 894.4 as they apply to the Town's negotiation of an initial cable television franchise with SLIC Network Solutions, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(10-V-0401SA1)

NOTICE OF ADOPTION

Waiver of 16 NYCRR Sections 894.1 Through 894.4

I.D. No. PSC-37-10-00015-A

Filing Date: 2011-01-03

Effective Date: 2011-01-03

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

Action taken: On 12/16/10, the PSC adopted an order approving the petition of the Town of Dickinson (Franklin County) for waiver of the rules contained in 16 NYCRR sections 894.1 through 894.4 as they apply to the Town's negotiation of an initial cable television franchise.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1 through 894.4.

Purpose: To approve waiver of the rules contained in 16 NYCRR sections 894.1 through 894.4 for an initial cable television franchise.

Substance of final rule: The Commission, on December 16, 2010, adopted an order approving the petition of the Town of Dickinson (Franklin County) for waiver of the rules contained in 16 NYCRR § § 894.1, 894.2, 894.3, and 894.4 as they apply to the Town's negotiation of an initial cable television franchise with SLIC Network Solutions, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(10-V-0414SA1)

NOTICE OF ADOPTION

NYSERDA Administered SBC Programs

I.D. No. PSC-40-10-00019-A

Filing Date: 2010-12-30

Effective Date: 2010-12-30

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

Action taken: On 12/16/10, the PSC directed the New York State Energy Research and Development Authority (NYSERDA) to develop an operating plan in consultation with interested stakeholders regarding NYSERDA's proposal to establish a five-year portfolio.

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

Subject: NYSERDA administered SBC programs.

Purpose: To approve NYSERDA continuation of System Benefit Charge (SBC) funding at current SBC III levels for an additional five years.

Substance of final rule: The Commission, on December 16, 2010, adopted an order directing the New York State Energy Research and Development Authority (NYSERDA) to develop an operating plan in consultation with interested stakeholders regarding NYSERDA's proposal to establish a five-year portfolio of Technology and Market Development (T&MD) programs to be administered by NYSERDA and to be funded by ratepayers of the major electric utilities through the System Benefits Charge (SBC). The Commission also provided guidance to NYSERDA as to the type of stakeholder process expected and identified the issues that NYSERDA must address in the operating plan.

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

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

Assessment of Public Comment

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

(10-M-0457SA1)

NOTICE OF ADOPTION

NYSERDA Administered SBC Programs

I.D. No. PSC-40-10-00020-A

Filing Date: 2010-12-30

Effective Date: 2010-12-30

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

Action taken: On 12/16/10, the PSC adopted an order continuing the System Benefits Charge III (SBC III) programs for an additional six months with modifications thereby extending the programs until December 31, 2011.

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

Subject: NYSERDA administered SBC programs.

Purpose: To approve the SBC III programs for an additional six months with modifications and extending the programs until 12/31/2011.

Substance of final rule: The Commission, on December 16, 2010, adopted an order continuing the System Benefits Charge III (SBC III) programs for an additional six months with modifications thereby extending the programs until December 31, 2011, synchronizing their termination with the programs operating under the terms of the Energy Efficiency Portfolio Standard (EEPS). A budget of \$90,125,000 was established for the six month period to be administered by the New York State Energy Research and Development Authority to be funded by ratepayers of the major electric and gas utilities. The existing SBC III collection schedule was modified to defer any SBC III collections for 2011 until 2012 and 2013. The Commission also authorized the transition of SBC III energy efficiency resource acquisition programs into the EEPS portfolio such that commencing July 1, 2011, such programs will be administered in the same manner as EEPS programs, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(05-M-0090SA6)

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

Water Rates and Charges

I.D. No. PSC-03-11-00013-P

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

Proposed Action: PSC is considering a rate request from Garrow Water Works Company, Inc. to increase its annual revenues by \$125,000 or 1509% and for a surcharge to reconcile capital improvement costs.

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

Subject: Water rates and charges.

Purpose: For approval to increase Garrow Water Works Company, Inc.'s annual revenues by approximately \$125,000 or 1509%.

Text of proposed rule: On January 3, 2011, Garrow Water Works Company, Inc. (Garrow or the company) filed, to become effective on April 1, 2011, tariff amendment (Leaf No. 12, Revision 2) to its electronic tariff schedule P.S.C. No. 1 – Water. The filed amendment is designed to increase the company's annual revenues by \$125,000 or 1509%. The company also requested to implement a surcharge to reconcile the actual costs of capital improvements as well as related operating expenses. The company provides flat rate water service to 45 residential customers in the Town of Schuyler Falls, Clinton County.

The company's current tariff, along with the proposed changes, is available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Commission Documents – Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(11-W-0003SP1)

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

Water Rates

I.D. No. PSC-03-11-00014-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 a complaint of The Willows Home Owners Association against Aqua New York, Inc. concerning rates in the company's tariff for the Dykeer system.

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

Subject: Water rates.

Purpose: To investigate a consumer complaint concerning the rates of Aqua New York, Inc. for its Dykeer water system.

Substance of proposed rule: On October 9, 2010 a complaint and petition was filed on behalf of The Willows Home Owners Association, Inc. (HOA), concerning the rates established in Case 08-W-0107 for Aqua New York, Inc. for its Dykeer system. These rates which became effective January 1, 2009 were filed in compliance with the Commission Order in Case 08-W-0107 (Order Approving Modified Rate Increase, Issued and Effective December 23, 2008). The October 9, 2010 complaint and petition was denied by letter from Jaclyn Brillling, Secretary dated November 2, 2010. On November 16, 2010, a petition for rehearing of the denial of the complaint and petition to reduce rates was filed on behalf of The Willows Home Owners Association, Inc. As a result, Department of Public Service Staff initiated an investigation of the customer's complaints regarding the company's rates. The Dykeer Water system provides metered water service to about 120 residential customers in the development known as The Willows in the Town of Somers, Westchester County. The Commission may grant deny or modify, in whole or in part, the relief requested by the petitioners, and may also consider related matters.

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

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

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

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

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

(10-W-0652SP1)

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

The New York State Reliability Council's Revisions to Its Rules and Measurements

I.D. No. PSC-03-11-00015-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 28 of the NYSRC's Reliability Rules.

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

Subject: The New York State Reliability Council's revisions to its rules and measurements.

Purpose: To adopt revisions to various rules and measurements of the New York State Reliability Council.

Substance of proposed rule: The Public Service Commission (PSC) is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 28 of the NYSRC's Reliability Rules, which were filed with the PSC on December 29, 2010.

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

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

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

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

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

(05-E-1180SP10)