

# 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.

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## Office of Alcoholism and Substance Abuse Services

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

#### General Facility Requirements

**I.D. No.** ASA-33-12-00001-P

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

**Proposed Action:** Repeal of Part 814; and addition of new Part 814 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

**Subject:** General Facility Requirements.

**Purpose:** Updates to reflect standards that are currently enforced as well as new provisions required by changes in other regulations.

**Substance of proposed rule (Full text is posted at the following State website: [www.oasas.ny.gov](http://www.oasas.ny.gov)):** Articles 19 and 32 of the Mental Hygiene Law authorize 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 chemically dependent. 14 NYCRR Part 814 establishes the requirements for building standards in facilities in which chemical dependence services are located. These requirements ensure that patients receive services from qualified counselors in appropriate and safe physical surroundings, and receive services which comport with federal and state confidentiality and Medicaid requirements. The proposed new Part 814, General Facility Requirements, formalizes in regulation standards that are currently enforced as well as new provisions prompted by changes to other OASAS regulations.

§ 814.2 Incorporates by reference the Building Code of New York State (Title 19 NYCRR, Chapters XXXIII, subchapters A and B, et seq.), the Building Code of the City of New York (NYC Administrative Code, Title 27, Chapter 1), and all applicable local and state occupancy, use, building and zoning laws.

§ 814.3 Includes new requirements or clarification of existing requirements.

§ 814.4 Incorporates changes in square feet per occupant required by the NY State Building Code and changes in terminology and configuration of OASAS certified chemical dependence services. It clarifies when occupancy standards will change for facilities currently certified pursuant to lesser standards but grandfathered into current regulations.

§ 814.5 Updates the requirements applicable to supportive living facilities regarding compliance with local occupancy codes, fire safety measures, and configuration of space use.

§ 814.6 Contains provisions related to patient confidentiality in waiting areas and applies to a range of outpatient services in varied types of facilities.

§ 814.7 Contains language from the current version of section 814.6 regarding circumstances where an OASAS certified provider shares space with another corporate entity, reflecting an increase in frequency of this type of arrangement. The section adds a new requirement for a shared space agreement to ensure compliance with federal confidentiality laws.

§ 814.8 Clarifies and strengthens timing and notice requirements for OASAS approval of any space alternations in certified facilities.

New Part 814 removes former sections related to crisis services, chemotherapy chemical dependence outpatient services, and a smoke-free environment which are addressed within other sections of the Part or in other OASAS regulations. The new Part 814 will result in a reduction in paperwork for both OASAS facilities inspectors and OASAS certified providers in relation to re-certification applications and corrective action plans by clarifying ambiguity in current regulations and reducing the number of items required for facilities inspections and the number of waiver requests. The proposed regulations are also clearer for new certification applicants.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services (OASAS), 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [SaraOsborne@oasas.ny.gov](mailto:SaraOsborne@oasas.ny.gov)

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Section 19.07(c) of the Mental Hygiene Law provides that the Office of Alcoholism and Substance Abuse Services is responsible for seeing that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

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

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

Sections 32.01 and 32.07(a) of the Mental Hygiene Law authorize 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.

The relevant sections of the Mental Hygiene Law cited above authorize the Commissioner to regulate the provision of alcoholism, substance abuse and chemical dependence services to patients, establish standards for the

provision of such services, and established minimum qualifications of staff.

#### 2. Legislative Objectives:

Articles 19 and 32 of the Mental Hygiene Law authorize 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 chemically dependent. 14 NYCRR Part 814 establishes the requirements for building standards in facilities in which chemical dependence services are located. These requirements ensure that patients receive services from qualified counselors in appropriate and safe physical surroundings, and receive services which comport with federal and state confidentiality and Medicaid requirements. The proposed new Part 814, General Facility Requirements, formalizes in regulation standards that are currently enforced as well as new provisions prompted by changes to other OASAS regulations.

#### 3. Needs and Benefits:

The proposed regulation replaces the existing Part 814 to incorporate amendments necessary to bring OASAS regulations in conformity with changes in law, policy and technology affecting OASAS certified facilities that have occurred since general facilities regulations were initially promulgated in 2002. Such changes include changes in state and local building codes, technological advances in building safety and construction, and policy changes affecting OASAS programmatic goals. OASAS is currently regulating as if the new Part 814 is already promulgated because authorities outside of the regulatory scope of OASAS regulations, or other Parts of the OASAS regulations, have established standards of compliance that define best practices. Providers must utilize a waiver request and review process to resolve any discrepancies between current practice and the current version of the regulation. The proposed technical and substantive amendments in the new Part 814 will streamline administrative processes during certification, recertification, capital projects, enforcement inspections and reviews. The new Part 814 also removes internal numeric references to other OASAS regulatory Parts to avoid confusion and minimize the need for future amendments if/when numbering is changed. The following summarizes by section proposed amendments contained in the new Part 814.

##### § 814.1 Legal base

New section 814.1 describes the Commissioner's authority to promulgate regulations applicable to facilities that provide alcoholism, substance abuse, and chemical dependence facilities.

##### § 814.2 Building code requirements

New section 814.2 incorporates by reference the Building Code of New York State (Title 19 NYCRR, Chapters XXXIII, subchapters A and B, et seq.), the Building Code of the City of New York (NYC Administrative Code, Title 27, Chapter 1), and all applicable local and state occupancy, use, building and zoning laws. Unlike the current version of the regulation, there are no specific references to the State Sanitary Code and the State Uniform Fire Prevention and Building Code, since the new Part 814 requires compliance with applicable local and state occupancy, use, building and zoning laws.

##### § 814.3 Requirements for all facilities

New section 814.3 includes many of the requirements set forth in the current version of the section and includes additional new requirements or clarification of existing requirements.

New section 814.3(b) clarifies requirements for facility floor plans to be kept on site and available for inspection.

New section 814.3(c) clarifies regulations relating to safety and fire precautions; for example, the paragraph: (1) requires quarterly frequency of fire drills for each "shift" rather than monthly random drills for the entire facility, with an exception for certified services located in hospitals which may follow fire drill schedules established and conducted by hospitals; (2) accommodates changes in portable heating technology and language describing such heaters by prohibiting "portable" space heaters rather than "unvented open" space heaters, and clarifies exceptions to prohibition of all "open flame devices" limited to "UL approved kitchen equipment and code compliant solid fuel heating devices;" (3) requires fire alarm "systems" and annual inspection and testing by a "certified vendor" where appropriate; and (4) requires annual employee training in use of fire extinguishers and evacuation plans.

New section 814.4(d) clarifies provisions for general building requirements related to privacy, confidentiality, fire safety, furnishings, utilities, and protection of patient records and medications kept on site, and requires a written policy and protocol for storage and disposal of medical waste. New language is included to specify that supportive living facilities are exempt from certain of these requirements.

§ 814.4 Additional requirements for all inpatient and residential facilities

Section 814.4 incorporates changes in square feet per occupant required by the NY State Building Code and changes in terminology and configura-

tion of OASAS certified chemical dependence services. It clarifies when occupancy standards will change for facilities currently certified pursuant to lesser standards but grandfathered into current regulations ("until a major relocation or major renovation of OASAS certified treatment space occurs, or there is a change in the type of capacity of service certified at the present location"). Prohibition against cots or futons was removed in order to permit them in supportive living services and to avoid having to develop a list of other specific bed substitutes such as Laz-e-boys, inflatable mattresses, etc. A requirement for closets and wardrobes for each person occupying a bedroom is added.

##### § 814.5 Additional requirements for supportive living facilities

New section 814.5 updates the requirements applicable to supportive living facilities regarding compliance with local occupancy codes, fire safety measures, and configuration of space use.

##### § 814.6 Additional requirements for all outpatient facilities

New section 814.6 contains provisions related to patient confidentiality in waiting areas and applies to a range of outpatient services in varied types of facilities.

##### § 814.7 Shared facilities

New section 814.7 contains language from the current version of section 814.6 regarding circumstances where an OASAS certified provider shares space with another corporate entity, reflecting an increase in frequency of this type of arrangement. The section adds a new requirement for a shared space agreement to ensure compliance with federal confidentiality laws.

##### § 814.8 Space alterations

New section 814.8, which contains language from the current version of 814.10, clarifies and strengthens timing and notice requirements for OASAS approval of any space alterations in certified facilities.

New Part 814 does not include certain sections contained in the current Part, such as former sections 814.7 (additional requirements for all crisis services, 814.8 (additional requirements for chemotherapy chemical dependence outpatient services) and section 814.11 (smoke free environment), which are addressed within other sections of the Part or in other OASAS regulations.

#### 4. Costs:

There are no increased costs anticipated from promulgation of the new Part 814.

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

b. Costs to providers: There will be no additional costs to certified providers.

#### 5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

#### 6. Paperwork / Reporting:

The new Part 814 will result in a reduction in paperwork for both OASAS facilities inspectors and OASAS certified providers in relation to re-certification applications and corrective action plans by clarifying ambiguity in current regulations and reducing the number of items required for facilities inspections. The proposed regulations are also clearer for new certification applicants.

#### 7. Duplications:

There is no duplication of other state or federal requirements; applicable federal and state laws and regulations are incorporated by reference into this Part.

#### 8. Alternatives:

The alternative to these changes is to continue operating facilities as if these regulations are already promulgated. This is a less efficient means for OASAS to meet its statutory and regulatory obligations related to facilities for certified services, since it requires providers in some cases to utilize a time consuming administrative waiver process.

#### 9. Federal Standards:

There are no specific federal standards or regulations related to these amendments except those applicable to patient confidentiality, which are addressed by this regulation.

#### 10. Compliance Schedule:

Providers will be in compliance with the new regulation immediately upon its promulgation because they are currently operating as if the new Part 814 was already in effect.

#### **Regulatory Flexibility Analysis**

##### Types / Numbers:

The proposed amendments to Part 814 impact, to varying degrees, all OASAS certified and funded programs. All providers may interact with local governments; some of these providers are also small businesses.

##### Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), it is anticipated that there will be no impact on reporting, recordkeeping or engagement of professional services by local governments or small businesses.

**Costs:**

Regardless of program treatment modality, size, or location (rural, urban or suburban), it is anticipated that there will be no costs to local governments or small businesses as a result of the proposed amendments.

**Economic / Technological Feasibility:**

Regardless of program treatment modality, size, or location (rural, urban or suburban), the proposed amendments require no new equipment or technological improvements beyond what is already required by state and local building and safety codes.

**Minimizing Adverse Economic Impacts:**

No adverse economic impacts associated with the proposed amendments have been identified. Providers are supportive of these proposed changes because they clarify points of ambiguity to make compliance with required regulations less burdensome and time consuming.

**Participation of Affected Parties:**

This regulation has not been updated since its initial promulgation in 2002. Since then, changes in the New York State building code, OASAS policies, other public policies for health and safety, and safety technology have made it necessary for OASAS to regulate its providers as if these changes were incorporated into the language of the regulation. Providers are aware of the need for these changes because they have already been affected by them; the process of drafting has included providers' active participation for several years. Additional input has been received from the OASAS Advisory Council and an OASAS/provider work group focused on administrative relief and paperwork reduction. Providers, stakeholders and the agency are supportive of these proposed changes.

**Rural Area Flexibility Analysis****Types / Numbers:**

The proposed amendments to Part 814 impact, to varying degrees, all OASAS certified and funded programs, some of which are located in rural areas.

**Reporting / Recordkeeping, Professional Services:**

Regardless of program location (rural, urban or suburban), it is anticipated that there will be no impact on reporting or recordkeeping or engagement of professional services by local governments or small businesses.

**Costs:**

Regardless of program location (rural, urban or suburban), there will be no cost impact on small businesses or local governments.

**Economic / Technological Feasibility:**

Regardless of location (rural, urban or suburban), the proposed amendments require no new equipment or technological improvements beyond what is already required by state and local building and safety codes.

**Minimizing Adverse Economic Impacts:**

No adverse economic impacts associated with the proposed amendments have been identified. Providers are supportive of these proposed changes because they clarify points of ambiguity to make compliance with required regulations less burdensome and time consuming.

**Participation of Affected Parties:**

This regulation has not been updated since its initial promulgation in 2002. Since then, changes in the New York State building code, OASAS policies, other public policies for health and safety, and safety technology have made it necessary for OASAS to regulate its providers as if these changes were incorporated into the language of the regulation. Providers are aware of the need for these changes because they have already been affected by them; the process of drafting has included providers' active participation for several years. Additional input has been received from the OASAS Advisory Council and an OASAS/provider work group focused on administrative relief and paperwork reduction. Providers, stakeholders and the agency are supportive of these proposed changes.

**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 apply to structural requirements for facilities that house OASAS certified and/or funded programs, rather than to programmatic practices implemented by staff. Treatment providers will not need to hire additional staff or reduce staff size.

## Department of Economic Development

### EMERGENCY RULE MAKING

**Empire Zones Reform****I.D. No.** EDV-33-12-00003-E**Filing No.** 750**Filing Date:** 2012-07-25**Effective Date:** 2012-07-25

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

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

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

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

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

**Subject:** Empire Zones reform.

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

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

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

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

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

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

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

eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

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

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

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

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

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

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

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

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

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

revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

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

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

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

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

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

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

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

The full text of the emergency rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

*This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires October 22, 2012.*

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

#### **Regulatory Impact Statement**

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commis-

sioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

**LEGISLATIVE OBJECTIVES:**

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

**NEEDS AND BENEFITS:**

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

**COSTS:**

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

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

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

**LOCAL GOVERNMENT MANDATES:**

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

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

**PAPERWORK:**

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

**DUPLICATION:**

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

**ALTERNATIVES:**

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

**FEDERAL STANDARDS:**

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

**COMPLIANCE SCHEDULE:**

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

**Regulatory Flexibility Analysis**

1. Effect of rule

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

2. Compliance requirements

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

3. Professional services

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

4. Compliance costs

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

5. Economic and technological feasibility

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

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

7. Small business and local government participation

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

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## Department of Environmental Conservation

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### EMERGENCY RULE MAKING

**Section 326.2(b)(4)(ii) is Amended to Allow Use of Fluridone Pellets in Waters Less Than Two Feet Deep**

**I.D. No.** ENV-33-12-00005-E

**Filing No.** 756

**Filing Date:** 2012-07-30

**Effective Date:** 2012-07-30

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

**Action taken:** Amendment of section 326.2(b)(4)(ii) of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 33-0303

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

**Specific reasons underlying the finding of necessity:** Subparagraph 326.2(b)(4)(ii) of 6 NYCRR prohibits fluridone applications of pellet formulations in waters less than two feet deep. A change to the regulation will allow certified applicators to use fluridone pellets in waters less than two feet to adequately control invasive plant species. Hydrilla (Hydrilla

verticillata) is considered among the most invasive aquatic plants in North America, and has resulted in significant ecological, recreational and economic impacts in other regions of the country. Its biological traits enable it to out-compete native species and dominate aquatic ecosystems, due to its ability to grow in a variety of environmental settings and to propagate and spread from fragments, turions (overwintering buds) and tubers (reproductive structures attached to plant rhizomes).

The plant was first discovered in New York in 2008. Prior to 2011, this plant was limited in New York to small isolated occurrences in Long Island and Orange County, where the populations can be contained and the risk of spread is greatly reduced. However, dense stands of hydrilla were found in the Cayuga Inlet in late summer of 2011, near the Allen Treman Marine State Park and several private boatyards. The plant has been found throughout this area, ranging in densities from sparse to dense, and in depth from water less than 1 foot deep to the center of the Inlet, in water 8-12 feet deep. Rooted plants have not been found in Cayuga Lake, although floating fragments were observed during the fall 2011 surveys. If this plant escapes from an approximately 166 acre infestation zone within Cayuga Inlet and its tributaries, it will be extremely difficult to prevent its rapid spread throughout the Finger Lakes and Great Lakes regions.

The areas affected by this emergency rule making correspond to very shallow regions where hydrilla tubers have been found. These areas are flow-isolated from the rest of the Inlet and are therefore not likely to be exposed to adequate herbicide from the proposed metered distribution ports in three locations throughout the treatment area. These areas also tend to have warmer water and sediments due to depth and flow isolation, so it is anticipated that hydrilla germination will occur at a different time scale than in the rest of treatment area. This will require the use of direct application pellets to prevent this growth.

If fluridone pellets cannot be applied to shallow waters, hydrilla tubers will not likely be exposed to sufficient herbicide migration from deeper waters to effectively prevent germination. This could lead to production of hydrilla biomass that will quickly reach the water surface, significantly increasing the likelihood of fragmentation and spread from boat traffic, waterfowl, or even wind. This fragmentation will substantially increase the risk of hydrilla spread to Cayuga Lake and to surrounding waterways visited by boaters using Cayuga Inlet.

**Subject:** Section 326.2(b)(4)(ii) is amended to allow use of fluridone pellets in waters less than two feet deep.

**Purpose:** Allow the use of fluridone pellets in waters less than two feet deep to control hydrilla, an invasive plant.

**Text of emergency rule:** Subparagraph 326.2(b)(4)(ii) is amended to read as follows:

(ii) applications of pellet formulations are not permitted in waters less than two feet deep. *The use of pellet formulations in waters less than two feet deep may be authorized for the control of invasive species. This use will be authorized by the issuance of an Article 15 permit and the pellet formulations shall only be applied in accordance with label and labeling directions or as modified and approved by the Department of Environmental Conservation.*

**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 October 27, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Anthony Lamanno, Department of Environmental Conservation, Division of Materials Management, 625 Broadway, 9th Floor, Albany, NY 12233-7254, (518) 402-8781, email: pestmgt@gw.dec.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority

Section 33-0303(3)(d),(e) of the Environmental Conservation Law ('ECL') authorizes the Department of Environmental Conservation (department) to promulgate a list of restricted use pesticides and the usages of such pesticides that may be permitted subject to whatever conditions or limitations which the commissioner deems appropriate to fully protect the public interest. In addition, rules and regulations may be promulgated to prescribe methods to be used in the application of pesticides, including the time, place, manner and method of application and equipment used, and may restrict or prohibit use of materials in designated areas to prevent damage or injury to health, property and wildlife.

##### 2. Legislative Objectives

Promulgating regulations that limit or restrict where pesticides may be used is an important and valuable function of the department, consistent with the intent of the Legislature to protect property, health and welfare. The limitation placed on the use of fluridone pellets resulted from a concern by New York State Department of Health that the use of pellets in less than two feet of water may be an attractive nuisance to children wading or swimming in the water body. The use of fluridone pellets could

prove very effective for the long-term control of invasive aquatic plants, such as hydrilla. When the department confirms the presence of an invasive species, immediate action may be necessary. A regulatory change will allow the use of fluridone pellets in waters less than two feet deep to control hydrilla.

##### 3. Needs and Benefits

Subparagraph 326.2(b)(4)(ii) of 6 NYCRR prohibits fluridone applications of pellet formulations in waters less than two feet deep. A change to the regulation will allow certified applicators to use fluridone pellets in waters less than two feet to adequately control invasive plant species. Hydrilla (*Hydrilla verticillata*) is considered among the most invasive aquatic plants in North America, and has resulted in significant ecological, recreational and economic impacts in other regions of the country. Its biological traits enable it to out-compete native species and dominate aquatic ecosystems, due to its ability to grow in a variety of environmental settings and to propagate and spread from fragments, turions (overwintering buds) and tubers (reproductive structures attached to plant rhizomes).

The plant was first discovered in New York in 2008. Prior to 2011, this plant was limited in New York to small isolated occurrences in Long Island and Orange County, where the populations can be contained and the risk of spread is greatly reduced. However, dense stands of hydrilla were found in the Cayuga Inlet in late summer of 2011, near the Allen Treman Marine State Park and several private boatyards. If this plant escapes from an approximately 166 acre infestation zone within Cayuga Inlet and its tributaries, it will be extremely difficult to prevent its rapid spread throughout the Finger Lakes and Great Lakes regions.

Immediately after the initial discovery of hydrilla in August of 2011, State and local Task Forces were established to coordinate the response effort, including committees addressing management, surveys and monitoring, and outreach and prevention. The 2011 management plans were limited by the timing of discovery, and informed by the primary goal of reducing biomass and preventing spread of the known infestation. Endothal treatments for the initially discovered 73 acres of the Inlet took place in mid-October, and diver assisted hand harvesting occurred in late November/early December for a portion of the infestation discovered too late for the herbicide regulatory permit. The endothal treatment substantially reduced plant biomass and appeared to prevent continuing production of reproductive tubers and turions, but did little to control the existing tuber bank in the sediments. The reduction in biomass also prevented the fragmentation and spread of plants through the balance of the growing season. The deepest portions of the Inlet will be subject to navigational dredging starting in the fall of 2012; this will have little effect on the hydrilla populations in the majority of the proposed treatment area.

The hydrilla was found within a 166 acre area associated with the Cayuga Inlet north of the fish ladder, Cascadilla Creek west of the Route 13 overpass, and Linderman Creek to the Route 89 culvert. The plant has been found throughout this area, ranging in densities from sparse to dense, and in depth from water less than 1 foot deep to the center of the Inlet, in water 8-12 feet deep. Rooted plants have not been found in Cayuga Lake, although floating fragments were observed during the fall 2011 surveys.

The areas affected by this emergency rule-making correspond to very shallow regions where hydrilla tubers have been found. These areas are flow-isolated from the rest of the Inlet and are therefore not likely to be exposed to adequate herbicide from the proposed metered distribution ports in three locations throughout the treatment area. These areas also tend to have warmer water and sediments due to depth and flow isolation, so it is anticipated that hydrilla germination will occur at a different time scale than in the rest of treatment area. This will require the use of direct application pellets to prevent this growth.

If fluridone pellets cannot be applied to shallow waters, hydrilla tubers will not likely be exposed to sufficient herbicide migration from deeper waters to effectively prevent germination. This could lead to production of hydrilla biomass that will quickly reach the water surface, significantly increasing the likelihood of fragmentation and spread from boat traffic, waterfowl, or even wind. This fragmentation will substantially increase the risk of hydrilla spread to Cayuga Lake and to surrounding waterways visited by boaters using Cayuga Inlet.

##### 4. Costs

Enactment of the emergency regulation described herein allowing the use of fluridone pellet in waters less than two feet will not result in any cost to regulated parties, State or local governments, or the general public.

##### 5. Local Government Mandates

The amendment of Subparagraph 326.2(b)(4)(ii) of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

##### 6. Paperwork

No additional paperwork will be required as a result of this change in regulation.

##### 7. Duplication

There are no other state or federal regulations which govern the use of fluridone pellets in waters less than two feet.

## 8. Alternatives

Options that have been evaluated by the Task Force and the external reviewers include the use of the just the contact herbicide endothal, diver assisted hand removal and benthic mats. While the fall 2011 Hydrilla treatment for Cayuga Lake Inlet consisted of only endothal treatment, this is not the most ideal long term approach as it does not adequately address the large tuber bank produced by this aquatic invasive species. The systemic herbicide fluridone does impact the tuber bank, thus more effectively controlling hydrilla and reducing the long-term use of herbicides, but requires a long exposure/contact time at a low dosage rate. A balance of endothal and fluridone applications takes advantage of the benefits from both control strategies. The use of diver assisted hand harvesting removed a small percentage of the biomass, but significant turbidity and hard clay substrates prevented effective removal via this method. Small scale use of benthic mats is being considered for 2012, but only in areas that will be challenging to address via herbicide application. High boater usage of these waters makes large scale use of this approach challenging. The department does not see any viable alternative to the emergency rule making to deal with this invasive aquatic weed.

## 9. Federal Standards

There are no minimum federal standards that apply to use of fluridone pellets in waters less than two feet.

## 10. Compliance Schedule

This regulation will take effect immediately upon filing with the Department of State. The use of fluridone pellets in waters less than two feet can be applied by certified applicators when the proper permits have been obtained from the department.

**Regulatory Flexibility Analysis**

This rule making will not impose an adverse impact on small businesses or local governments. In addition, it will not impose reporting, recordkeeping or other compliance requirements on small businesses or local government.

The new regulation will give certified applicators the ability to use fluridone pellets in waters less than two feet deep in order to control an invasive aquatic weed. The regulation, on its face, will not require any reporting or recordkeeping requirements for anyone. Certified applicators that use fluridone pellets in waters less than two feet deep will need to comply with permitting requirements and obtain a permit for such application.

However, since the regulation will not apply to small businesses or local government, there will be no adverse effect. For these reasons, the Department of Environmental Conservation has determined that a regulatory flexibility analysis for small businesses and local government is not required.

**Rural Area Flexibility Analysis**

This rule making will not impose any adverse impacts on rural areas and will not impose any additional reporting, recordkeeping or other compliance requirements on public and private entities in rural areas. There will be no initial capital costs or any annual costs to comply with the rule.

The new regulations will give certified applicators the ability to use fluridone pellets in waters less than two feet deep in order to control an invasive aquatic plants in waters across New York. The regulation, on its face, will not require any additional reporting or recordkeeping requirements. Certified applicators that use fluridone pellets in waters less than two feet deep will need to comply with permitting requirements and obtain a permit for such application, which is an existing requirement.

However, since the regulation will apply equally to all certified applicators in rural areas Statewide, there will be no adverse effect. For these reasons, the Department of Environmental Conservation has determined that rural area flexibility analysis is not required.

**Job Impact Statement**

The Department of Environmental Conservation (department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities. There are no jobs or employment opportunities that will be affected, since the nature and purpose of the emergency rule making is simply to allow the use of fluridone pellets in waters less than two feet to control invasive aquatic weeds.

This rule will not eliminate any jobs or limit what a certified applicator can apply. The rule making will allow the use of fluridone pellets in waters less than two feet, which will not affect applicator certification requirements. Therefore, the department has determined that a job impact statement is not required.

## NOTICE OF ADOPTION

**Commercial and Recreational Harvest Regulations for Tautog (Blackfish)**

**I.D. No.** ENV-03-12-00008-A

**Filing No.** 760

**Filing Date:** 2012-07-31

**Effective Date:** 2012-08-15

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

**Action taken:** Amendment of Part 40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 13-0105 and 13-0340-d

**Subject:** Commercial and recreational harvest regulations for tautog (blackfish).

**Purpose:** To reduce fishing mortality on tautog, remain in compliance with ASMFC fishery management plan and allow the stock to rebuild.

**Text or summary was published** in the January 18, 2012 issue of the Register, I.D. No. ENV-03-12-00008-RP.

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

**Text of rule and any required statements and analyses may be obtained from:** Stephen Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0435, email: swheins@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to the State Administrative Procedures Act, a neg dec is on file at the Department of Environmental Conservation.

**Revised Regulatory Impact Statement**

## 1. Statutory authority:

Environmental Conservation Law (ECL) sections 13-0105 and 13-0340-d authorize the Department of Environmental Conservation (DEC or the department) to establish by regulation the open season, size, catch limits, possession and sale restrictions and manner of taking for tautog.

## 2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate fishery management plans.

## 3. Needs and benefits:

These regulations are necessary for New York to maintain compliance with the Interstate Fishery Management Plan (FMP) for Tautog as adopted by the Atlantic States Marine Fisheries Commission (ASMFC). New York, as a member state of ASMFC, must comply with the provisions of the Interstate Fishery Management Plans adopted by ASMFC. These FMPs are designed to promote the long-term sustainability of coast-wide marine species, preserve the states' marine resources, and protect the interests of both commercial and recreational fishermen. All member states remain in compliance with the FMPs by promulgating any necessary regulations that implement the provisions of the FMPs. If ASMFC determines a state to be in non-compliance with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Under Addendum VI to the FMP, ASMFC requires New York State to reduce its commercial and recreational harvest of tautog in 2012 by 48 percent. In compliance with the FMP, DEC submitted a Notice of Emergency Adoption and Proposed Rule Making to the Department of State on December 30, 2011 and more restrictive tautog harvest measures became effective in New York that day. After the 45 day public comment period, DEC staff anticipated adopting the rule as it was proposed. However, ASMFC refined the findings of the most recent stock assessment and New York State is now required to achieve a 39 percent reduction in exploitation of tautog. DEC must revise the original proposed rule by slightly relaxing the management measures specified in the original amendment. This rule making package will revise the originally proposed rule.

For the recreational tautog fishery, the revised proposed rule will still require a 16-inch minimum size limit, as originally proposed. However, the revised recreational season for tautog is longer than what was originally proposed, from October 5 through December 14, instead of October 8 through December 4. There was no change to the 2011 possession limit of 4 fish.

For the commercial fishery, there is no change to the original proposed rule. The size limit remains at 15 inches, an increase from 14 inches in 2011.

With this revised proposed rule, New York State will satisfy the ASMFC requirement to reduce fishing mortality on tautog and remain in compliance with the FMP.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

However, these proposed management measures will decrease the number of days in the recreational season for tautog and will reduce angler participation in the recreational fishery. This is likely to decrease revenues for party and charter boat businesses and bait and tackle shops that cater to anglers who target tautog. The proposed rule may reduce the number of tautog taken by commercial fishermen and consequently may reduce their income earned from fishing.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The department will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying commercial and recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

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

8. Alternatives:

No "action alternative" – Failure to promulgate this rule would result in the resumption of the 2011 tautog regulations. Under those regulations New York State anglers and fishermen would harvest tautog at a rate that would exceed the fishing mortality recommended to allow the stock to rebuild. Furthermore, New York State would no longer be in compliance with the FMP for tautog.

A suite of options, using a variety of different seasons, minimum size limits, and possession limits that met the requirements of the ASMFC, were developed and presented to the Marine Resources Advisory Council (MRAC). Each of these various options shifted the burden of the reduction in fishing effort between recreational and commercial participants differently. The option proposed in this revised rule making had the most support from MRAC members and members of the public.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and the Regional Fishery Management Council FMPs.

10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via DEC's website of the changes to the regulations. The emergency regulations will take effect upon filing with the Department of State.

**Assessment of Public Comment**

The agency received no public comment.

sue the proposed regulations on an emergency basis in order to implement, as expeditiously as possible, the new Medicaid reimbursement methodology for nursing homes, effective January 1, 2012. The new methodology will replace an overly complex and burdensome methodology with a transparent pricing methodology that will stabilize the nursing home industry by timely providing predictable rate setting information that can be effectively used by providers to plan and manage their operations. In addition, implementing the pricing methodology as soon as possible will also mitigate the retroactive cash flow impact of reconciling rates that are paid today to the new pricing rates effective on January 1, 2012.

Proceeding with the proposed regulations on an emergency basis is in accordance with the provisions of Public Health Law section 2808 (2-c) which provides the Commissioner of Health the explicit authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Statewide Pricing Methodology for Nursing Homes.

**Purpose:** To establish a new Medicaid reimbursement methodology for Nursing Homes.

**Substance of emergency rule:** This regulation establishes a new reimbursement methodology for the operating component of non-specialty residential health care facilities (nursing homes). The operating component of the price is based upon allowable costs and is the sum of the direct price, indirect price and a facility-specific non-comparable price. The direct and indirect prices are a blend of a statewide price and a peer group price. There are two peer groups: 1) all non-specialty hospital-based facilities and non-specialty freestanding facilities with certified beds capacities of 300 or more, and 2) non-specialty freestanding facilities with certified bed capacities of less than 300 beds. The direct price is subject to a case mix adjustment and a wage index adjustment. The indirect price is subject to a wage index adjustment. Per-diem adjustments to the operating component of the rate include add-ons for bariatric, traumatic brain-injured (TBI) extended care, and dementia residents; adjustments for the reporting of quality data; and transition payments. Non-specialty facilities will transition to the price over a five-year period (2012-2016), with prices fully implemented beginning in 2017. The non-capital component of the rate for specialty facilities, which are not subject to the new reimbursement methodology, will be the rates in effect for such facilities on January 1, 2009.

**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 October 27, 2012.

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

**Regulatory Impact Statement**

Statutory Authority:

The statutory authority for this regulation is contained in Section 2808(2-c) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate emergency regulations, with regard to Medicaid reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.40 to establish a new Medicaid reimbursement methodology for Nursing Homes. The reimbursement methodology is based on a blend of statewide prices and peer group prices, with adjustments for case mix, regional wage differences, add-ons for certain patients, and quality incentives and payments. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new and streamlined methodology will significantly reduce administrative burdens on both nursing homes and the Department and, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Needs and Benefits:

The new pricing reimbursement methodology reforms an outdated, complex, administratively burdensome (to both providers and the Department) rate-setting system with a stable, predictable and transparent

## Department of Health

### EMERGENCY RULE MAKING

#### Statewide Pricing Methodology for Nursing Homes

**I.D. No.** HLT-33-12-00006-E

**Filing No.** 758

**Filing Date:** 2012-07-30

**Effective Date:** 2012-07-30

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

**Action taken:** Addition of section 86-2.40 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2808(2-c)

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

**Specific reasons underlying the finding of necessity:** It is necessary to is-

methodology that rewards efficiencies and incentivizes quality outcomes. The new pricing system will also provide a good foundation for the transition of nursing home residents to Managed Care that will occur over the next several years. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

**Costs to Private Regulated Parties:**

There will be no additional costs to private regulated parties. The only additional data requested from providers would be reporting quality measures in their annual cost report.

**Costs to State Government:**

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations.

**Costs to Local Government:**

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health as a result of this proposed regulation.

**Local Government Mandates:**

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

**Paperwork:**

The proposed regulation does not create new or additional paperwork responsibility of any kind.

**Duplication:**

These regulations do not duplicate existing state or federal regulations.

**Alternatives:**

The Department is required by the Public Health Law section 2808 2-c to implement the new pricing methodology. The department worked closely with the Nursing Home Industry Associations to develop the details of the pricing methodology to be implemented by the regulation.

**Federal Standards:**

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

**Compliance Schedule:**

The new prices will be published by the department and transmitted to the EMedNY system. There are no new compliance efforts required by the nursing homes.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities were identified as employing fewer than 100 employees.

To ensure a smooth transition and mitigate significant swings in Medicaid revenues, the new Medicaid reimbursement methodology for nursing homes implemented by this regulation will be phased-in over a five year period (full implementation in the sixth year). Of the 60 nursing homes, 36 nursing homes that are subject to this regulation will experience a decrease in Medicaid revenues. The losses in Medicaid revenues will occur gradually - and will increase from .473% of total operating revenue in year to 5.4% of total operating revenue in year six. Twenty-four nursing homes that are subject to this regulation will experience an increase in Medicaid revenues. The gains in Medicaid revenues will occur gradually - and will increase from 1.2% of total operating revenue in year to 2% of total operating revenue in year six. In addition, the new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

This rule will have no direct effect on local governments.

**Compliance Requirements:**

There are no new compliance requirements.

**Professional Services:**

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

**Compliance Costs:**

No additional compliance costs are anticipated as a result of this rule.

**Economic and Technological Feasibility:**

The proposed rule doesn't require additional technological or economic requirements.

**Minimizing Adverse Impact:**

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate

adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

**Small Business and Local Government Participation:**

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. The Department worked closely with the Nursing Home Associations to develop the details of the pricing methodology to be implemented by the regulation. In addition, contact information for the Department was provided for anyone interested in further information.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

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

The following nine 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:**

There are no new compliance requirements as a result of the proposed rule.

**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 additional compliance costs are anticipated as a result of this rule.

**Minimizing Adverse Impact:**

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

**Rural Area Participation:**

The Department, in collaboration with the Nursing Home Industry Associations (which include representation of rural nursing homes) worked collaboratively to develop the key components of the statewide pricing methodology. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

**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 not expected that the

proposed rule to establish a new Medicaid reimbursement methodology for Nursing Homes will have a material impact on jobs or employment opportunities across the Nursing Home industry. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included in the proposed regulations to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year.

## EMERGENCY RULE MAKING

### Reduction to Statewide Base Price

**I.D. No.** HLT-33-12-00007-E

**Filing No.** 759

**Filing Date:** 2012-07-30

**Effective Date:** 2012-07-30

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

**Action taken:** Amendment of section 86-1.16 of Title 10 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to achieve targeted savings.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Reduction to Statewide Base Price.

**Purpose:** Continues a reduction to the statewide base price for inpatient services.

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35)(b) of the Public Health Law, Subdivision (c) of section 86-1.16 of Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective May 1, 2012, to read as follows:

(c)(1) For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by \$24,200,000.

(2) For the period May 1, 2012 through March 31, 2013, the statewide base price shall be adjusted such that total Medicaid payments are decreased for such period by \$19,200,000.

**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 October 27, 2012.

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

### Regulatory Impact Statement

#### Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in Section 2807-c(35) of the Public Health Law, which states that the Commissioner has the authority to set emergency regulations for general hospital inpatient rates and such regulations shall include but not be limited to a case-mix neutral Statewide base price. Such Statewide base price will exclude certain items specified in the statute and any other factors as may be determined by the Commissioner.

#### Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal, it was determined that a more clinically sound method needed to be developed. To generate immediate savings, however, a \$24.2 million gross (\$12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop a more clinically sound approach to meet Legislative objectives. Based on the results of workgroup meetings, a new proposal was developed

which achieved less savings than required by the Financial Plan (\$5 million gross/\$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at \$19.2 million gross (\$9.6 million State share) to account for the difference through March 31, 2013.

#### Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

Due to industry concerns with the initial proposal, it was determined that a more clinically sound approach to meeting Legislative objectives needed to be developed. To generate immediate savings, however, a \$24.2 million gross (\$12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop such an approach. Based on the results of those meetings, a new proposal was developed which achieved less savings than required by the Financial Plan (\$5 million gross/\$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at \$19.2 million gross (\$9.6 million State share) to account for the difference through March 31, 2013.

#### COSTS:

##### Costs to State Government:

There are no additional costs to State government as a result of this amendment.

##### Costs of Local Government:

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

##### Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this amendment.

##### Local Government Mandates:

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

##### Paperwork:

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

##### Duplication:

These regulations do not duplicate existing State and Federal regulations.

##### Alternatives:

No significant alternatives are available at this time. In collaboration with the hospital industry, the State developed a more clinically sound method to achieve savings. However, this amount was less than was required by the Financial Plan. Thus, there is no option to not act on this initiative since the Enacted Budget assumed savings that total \$24.2 million.

##### Federal Standards:

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

##### Compliance Schedule:

Section 86-1.16 requires that the statewide base price be reduced by \$19,200,000 for the period May 1, 2012, through March 31, 2013.

### Regulatory Flexibility Analysis

#### Effect on Small Business and Local Governments:

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

Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.

This rule will have no direct effect on Local Governments.

#### Compliance Requirements:

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

#### Professional Services:

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

#### Compliance Costs:

As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.

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

**Minimizing Adverse Impact:**  
 The proposed amendments reflect statutory intent and requirements.  
**Small Business and Local Government Participation:**  
 Hospital associations participated in discussions and contributed comments through the State’s Medicaid Redesign Team process regarding these changes.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**  
 This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<http://quickfacts.census.gov>). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

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

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

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

**Minimizing Adverse Impact:**  
 The proposed amendments reflect statutory intent and requirements.

**Rural Area Participation:**  
 This amendment is the result of discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

**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 rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed emergency regulation revises the final statewide base price for the period beginning May 1, 2012, through March 31, 2013.

**EMERGENCY  
 RULE MAKING**

**Episodic Pricing for Certified Home Health Agencies (CHHAs)**

**I.D. No.** HLT-33-12-00014-E  
**Filing No.** 761  
**Filing Date:** 2012-07-31  
**Effective Date:** 2012-07-31

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

**Action taken:** Amendment of section 86-1.44 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3614(13)

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to ensure an appropriate level of reimbursement to those Certified Home Health Agencies (CHHAs) that provide services to a special needs population of medically complex children, adolescents and young disabled adults and to those CHHAs that serve primarily patients who are eligible for OPWDD services.

Section 111 of Part H of Chapter 59 of the Laws of 2011 provides the Commissioner of Health with authority to issue regulations such as these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Episodic Pricing for Certified Home Health Agencies (CHHAs).

**Purpose:** To exempt services to a special needs population from the episodic payment system for CHHAs.

**Text of emergency rule:** Subdivisions (a) and (c) and the opening paragraph of subdivision (b) of section 86-1.44 of title 10 of NYCRR are amended to read as follows:

(a) Effective for services provided on and after [April 1] May 2, 2012, Medicaid payments for certified home health care agencies (“CHHA”), except for such services provided to children under eighteen years of age and except for services provided to a special needs population of medically complex and fragile children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department, shall be based on payment amounts calculated for 60-day episodes of care.

(b) An initial statewide episodic base price, to be effective [April 1] May 2, 2012, will be calculated based on paid Medicaid claims, as determined by the Department, for services provided by all certified home health agencies in New York State during the base period of January 1, 2009 through December 31, 2009.

(c) The base price paid for 60-day episodes of care shall be adjusted by an individual patient case mix index as determined pursuant to subdivision (f) of this section; and also by a regional wage index factor as determined pursuant to subdivision (h) of this section. *Such case mix adjustments shall include an adjustment factor for CHHAs providing care primarily to a special needs patient population coming under the jurisdiction of the Office of People With Developmental Disabilities (OPWDD) and consisting of no fewer than two hundred such patients.*

**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 October 28, 2012

**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](mailto:regsqna@health.state.ny.us)

**Regulatory Impact Statement**

**Statutory Authority:**

The authority for implementation of an episodic payment system for Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law.

**Legislative Objectives:**

The Legislature chose to address the issue of over-utilization of Certified Home Health Agency services as a result of the recommendations submitted by the Medicaid Redesign Team and accepted by the Governor. Pursuant to statute, an episodic payment system based on 60-day episodes of care, with payments tied to patient acuity, was chosen as one of the vehicles to address this issue.

**Needs and Benefits:**

The proposed amendment will exempt services provided to a special needs population of medically complex children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department from the episodic payment system and will also provide for an adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services when such CHHAs have over 200 such patients. This amendment will help assure that agencies primarily serving certain special needs populations will receive a level of reimbursement from the Medicaid system to maintain both adequate access and quality of care for members of these populations.

**Costs:**

The regulated parties (providers) are not expected to incur any additional costs as a result of the proposed rule change. There are no additional costs to local governments for the implementation of and continuing compliance with this amendment. It is anticipated there will be a slight decrease to the total state fiscal savings which were budgeted for the Episodic Payment System.

**Local Government Mandates:**

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

**Paperwork:**

There is no additional paperwork required of providers as a result of this amendment.

**Duplication:**

These regulations do not duplicate existing state or federal regulations.

**Alternatives:**

No significant alternatives are available. The Department is required by the Public Health Law section 3614(13) to promulgate implementing regulations.

**Federal Standards:**

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

**Compliance Schedule:**

There are no significant actions which are required by the affected providers to comply with the rule change.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The proposed rule is expected to initially affect two Certified Home Health Agencies. Neither agency is a small business and neither is government sponsored.

**Compliance Requirements:**

There are no additional reporting, recordkeeping or other affirmative acts that small businesses or local governments will need to undertake to comply with the proposed rule. A “small business regulation guide” is not required.

**Professional Services:**

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

**Compliance Costs:**

The proposed rule will not require providers or local government to incur any additional compliance costs.

**Economic and Technological Feasibility:**

Compliance by small businesses and local governments is not expected to have economic or technological implications.

**Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements.

**Small Business and Local Government Participation:**

The two affected Certified Home Health Agencies are not small businesses or government sponsored.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<http://quickfacts.census.gov>). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal. No additional professional services will be required for compliance.

**Costs:**

Certified Home Health Agencies are not expected to incur any significant costs as a result of this rule change.

**Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements.

**Rural Area Participation:**

The two affected Certified Home Health Agencies are not rural providers.

**Job Impact Statement**

**Nature of Impact:**

The proposed rule change will exempt services to a special needs population of medically complex children, adolescents and young adults from the episodic payment system for Certified Home Health Agencies (CHHAs) and will provide for a positive adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services.

These changes are not expected to have a negative impact on jobs or employment opportunities and could slightly increase employment levels at the impacted CHHAs due to higher Medicaid reimbursement levels.

## Categories and Numbers Affected:

There are five categories of direct care workers at CHHAs: home health aides, nurses, physical therapists, occupational therapists and speech pathologists. Statewide, 84% of CHHA claims dollars are for home health aide services. The proposed rule changes are not expected to negatively impact any of these five categories.

## Regions of Adverse Impact:

No adverse impact is anticipated as a result of this rule change.

## Minimizing Adverse Impact:

No adverse impact is anticipated as a result of this rule change.

## Self-Employment Opportunities:

Not applicable.

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## Long Island Power Authority

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Fuel and Purchased Power Cost Adjustment (“FPPCA”) Rate in the Authority’s Tariff

**I.D. No.** LPA-33-12-00008-P

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

**Proposed Action:** The Long Island Power Authority is considering a proposal to modify its Tariff for Electric Service (“Tariff”) to authorize full recovery of the Authority’s fuel and purchased power costs and modify the Fuel and Purchased Power Cost Adjustment rate.

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

**Subject:** Fuel and Purchased Power Cost Adjustment (“FPPCA”) rate in the Authority’s Tariff.

**Purpose:** To authorize full recovery of fuel and purchased power costs and alter the FPPCA rate to reflect monthly changes in pricing.

**Public hearing(s) will be held at:** 10:00 a.m., Oct. 1, 2012 at H. Lee Denison Bldg., 100 Veteran’s Memorial Hwy., Hauppauge, NY; and 2:00 p.m., Oct. 1, 2012 at Long Island Power Authority, 333 Earle Ovington Blvd., 4th Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority (“Authority”) is considering a proposal to modify its Tariff for Electric Service (“Tariff”) to authorize full recovery of the Authority’s fuel and purchased power costs and alter the Fuel and Purchased Power Cost Adjustment (“FPPCA”) rate (also known as the Power Supply Charge) to reflect monthly changes in pricing. Staff proposes to modify the FPPCA to conform more closely to the power supply charges approved for the investor-owned utilities by: (1) recovering 100% of the Authority’s power supply costs; and (2) transitioning from a quarterly update process to a monthly basis; with reconciliation to actual costs occurring within the subsequent months as soon as the variations become known. In addition, Staff proposes to modify the Tariff: 1) to clarify the definition of purchased power on leaf 166 to indicate that revenues from the sale of energy to other utilities and marketers are used to offset the expense of purchased power; and 2) to indicate that costs deferred from 2003 are being recovered over ten years without interest. The Authority may approve, modify, or reject, in whole or part, the proposal.

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

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

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

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

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

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## Office of Mental Health

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

#### Rates of Reimbursement - Hospitals Licensed by OMH

**I.D. No.** OMH-33-12-00004-EP

**Filing No.** 755

**Filing Date:** 2012-07-27

**Effective Date:** 2012-07-27

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

**Proposed Action:** Amendment of Part 577 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02; L. 2012, ch. 56

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

**Specific reasons underlying the finding of necessity:** The proposed rule eases the burden on hospital providers licensed by the Office of Mental Health (Office) by making their Institutional Cost Reports subject to audit by the Department of Health, rather than requiring that they have such reports certified by an independent certified public accountant, as is currently required under the Office’s regulations. This proposal is consistent with the 2012-2013 enacted State budget. Since hospital providers must be made aware of these changes which were effective as of April 1, 2012, and must act accordingly, the rule making warrants emergency filing.

**Subject:** Rates of Reimbursement - Hospitals Licensed by OMH.

**Purpose:** To amend the audit protocol for hospitals licensed by OMH pursuant to Article 31 of the Mental Hygiene Law.

**Text of emergency/proposed rule:** 1. Subdivision (b) of section 577.5 of Title 14 NYCRR is amended to read as follows:

(b) All reports required to be prepared and submitted to the commissioner:

(1) shall be prepared in accordance with generally accepted accounting principles, unless otherwise required by the commissioner; [and]

(2) shall be certified by an [independent certified public accountant and an] officer or administrator of the hospital; and

(3) shall be subject to audit pursuant to section 577.6 of this Part.

2. Subdivisions (c) and (d) of section 577.6 of Title 14 NYCRR are amended to read as follows:

(c) The commissioner may enter into agreements with the Department of [Social Services] Health or other organizations or other agencies having audit responsibilities to audit the financial and statistical records of hospitals. The conduct of such audits by the Department of [Social Services] Health shall be done in accordance with procedures as set forth in applicable regulations of the Department of [Social Services] Health and shall be subject to any fees that may be set for the purpose of funding such audits as may be established pursuant to said regulations. Audits of Medicaid by the Office of Mental Health shall also be conducted in accordance with procedures as set forth in applicable Department of [Social Services] Health regulations or as set forth in agreement(s) between the Office of Mental Health and the Department of [Social Services] Health. All other audits shall be done in accordance with this Part.

(d) Audits which are conducted by the Office of Mental Health, or by its designee, other than audits conducted by the Department of Health pursuant to subdivision (c) of this section, shall be conducted in accordance with Part 552 of this Title and the following procedures:

(1) In addition to the draft audit report issued in accordance with section 552.6(a) of this Title, a notice of proposed rate revision shall be sent to the hospital.

(2) In addition to the provider's response to the final audit report required in section 552.7(e) of this Title, proposed rate revisions resulting from the implementation of audit findings shall be final unless within 45 days of receipt of the proposed rate revision, the hospital requests a hearing on factual issues. Requests for hearings, and the conduct of such hearings, shall be pursuant to Part 503 of this Title.

(3) Revisions to rates determined in accordance with the provisions of this paragraph shall be retroactive to the rate year covered by the audit. Any resulting overpayment shall be satisfied by either retroactive adjustments of the provisional rate paid, based on the period audited, or prospective adjustment of the current certified rate at the discretion of the commissioner.

**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 October 24, 2012.

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

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

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

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 7.09 and 43.02 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health (Office) the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction and to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services provided by facilities, including hospitals, licensed by the Office pursuant to Article 31 of the Mental Hygiene Law. All payments by such agencies shall be at rates certified by the Commissioner and approved by the Director of the Budget.

Chapter 56 of the Laws of 2012, Part D, Section 5 provides that inpatient hospitals licensed by the Office pursuant to Article 31 of the Mental Hygiene Law be subject to audit fees as set forth in the regulations issued by the Department of Health pursuant to Subparagraph (xii) of Paragraph D of Subdivision 35 of Section 2807-c of the Public Health Law, with regard to cost reports submitted to the Department of Health on and after April 1, 2012.

2. Legislative objectives: The proposed rule implements the provisions found in the enacted 2012-2013 State Budget. The Legislature intended, through the passage of Chapter 56 of the Laws of 2012, Part D, Section 5, to ease the burden on hospital providers licensed by the Office of Mental Health, by making their Institutional Cost Reports subject to audit by the Department of Health, as is currently the case for other hospitals, rather than requiring that they have such reports certified by an independent certified public accountant, as is currently required by the Office.

3. Needs and benefits: The existing regulations found at 14 NYCRR Part 577 mandate that financial reports submitted by hospitals licensed by the Office pursuant to Article 31 of the Mental Hygiene Law be certified by an independent certified public accountant and an officer or administrator of the hospital. The proposed rule provides mandate relief by eliminating the need for hospitals to hire an independent certified public accountant, and instead be subject to audit through the Department of Health. The fees established by the Department of Health for this certification are believed to be considerably less for most covered providers than what they currently pay for the services performed by an independent certified public accountant.

#### 4. Costs:

(a) cost to State government: These regulatory amendments will not result in any additional costs to State government.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: These regulatory amendments should not result in any additional costs to regulated parties. As stated above,

the fees established by the Department of Health for this audit function are believed to be less than what most of the hospitals licensed by the Office currently pay for the services of an independent certified public accountant.

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

6. Paperwork: The paperwork associated with this proposed rule is expected to be minimal.

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

8. Alternatives: The proposed rule implements the provisions of the 2012-2013 enacted State Budget; therefore, no alternative was considered.

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

10. Compliance schedule: The regulatory amendments will be effective immediately upon adoption.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not have an adverse economic impact upon small businesses or local governments. The amendments to Part 577 provide consistency with the 2012-2013 enacted State budget by eliminating the need for hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law to hire an independent certified public accountant to certify their Institutional Cost Reports (ICR). Instead, the ICR will be subject to audit by the Department of Health. This proposal is expected to provide mandate relief to covered providers as the fees established by the Department of Health for this certification are believed to be considerably less for most covered providers than what they currently pay for the services performed by an independent certified public accountant.

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

The amendments to Part 577 provide consistency with the 2012-2013 enacted State budget by eliminating the need for hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law to hire an independent certified public accountant to certify their Institutional Cost Reports (ICR). Instead, the ICR will be subject to audit by the Department of Health. This proposal is expected to provide mandate relief to covered providers as the fees established by the Department of Health for this certification are believed to be considerably less for most covered providers than what they currently pay for the services performed by an independent certified public accountant. The amendments will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because the purpose of the proposed rule is to implement provisions in accordance with the enacted 2012-2013 State budget. The amendments eliminate the need for hospitals licensed pursuant to Article 31 by the Office of Mental Health to hire an independent certified public accountant to certify their Institutional Cost Reports (ICR). Instead the ICR will be subject to audit through the Department of Health. There will be no adverse impact on jobs and employment opportunities as a result of this proposed rule.

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## Department of Motor Vehicles

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

#### **Rockland County Motor Vehicle Use Tax**

**I.D. No.** MTV-33-12-00013-P

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

**Proposed Action:** This is a consensus rule making to amend section 29.12(ak) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Rockland County motor vehicle use tax.

**Purpose:** To impose a Rockland County motor vehicle use tax.

**Text of proposed rule:** Section 29.12 is amended by adding a new subdivision (ak) to read as follows:

*(ak) Rockland County. The Rockland County Legislature adopted a local on June 20, 2012 to establish a Rockland County Motor Vehicle Use Tax. The County Executive of Rockland County entered into an agreement with the Commissioner of Motor Vehicles for the collection of the tax in accordance with the provisions of this Part, for the collection of such tax on original registrations made on and after November 1, 2012 and upon the renewal of registrations expiring on and after January 1, 2013. The Commissioner of Finance is the appropriate fiscal officer, except that the County Attorney is the appropriate legal officer of Rockland County referred to in this Part. The tax due on passenger motor vehicles for which the registration fee is established in paragraph (a) of subdivision (6) of Section 401 of the Vehicle and Traffic Law shall be \$5.00 per annum on such motor vehicles weighing 3,500 lbs. or less and \$10.00 per annum for such motor vehicles weighing in excess of 3,500 lbs. The tax due on trucks, buses and other commercial motor vehicles for which the registration fee is established in subdivision (7) of Section 401 of the Vehicle and Traffic Law used principally in connection with a business carried on within Rockland County, except for vehicles used in connection with the operation of a farm by the owner or tenant thereof shall be \$10.00 per annum.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Heidi Bazicki, DMV, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

**Data, views or arguments may be submitted to:** Ida Traschen, DMV, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: ida.traschen@dmv.ny.gov

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

#### Consensus Rule Making Determination

This proposed regulation would create a new 15 NYCRR Part 29.12(ak) to provide for the collection of a Rockland County motor vehicle use tax by the Department of Motor Vehicles. Pursuant to the authority contained in Tax Law section 1202(c) and Vehicle and Traffic Law section 401(6)(d)(ii), the Commissioner must collect a motor vehicle use tax if a county has enacted a local law requiring the collection of such tax.

On June 20, 2012 the Rockland County Legislature enacted a local law requiring that a motor vehicle use tax be imposed on passenger and commercial vehicles. Pursuant to this law, the Commissioner is required to collect the tax on behalf of the county and transmit the revenue to the County, minus the administrative costs required to process the tax. The tax is five dollars per annum on a passenger vehicle weighing 3,500 pounds or less, ten dollars per annum on a passenger vehicle weighing more than 3,500 pounds, and ten dollars per annum on all commercial vehicles. There are certain exempt vehicles, such as vehicles used by non-profit religious, charitable, or educational organizations, and vehicles used only in connection with the operation of a farm by the owner or tenant of the farm.

This is a consensus rule because the Commissioner has no discretion about whether to collect the tax, i.e., it must be collected per the mandate of the Rockland County law. The merits of the tax may have been debated before the Rockland County Legislature, but are no longer the subject of debate—it is now the law. DMV is merely carrying out the will expressed by the County Legislature.

#### Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

## Public Service Commission

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

#### Telecommunications Companies Ability to Attach to Utility Company Poles

**I.D. No.** PSC-33-12-00009-P

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

**Proposed Action:** The Commission is considering a complaint of TVC Albany, Inc. d/b/a Tech Valley Communications (TVC) against Central Hudson Gas and Electric Corporation regarding its right to attach facilities to poles owned by Central Hudson.

**Statutory authority:** Public Service Law, section 119-a

**Subject:** Telecommunications companies ability to attach to utility company poles.

**Purpose:** Consideration of Tech Valley's ability to attach to Central Hudson poles.

**Substance of proposed rule:** On June 12, 2012 TVC Albany, Inc., d/b/a Tech Valley Communications filed a formal complaint against Central Hudson Gas and Electric Corporation (Central Hudson) seeking to attach facilities to poles owned by Central Hudson. The Commission is considering whether to grant, deny or modify, in whole or part, the relief requested in the complaint filed by TVC Albany, Inc. or take additional action. The Commission may apply its decision here to the pole attachment arrangements of other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/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.ny.gov

**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.ny.gov

**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.

(12-C-0265SP1)

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

#### Include Provisions That Were Omitted from a Previous SC 19 Filing, and Addition of the Definition of "Force Majeure" to SC 19

**I.D. No.** PSC-33-12-00010-P

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

**Proposed Action:** The Commission is considering a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid NY to revise its rules and regulations contained in P.S.C. No. 12—Gas, to become effective November 1, 2012.

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

**Subject:** Include provisions that were omitted from a previous SC 19 filing, and addition of the definition of "Force Majeure" to SC 19.

**Purpose:** To make various changes to the rates, charges, rules and regulations contained in P.S.C. No. 12—Gas.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid NY to revise its rules and regulations contained in P.S.C. No. 12—Gas. The filing proposes to add a definition of "Force Majeure" regarding an ESCO's delivery

responsibility and to include more detail on capacity release services already available to ESCOs. The proposed filing has an effective date of November 1, 2012. The Commission may resolve related matters, and may take this action for other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/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.ny.gov

**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.ny.gov

**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.

(12-G-0342SP1)

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

**Refinancing of Long-Term Indebtedness**

**I.D. No.** PSC-33-12-00011-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, modify, or reject, a petition filed by New York Water Service Corporation d/b/a New York American Water Company to refinance long-term indebtedness in the amount of approximately \$10 million.

**Statutory authority:** Public Service Law, section 89-f

**Subject:** Refinancing of long-term indebtedness.

**Purpose:** To allow or disallow New York Water Service Corporation d/b/a New York American Water Company to refinance long-term debt.

**Substance of proposed rule:** The Commission is considering whether to approve or reject in whole or in part or modify a request sought in a petition filed by New York Water Service Corporation d/b/a New York American Water Company to refinance long-term indebtedness in the principal amount of approximately \$10 million.

**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.ny.gov/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.ny.gov

**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.ny.gov

**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.

(12-W-0314SP1)

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

**Central Hudson Gas & Electric Corporation's Net Metering Limit Under Public Service Law Section 66-j**

**I.D. No.** PSC-33-12-00012-P

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

**Proposed Action:** The Commission is considering a July 20, 2012 petition from Hudson Valley Clean Energy requesting an increase in Central Hudson Gas & Electric Corporation's Net Metering Limit pursuant to Public Service Law Section 66-j.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Central Hudson Gas & Electric Corporation's Net Metering Limit under Public Service Law Section 66-j.

**Purpose:** To increase the Net Metering Limit in Central Hudson Gas & Electric Corporation's electric service territory.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole, or in part, or to take any other action concerning Hudson Valley Clean Energy's July 20, 2012 petition requesting an increase of the Net Metering Limit in Central Hudson Gas and Electric Corporation's (Central Hudson) electric service territory. Public Service Law § 66-j (3)(a)(iii) requires each electric corporation to provide net metering contracts to eligible customer-sited generation on a first come, first serve basis, until the total rated generating capacity of such generation is equivalent to one percent of the corporation's electric demand for the year 2005. The statute allows electric corporations to provide net metering contracts to additional generation of their own accord. It also states that the Commission may require an increase in the limit if it determines that additional net energy metering is in the public interest. Hudson Valley Clean Energy requests that the Commission increase Central Hudson's net energy metering limit by three times its current limit to 36 MW.

**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.ny.gov/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.ny.gov

**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.ny.gov

**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.

(12-E-0343SP1)

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## Racing and Wagering Board

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

**Minimum Price for Which a Horse Shall be Entered in a Claiming Race**

**I.D. No.** RWB-33-12-00002-EP

**Filing No.** 749

**Filing Date:** 2012-07-25

**Effective Date:** 2012-07-25

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

**Proposed Action:** Amendment of section 4038.2 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, section 101(1)

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

**Specific reasons underlying the finding of necessity:** The Board has determined that immediate adoption of this rule is necessary for the preservation of the public safety and general welfare and that compliance with the requirements of subdivision 1 of Section 202 of the State Administrative Procedure Act would be contrary to the public interest.

Between November, 2011 and April 2012, 18 thoroughbred horses in New York State that were entered in claiming races were injured and subsequently died. Their deaths prompted a comprehensive analysis of the circumstances and possible causes for the deaths of these horses. One common aspect in these races is the fact that the horse that broke down was involved in a claiming race. This rule is neces-

sary to remove an incentive that a trainer or owner may have for entering an undervalued horse in proportion to the value of the purse that is offered in the claiming race. In other words, this rule will mandate a claiming price to purse proportion and thus establish a relationship between investment in a horse and the potential purse in a manner designed to provide a safer racing environment in which financial incentive is lessened to race a horse that should not be raced.

Given the danger of a horse breaking down, and the safety threat presented to both the jockey on the horse and the jockeys riding in close proximity, this rule is necessary to protect the safety of human and equine athletes. Thoroughbred horses travel over the racetrack at an average speed of approximately 40 miles per hour, sometimes exceeding that average as they sprint to the finish or to gain positional advantage. An outclassed horse in a superior racing field may be forced to race beyond its limits and result in a fatal breakdown.

This rule is also necessary to protect the general welfare of the horse racing industry and the thousands of jobs that are created through it. Public confidence in both the process of racing and in pari-mutuel wagering system is necessary for the sport to survive, and with it the jobs and revenue generated in support of government. Claiming races are an essential part of thoroughbred racing and pari-mutuel wagering. This rule is necessary to ensure integrity in the claiming process, and in turn promote the situation that when a horse steps onto a race track, it is fit to compete in the race in which it is entered.

**Subject:** Minimum price for which a horse shall be entered in a claiming race.

**Purpose:** To diminish the risk of injury to human and equine participants in horse racing.

**Text of emergency/proposed rule:** Section 4038.2 of 9 NYCRR is amended to read as follows:

4038.2. Minimum price for claim.

The minimum price for which a horse may be entered in a claiming race shall [be \$ 1,200.] *not be less than fifty percent of the value of the purse for the race.*

**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 September 22, 2012.

**Text of rule and any required statements and analyses may be obtained from:** John Googas, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.ny.gov

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

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

#### **Regulatory Impact Statement**

1. Statutory authority and legislative objectives of such authority: The Board is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law sections 101(1). Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel thoroughbred racing activities.

2. Legislative objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: This rulemaking is necessary to ensure that entries in claiming races in thoroughbred racing meet a minimum value, thereby ensuring that the horses are competitive in class proportional to the purses for which they are competing. The current rule was adopted prior to 1974 and continued when the Board's comprehensive rules were codified in 1974.

A claiming horse is, in effect, offered for sale at a designated price within the range of the claiming race at which they are entered by their owners. The potential buyer of a horse in a claiming race must enter his claim before the race. By entering a horse in a claiming race, the owner is offering his horse up for sale to another other individual.

The rule as written does not take into account principles of proportional economics in relation to current purses. Purses have increased due in part to the advent of video lottery terminals (VLTs). Video lottery terminals opened up at Aqueduct on October 28, 2011, making Aqueduct an attractive venue for owners to race their horses. This year, purses at the NYRA have increased substantially. As reported by

The Saratogian newspaper on March 17, 2012, NYRA spokesman Dan Silver said that for the first two months of 2012, purses at Aqueduct have averaged \$396,000 per day, which is up from \$266,000 per day over the same period last year. Subsequently, doubts have been raised publicly in the pari-mutuel wagering community as to whether the quality of horses has kept pace with the growth of claiming race purses.

Horses drop in class, but still compete for larger purses than they did in the previous higher class. This disproportionate relationship has resulted in inferior horses competing for more money, particularly when other states have smaller purses for higher grades. This rule will establish a relationship between investment in a horse and the potential purse in a manner designed to provide a safer racing environment.

Not only does this rule removes the flat threshold of \$1,200 (which the Racing and Wagering Board was unable to justify through archival research), the new rules adopt a sliding scale, which is more reasonable given that claiming purses may rise or fall in the future.

This rulemaking is consistent with one of the recommendation from the American Association of Equine Practitioners in its 2009 whitepaper titled "Putting the Horse First: Veterinary Recommendations for the Safety and Welfare of the Thoroughbred Racehorse," where veterinarians advised that purses should not exceed claiming prices by more than 50%.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules. Naturally, there will be an economic impact on horse owners who will not be able to enter their horses in races, but it impossible to gauge that number due to the speculative nature of whether an owner or trainer will decide to enter a horse in a claiming race, the changing value of a horse in relation to subjective performance and the performance of other race horses.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: Board staff reviewed published results, claiming values and horses that may or may not compete in future claiming races. After considering the issue, the Board determined that there was no reliable formula for determining the costs of this rule by excluding horses based on their value in comparison to the value of the purses.

5. Local government mandates: None. The New York State Racing and Wagering Board is the only governmental entity authorized to regulate pari-mutuel harness racing activities. This rulemaking does not impose any obligations on local governments.

6. Paperwork: There will be no additional paperwork. The Board will utilize the existing documents for administrative adjudication to determine whether the suspension of a pre-race detention order is appropriate.

#### 7. Duplication: None.

8. Alternatives: The only alternative that the Board considered is to retain the rule as currently written, which is not acceptable. This rulemaking reverses a 2006 amendment, which eliminated the consideration of a horse's value in proportion to the purse that is offered in a claiming race. Given the narrow purpose of requiring a specific value in proportion to the purse offered, no viable alternative could be presented.

#### 9. Federal standards: None.

10. Compliance schedule: The rule can be implemented immediately upon publication as an adopted rule.

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

As is evident by the nature of this rulemaking, this proposal affects the entry of horses in claiming races proportional to the value of the horse. This will not affect jobs or employment opportunities because racetracks can still offer claiming races with purses that are proportional to the value of some lower-priced claiming horses. This rule merely requires a proportional economic relationship between the purse offered and the value of a claiming horse. This amendment will not adversely impact rural

areas, jobs, small businesses or local governments and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. This amendment is intended to reduce an incentive to enter a horse in a claiming race where it is can be outperformed to the point of serious injury or death to the horse or jockey. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely affect small business, local governments, public entities, private entities, or jobs in rural areas. There will be no impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. There will also be no adverse impact on small businesses and jobs in rural areas. A Jobs Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either.

## Office of Temporary and Disability Assistance

### NOTICE OF ADOPTION

#### Fair Hearings Process

**I.D. No.** TDA-17-11-00016-A

**Filing No.** 748

**Filing Date:** 2012-07-25

**Effective Date:** 90 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 section 358-5.5 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 22(8) and 34(3)(f)

**Subject:** Fair Hearings Process.

**Purpose:** Amend fair hearings regulation to revise the time frames within which an Appellant or an Appellant's authorized representative must request that a defaulted fair hearing be rescheduled.

**Text of final rule:** Section 358-5.5 of Title 18 NYCRR is amended to read as follows:

§ 358-5.5 Abandonment of a request for a fair hearing.

(a) OAH will consider a fair hearing request abandoned if neither the appellant nor appellant's authorized representative appears at the fair hearing unless either the appellant or appellant's authorized representative has:

(1) contacted OAH [within 15 days of the scheduled date of the fair hearing] to request that the fair hearing be rescheduled; and

(2) provided OAH with a good cause reason for failing to appear at the fair hearing on the scheduled date; or

(3) contacted OAH within 45 days of the scheduled date of the hearing and establishes that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date].

(b) OAH will restore a [case] fair hearing to the calendar if the appellant or appellant's authorized representative has met the requirements of subdivision (a) of this section.

(c) *If the appellant defaults a fair hearing that is subject to aid-continuing, the right to aid-continuing ends upon default.*

(1) *If the fair hearing is restored to the calendar based upon a request to do so made within 60 days from the date of the default, aid-continuing will be restored retroactively.*

(2) *If the fair hearing is restored to the calendar based upon a request to do so made 60 days or more from the date of the default, aid-continuing will be restored prospectively only from the date of the request to restore the fair hearing to the calendar.*

(d) *In no event will a defaulted fair hearing be restored to the calendar if the request to do so is made one year or more from the date of the defaulted fair hearing.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 358-5.5(a) and (b).

**Revised rule making(s) were previously published in the State Register** on February 29, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.ny.gov

#### Revised Regulatory Impact Statement

##### 1. Statutory authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 22(8) requires OTDA to promulgate regulations as may be necessary to administer its fair hearings process.

SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules in order to ensure that the due process rights of applicants for and recipients of public assistance, medical assistance, food stamps and services are adequately protected. Furthermore, these statutes give OTDA the authority to promulgate regulations concerning the administration of the fair hearings process.

##### 3. Needs and benefits:

The regulations governing the fair hearings process for public assistance, medical assistance, food stamps and services are generally contained in 18 NYCRR Part 358. This instant regulatory change is in response to a case titled, Donald Johnson v. Elizabeth R. Berlin, et ano, Sup. Ct. New York County (400081/10). While the current regulations protect the rights of individuals who ask for hearings (the "Appellants"), the goal of this change is to ensure that the due process rights of Appellants are protected in instances where they have good cause reasons for not attending their scheduled fair hearings.

OTDA received comments on the regulations and in response thereto made changes to the regulations as originally proposed. The proposed amendments to 18 NYCRR § 358-5.5 would remove the 15-day and 45-day time frames within which an Appellant or Appellant's authorized representative is to request that a fair hearing be rescheduled. The criteria for reviewing an Appellant's reason for missing the scheduled hearing would be whether the Appellant has established good cause for missing same. What constitutes a good cause would be determined on a case-by-case basis and would be relative to the circumstances of each Appellant. This means that the Appellant's time frame to contact OTDA's Office of Administrative Hearings (OAH) would be proscribed by the Appellant's good cause reason, and timeliness would be a factor to be considered in such determination. Additionally, mindful of the comments received, yet weighing the due process rights of fair hearing Appellants, the proposed regulations would provide a one year time frame from the date of the default within which to ask for the hearing to be reopened. Furthermore, if the request to reopen is made 60 days or more from the date of the default, aid-continuing will be restored prospectively only from the date of the request.

In the Notice of Revised Rule Making published on February 29, 2012, OTDA proposed to amend 18 NYCRR § 358-5.5(a) regarding the Appellant's representation, specifically who may appear at a hearing on behalf of the Appellant when he or she is absent and who may request that a defaulted hearing be reopened. During the public comment period, the advocate community generally opposed the proposed amendments regarding who may appear at a hearing in lieu of the Appellant. OTDA has reviewed the concerns expressed by the advocate community and determined not to pursue amendments regarding representation at this time. The existing regulatory language in 18 NYCRR § 358-5.5(a) and (b) regarding representation will remain in effect.

## 4. Costs:

These regulatory amendments would have no significant cost impact, and the specific time frames will balance the amount of aid continuing to be paid and give repose to claims, while providing for the ongoing needs of an Appellant.

## 5. Local government mandates:

The proposed amendments may have a nominal impact on social services districts. Both before and after the regulatory change, the social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulation change might have resulted in procedural dismissals of the hearing requests.

These regulatory amendments would not impose any additional programs, services, duties or responsibilities upon the social services districts, other than the above. OAH is responsible for reviewing requests to have fair hearings rescheduled and for making good cause determinations.

## 6. Paperwork:

There would be no additional forms required to support this process.

## 7. Duplication:

The proposed amendments to 18 NYCRR § 358-5.5 would not duplicate, overlap or conflict with any existing State or federal requirements.

## 8. Alternatives:

The alternative is to leave the regulation as it is currently written. However, OTDA is pursuing amendments because the goal of this rule is to ensure fairness in the hearings process.

## 9. Federal standards:

The proposed amendments would not conflict with federal standards for public assistance, medical assistance, food stamps and services.

## 10. Compliance schedule:

Social services districts would be in compliance with the proposed amendments upon their adoption, and OAH would utilize its existing administrative framework to be in compliance with the proposal on its effective date.

**Revised Regulatory Flexibility Analysis**

## 1. Effect of rule:

The proposed amendments would have no effect on small businesses. The proposed amendments may have a nominal impact on social services districts. Both before and after the regulatory change, the social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

## 2. Compliance requirements:

As this proposed regulation is primarily directed at OTDA's administration of the hearings process, these regulatory amendments would only have a nominal impact on the social services districts.

## 3. Professional services:

The proposed amendments would not require small businesses or local governments to hire additional professional services.

## 4. Compliance costs:

These regulatory amendments would have no significant cost impact.

## 5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with the proposed regulation.

## 6. Minimizing adverse economic impact:

It is anticipated that there would not be an adverse economic impact.

## 7. Small business and local government participation:

All 58 social services districts in the State have had opportunities to review and comment upon these proposed regulatory amendments. The first round of comments was responded to in the April 27, 2011 issue of the New York State Register (I.D. No. TDA-17-11-00016-P). A second round of comments was received in response to the April 27, 2011 publication and was addressed in the Assessment of Public Comments published on February 29, 2012 (I.D. No. TDA-17-11-00016-RP). A final round of comments was received in response to the February 29, 2012 publication and is addressed in the current Assessment of Public Comment.

**Revised Rural Area Flexibility Analysis**

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

The proposed amendments may have a nominal impact on the forty-four rural social services districts in the State. Both before and after the regulatory change, the rural social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the rural social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

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

No additional record keeping, reporting or compliance would be required by the rural social services districts, other than that noted above. The proposed amendments would primarily affect the operations of OTDA's Office of Administrative Hearings.

## 3. Costs:

These regulatory amendments would have no significant cost impact.

## 4. Minimizing adverse impact:

It is anticipated that there would not be an adverse economic impact.

## 5. Rural area participation:

All rural social services districts in the State have had opportunities to review and comment upon these proposed regulatory amendments. The first round of comments was responded to in the April 27, 2011 issue of the New York State Register (I.D. No. TDA-17-11-00016-P). A second round of comments was received in response to the April 27, 2011 publication and was addressed in the Assessment of Public Comments published on February 29, 2012 (I.D. No. TDA-17-11-00016-RP). A final round of comments was received in response to the February 29, 2012 publication and is addressed in the current Assessment of Public Comment.

**Revised Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they would not have a substantial adverse impact on jobs and employment opportunities in the private or public sectors. The proposed amendments would not affect in any real way the jobs of the workers in the social services districts. Thus the changes would not have any adverse impact on jobs and employment opportunities in the State.

**Assessment of Public Comment**

The Office of Temporary and Disability Assistance (OTDA) received seventeen communications regarding the regulatory change. Thirteen of the communications were comments from the advocate community, three of the comments came from social services districts (SSDs), and one was from a retired State employee. One of the SSDs requested information. All of these comments were reviewed and considered in this Assessment of Public Comments.

## 15 and 45 Day Time Frames

In regard to the removal of the 15 and 45 day time frames, eleven advocates specifically endorsed their removal. Two SSDs opposed the removal of the 15 and 45 day time frames, claiming that removal of

the time frames would create uncertainty and opined that the current procedures were adequate, and one of them advocated that the 15 day time frame could be expanded to 30 days.

It is noted that Appellants will have the initial burden of demonstrating that they have a good cause reason for missing the originally scheduled hearing, and that time will be a factor in that determination. Any “uncertainty” regarding the ongoing nature of the fair hearings will be no different than it is now, as an Appellant presently can request that a fair hearing be reopened every 44 days, claiming that there is a mailing problem. The reason 30 days was not chosen, was that it does not take into account the variability of reasons for missing a hearing.

#### One Year Limit

In regard to the one year time limit within which to request a re-opening, seven advocates endorsed the time frame, and two opposed the time limit. Two SSDs opposed the time limit. The opposing advocates claimed that there may be exceptional circumstances which would militate against the one year time frame, essentially that the time frame was not long enough. The SSDs opposed the time limit as being too long, claiming that they would have difficulties due to staff turnover, implementing sanctions, case closings and recoupments as they relate to Aid to Continue (ATC). As was indicated in the previous New York State Register publication on February 29, 2012, the award of ATC in a reopening is not automatic, and will be awarded on a case by case basis. In reviewing previous comments, OTDA considered the concerns of the SSDs and determined that a one year time period, as opposed to a six month time period, was reasonable. The one year time frame strikes a balance between protecting the due process rights of the Appellants and providing needed finality to the process. If a default occurs, then the SSD should implement its action. In regard to staff turnover, the complaining SSD did not explain why it had significant staffing turnover.

#### 60 Day Aid to Continue

As to the 60 day time frame to receive ATC, OTDA received five endorsements and two complaints from the advocates. The advocates complained that the 60 day time frame treats Appellants disparately depending on when they request the default to be vacated. OTDA also received a complaint from one SSD, which asserted that the additional ATC would be costly and that the 60 day time frame would be problematic as it relates to managed care and home care. OTDA notes that the proposed regulations were previously revised to add a one year time frame to ask for a defaulted hearing to be reopened. Additionally, a 60 day time frame for retroactive ATC was previously added. These revisions struck a balance between the needs of the Appellants for sustenance, and the fiscal concerns of the SSD regarding the amount of aid-continuing to be paid. As to the SSD’s complaint regarding managed care and home care, its concerns are a non-issue as ATC in the areas of managed care and home care is prospective unless there are some outstanding medical bills. If there is an overpayment, the SSD can commence a recoupment action.

#### Good Cause

Advocate groups opined that the definition of good cause is ambiguous. However, the current regulation already has a good cause standard, and the determination of good cause will be determined on a case by case basis. One commentator opined that the determination of good cause puts too much authority in the hands of OAH intake staff. Under the current regulations, these same individuals regularly make good cause determinations; as such there will be no “increase” in their authority.

#### Representation

The advocates generally opposed the proposed amendments regarding representation, specifically who may appear at a hearing on behalf of the Appellant when he or she is absent. OTDA has reviewed the concerns expressed by the advocate community and determined not to pursue the proposed amendments regarding representation at this time. The existing regulatory language in 18 NYCRR § 358-5.5(a) and (b) regarding representation will remain in effect.

#### Litigation

To the extent that certain comments went beyond the scope of com-

menting on the instant regulation and tried to link it to ongoing litigation in cases such as Fishman v. Daines, 09-CV-5248 (EDNY), which deals with post-default letters, and Shakhnes v. Daines, 06-CV-4103 (SDNY), which deals with the timeliness of hearings, those comments will not be assessed herein other than to note that the proposed regulatory change will ameliorate the situation for Appellants who default a hearing.

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## Workers’ Compensation Board

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### NOTICE OF ADOPTION

#### Recording of Hearings

**I.D. No.** WCB-39-11-00011-A

**Filing No.** 754

**Filing Date:** 2012-07-26

**Effective Date:** 2012-08-15

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

**Action taken:** Amendment of sections 300.7(c), 300.9, 300.13(d), 300.18(f), 325-4.6(c), 326-1.5(b), 326-2.7, 330.4(b), 340.4(b) and 345.4 of Title 12 NYCRR.

**Statutory authority:** Workers’ Compensation Law, sections 117(1), 25(3)(c), 142(5) and 118

**Subject:** Recording of hearings.

**Purpose:** To provide flexibility in determining the appropriate means for recording of hearings.

**Text or summary was published** in the September 28, 2011 issue of the Register, I.D. No. WCB-39-11-00011-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, NYS Workers’ Compensation Board, Office of General Counsel, 328 State Street, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

#### Assessment of Public Comment

The 45-day public comment period with respect to Proposed Rule I.D. No. WCB-39-11-00011-P commenced on September 28, 2011, and expired on November 14, 2011. The Chair and the Workers’ Compensation Board (Board) received and accepted formal written public comments on the proposed rule through November 18, 2011.

The Chair and Board received 67 formal written comments. 66 of the comments expressed concern regarding the adoption of the regulatory amendments. The Board received letters or emails from: ten attorneys or attorney groups; fifteen Board employees; 24 court reporters; eight New York State legislators; one manufacturer of digital audio recording equipment; and, three unions. The remaining six commenters did not identify themselves with any group.

All of the comments received were reviewed and assessed. The commenters shared similar concerns about the proposed regulatory amendments. In fact a number of the letters used identical language. The concerns expressed mirrored the concerns expressed by the Senate Labor Committee and addressed by the Chair of the Board at a hearing on October 6, 2009. At that hearing the Chair of the Workers’ Compensation Board testified to address those concerns. This assessment will summarize and respond to the comments received.

Comments concerning Workers’ Compensation Law section 122

A number of commenters expressed concern that the proposed regulatory amendments are in violation of the language contained in Workers’ Compensation Law (WCL), section 122. Section 122 of the WCL provides that:

A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified.

As set forth in the Regulatory Impact Statement, section 122 of the WCL does not require that records of hearing testimony be taken by Board employees, nor does it require that testimony be recorded by a stenographer. Rather, this section provides that if such testimony, evidence or procedure of an investigation is taken by a Board stenographer (now known as verbatim reporters) it does not require the stenographer’s

presence to be entered into evidence. Therefore, this section focuses on the evidence which can be admitted in a Board proceeding. This section does not address the record to be kept of hearings, and only discusses who transcribes any minutes of an investigation taken. Further, this section relates to investigations, and an investigation is not a hearing.

The amendments to 12 NYCRR §§ 300.7(c), 300.9, 300.13(d), 300.18(f), 325-4.6(c), 326-1.5(b), 326-2.7, 330.4(b), 340.4(b) and 345.4(b) are in accordance with the Board's duty to conduct accurate and fair hearings, to ensure that all parties are afforded due process and to preserve the integrity of the hearing process. Alternative and additional means of recording hearings, such as electronic recording devices, will ensure that all parties receive accurate, impartial, timely and fair hearings. In addition, alternative means of recording will assist the Board in ensuring that the hearings are conducted in the utmost professional and ethical manner. This will assist the Board in maintaining the integrity of the hearing process.

Comments concerning the "replacement" of verbatim reporters with electronic recording devices

The regulatory amendments will not have an adverse impact on existing verbatim reporters' jobs. Rather than requiring that hearings be recorded by a stenographer in §§ 300.7(c), 300.9, 300.13(d), 300.18(f), 325-4.6(c), 326-1.5(b), 326-2.7, 330.4(b), 340.4(b), and 345.4(b), the rule allows the Board to maintain the verbatim record in a readable, viewable, or audible format. This change will provide the Board flexibility to use other means of recording hearings, such as audio digital recordings, in addition to using verbatim reporters. The proposed regulation should have little to no effect on the verbatim reporters currently employed by the Board. The Board expects to continue to use their services to record and transcribe hearings. It is not clear what effect this rule will have on the employment of new verbatim reporters. The implementation of additional means of recording hearings may reduce the need to fill all of the unfilled verbatim reporter positions. As was fully developed at a hearing before the New York State Senate Standing Committee on Labor on October 6, 2009, the Board has had longstanding and intractable difficulties attracting verbatim reporters and retaining verbatim reporters. An important reason why the Board has so many unfilled positions is that verbatim reporters, especially downstate, leave the Board after a few years, four to five, for employment in higher-paying positions with the Office of Court Administration.

Comments regarding accuracy of electronic recordings

A number of commenters voiced opposition to the proposed regulatory amendments based on a belief that electronic recording of hearings will not result in an accurate record. The commenters concerns appear to be based on prior experience with or anecdotal information regarding older, less technologically advanced equipment than that selected by the Board. The concerns by the commenters are that the electronic equipment will not clearly record the variety of speakers and languages at a workers' compensation hearing. It is noted that the amended regulations require that the Board maintain a record of a proceeding in a "readable, viewable or audible format." Thus the Board retains its obligation to create a usable record of every hearing and proceeding.

Furthermore, it is believed that the commenters concerns are based on misconceptions about the equipment used by the Board and the process the Board employs when digital-audio recording is employed. The digital audio-recording equipment that the Board has been using, records each speaker at a workers compensation hearing using an individual microphone. The Board has extensively tested this equipment during the pilot phase to ensure that the equipment generates an accurate, understandable and complete record.

Comments that verbatim reporters job function reaches beyond recording of hearings

Several commenters stated that a verbatim reporter does not merely record the hearing or proceedings, but in fact facilitates the smooth functioning of the hearing by assisting and directing the parties as well as reading back testimony or requesting clarification when an accented speaker testifies. It is undisputed that verbatim reporters perform these functions at hearings and will continue to function in this capacity on behalf of the Board. However, the gradual and smooth transition to use of digital audio-recording at hearings will permit all participants to adapt to any changes in process. Furthermore, verbatim reporters will still participate in many trials with multiple participants.

Comments regarding availability of transcript

Several commenters were concerned that transcripts of hearings would not be available for reference in appeals by page number and that listening to a recorded hearing takes much longer than reviewing a typed transcript. This is a misconception about the process. Transcripts will still be made of Board hearings when requested. Use of alternate methods of recording the hearing, such as digital audio recording, will permit verbatim reporters to use their time in a more valuable manner. Currently seventy-three percent (73%) of all Board cases require a hearing which in turn requires a verbatim reporter to be present. Of the seventy-three percent (73%) only

three and one-half percent (3.5%) require stenographic transcription of the hearing minutes. In other words, nearly seventy percent (70%) of the verbatim reporters' work at hearings is never transcribed. This is an inefficient and expensive way to record hearings. Verbatim reporters spend approximately seventy percent (70%) of their work time recording hearings that will never be transcribed and only (30%) of their work time transcribing the hearing minutes and performing other job-related duties. Transcripts will continue to be made of hearings as requested by the parties regardless of the method used in recording the actual hearing.

Comment that hearing reporters are available and that use of digital audio recording equipment is too expensive

Some commenters expressed skepticism at the Board's contention that it has difficulty attracting and retaining verbatim reporters and that the unavailability of hearing reporters has resulted in unnecessary adjournments of hearings. As stated in the Regulatory Impact Statement, the shortage of verbatim reporters was so severe that the Department of Civil Service granted the Board the ability to conduct the exam on a decentralized basis. In 2002, verbatim reporters were upgraded and received an increase in salary. Additionally, verbatim reporters are permitted to supplement their state wages by charging parties a per page fee for transcriptions of Board hearings and working for parties on their own time taking depositions of medical witnesses in Board related cases. In spite of all this, verbatim reporters elect to leave the Board for positions at the Office of Court Administration when they have gained the required experience. Due to shortages, the Board has been forced in certain locations to schedule calendars of hearings which are not trials. The purpose of no-trial hearing calendar is that if there is no verbatim reporter available, the Board can more easily cancel the calendar if necessary. Currently, conducting a hearing without a means to record it stenographically violates the regulations. Alternative and additional means of recording hearings, such as electronic audio and video devices, would supplement the existing verbatim reporter staff and provide the Board with much needed flexibility in scheduling and conducting hearings. If the Board had the ability to conduct hearings without verbatim reporters being present, there would be no need to cancel hearings which necessarily would prevent delays and difficulties in ensuring timely resolution of claims. Further, when cases are cancelled it not only delays the resolution of a case, but it also creates backlogs of cases to be heard. With additional means of recording proceedings, the Board can examine whether proceedings, such as conciliation meetings, should be recorded.

As stated in the Regulatory Impact Statement, it is estimated that the cost of installing electronic recording devices will be \$5,000.00 per unit for each hearing part. At the present time, the Board has not determined the number of electronic recording devices which may be installed or a time frame that the installation will be performed. It is the Board's plan to install alternative means of recording on an as needed basis over time. The cost of adding an electronic recording device will not be passed to any of the participants in the workers' compensation system.

Comments that electronic recording of hearings will stifle off-the-record discussions

Several commenters were concerned that the use of electronic recording devices will stifle off-the-record and settlement discussions between the parties. The use of electronic recording devices should not affect the conduct of hearings in any manner. The parties will still be able to conduct off-the-record and settlement discussions and those discussions will not be transcribed for use in appeals.