

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.

Office of Alcoholism and Substance Abuse Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Behavioral Health Organizations

I.D. No. ASA-03-12-00007-EP

Filing No. 1441

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Proposed Action: Addition of Part 801 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 22.07, 32.01, 32.02, 32.07, 33.16, 33.23 and 33.25; L. 2011, ch. 59, section 111(t)

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

Specific reasons underlying the finding of necessity: The amendments to 14 NYCRR Parts 580, 582 and 587 are necessary to inform providers of services of their responsibilities with respect to Behavioral Health Organization (BHO) implementation. As the BHO implementation date commenced November 1, 2011, with full implementation effective January 1, 2012, the emergency filing is needed to inform providers of their responsibilities. Further, the delivery and coordination of care for persons in need of services could be negatively impacted if the emergency rule is not in effect at the time of the BHO implementation. Therefore, for the

health, safety and general welfare of persons in need of services, an emergency filing is necessary.

Subject: Behavioral Health Organizations.

Purpose: To ensure compliance by OASAS certified providers regarding their obligations in relation to Behavioral Health Organizations.

Text of emergency/proposed rule: A new Part 801 is added to Title 14 of the New York Codes, Rules and Regulations to read as follows:

Part 801

Behavioral Health Organizations

Section 801.1 Statement of Purpose

The purpose of this part is to set forth the responsibilities for providers of Part 816 Medically Managed Detoxification Services and inpatient medically supervised withdrawal services, Part 818 Chemical Dependence Inpatient Rehabilitation Services and Part 822 Chemical Dependence Outpatient and Opioid Treatment Services regarding Behavioral Health Organizations.

Section 801.2 Legal Base

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

(b) Section 19.07(e) of the MHL authorizes the Commissioner to adopt standards including necessary rules and regulations pertaining to chemical dependence treatment services.

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

(d) Section 19.16 of the MHL requires the Commissioner to establish and maintain, either directly or through contract, a central registry for purposes of preventing multiple enrollments in methadone programs.

(e) Section 19.21(b) of the MHL requires the Commissioner to establish and enforce regulations concerning the licensing, certification, and inspection of chemical dependence treatment services.

(f) Section 19.21(d) of the MHL requires OASAS to establish reasonable performance standards for providers of services certified by OASAS.

(g) Section 19.40 of the MHL authorizes the Commissioner to issue operating certificates for the provision of chemical dependence treatment services.

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

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

(j) Section 365-m of the Social Services Law authorizes the Commissioner of OASAS and the Commissioner of the Office of Mental Health, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

Section 801.3 Behavioral Health Organization

(a) Behavioral Health Organization or BHO shall mean an entity selected by the Commissioner of the Office of Alcoholism and Substance Abuse Services and the Commissioner of the Office of Mental Health pursuant to Section 365-m of the New York State Social Services Law to provide administrative and management services for the purposes of conducting concurrent review of Behavioral Health admissions to inpatient treatment settings, assisting in the coordination of Behavioral Health Services, and facilitating the integration of such services with physical health care.

(b) Concurrent Review shall mean the review of the clinical necessity

for continued inpatient Behavioral Health Services, resulting in a non-binding recommendation regarding the need for such continued inpatient services.

Section 801.4 Provider Obligations for Part 816 and Part 818 services

Providers of Part 816 Medically Managed Detoxification Services and inpatient Medically Supervised Withdrawal Services and Part 818 Chemical Dependence Inpatient Rehabilitation Services shall cooperate with their designated regional Behavioral Health Organization. At a minimum, such cooperation shall include:

(a) notifying the appropriate Behavioral Health Organization of an admission for a behavioral health condition for which coverage is provided by Medicaid on a fee-for-service basis to an individual who is not also enrolled in the Medicare program. Such notification shall be provided within 24 hours of such admission or, for an admission occurring on a Friday, Saturday, Sunday or public holiday, by 5:00 p.m. on the next business day following such admission. When Medicaid coverage cannot be determined at the time of admission, notification shall be provided as soon as practicably possible after confirmation of Medicaid eligibility, but in no event more than 24 hours after such confirmation or, for a confirmation made on a Friday, Saturday, Sunday or public holiday, later than 5:00 p.m. on the next business day following such confirmation;

(b) cooperating with concurrent review activities;

(c) ensuring that the discharge plan for such an individual includes consideration of physical health needs and services;

(d) notifying such behavioral health organization no later than 24 hours subsequent to the discharge of such an individual or, for a discharge occurring on a Friday, Saturday, Sunday or public holiday, by 5:00 p.m. on the next business day following such discharge; and

(e) seeking to obtain, as needed, such individual's consent to receive and provide information in a manner that is consistent with federal and state confidentiality laws.

Section 801.5 Provider Obligations for Part 822 services

Providers of Part 822 Chemical Dependence Outpatient and Opioid Treatment services shall cooperate with designated regional behavioral health organizations and shall be authorized to exchange clinical information concerning clients with such organizations in a manner consistent with federal and state confidentiality laws.

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 March 28, 2012.

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: 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:

a) Section 19.07(c) of the Mental Hygiene Law (MHL) charges OASAS with the responsibility of seeing that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment that is effective and of high quality.

b) Section 19.07(e) of the MHL authorizes the Commissioner of OASAS to adopt standards including necessary rules and regulations pertaining to chemical dependence treatment services.

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

d) Section 19.16 of the MHL requires the Commissioner to establish and maintain, either directly or through contract, a central registry for purposes of preventing multiple enrollments in methadone programs.

e) Section 19.21(b) of the MHL requires the Commissioner to establish and enforce regulations concerning the licensing, certification, and inspection of chemical dependence treatment services.

f) Section 19.21(d) of the MHL requires OASAS to establish reasonable performance standards for providers of services certified by OASAS.

g) Section 19.40 of the MHL authorizes the Commissioner to issue operating certificates for the provision of chemical dependence treatment services.

h) Section 32.01 of the MHL authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the MHL.

i) Section 32.07(a) of the MHL authorizes the commissioner to adopt regulations to effectuate the provisions and purposes of article 32 of the MHL.

j) Section 365-m of the Social Services Law authorizes the Commis-

sioner of the Office of Alcoholism and Substance Abuse Services and the Commissioner of the Office of Mental Health, in consultation with the Department of Health, to contract with regional BHOs to provide administrative and management services for the provision of behavioral health services.

The proposed OASAS regulation sets forth the responsibilities for providers of Part 816 Medically Managed Detoxification Services and inpatient medically supervised withdrawal services, Part 818 Chemical Dependence Inpatient Rehabilitation Services and Part 822 Chemical Dependence Outpatient and Opioid Treatment Services regarding BHOs.

These regulations are necessary because, to be effective and consistent with federal and state confidentiality laws, cooperation between BHOs and OASAS certified service providers will require timely communication regarding patient admissions, treatment progress and discharges. The proposed regulation defines a BHO pursuant to section 365-m of the Social Services Law and details the obligations of OASAS certified service providers to participating BHOs. The regulation also defines "concurrent review," which will be the process of reaching a non-binding recommendation of a BHO regarding the need for continued inpatient services.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 (Mental Hygiene Law Article 32) requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers.

3. Needs and Benefits:

The proposed regulations are necessary to set forth the responsibilities for providers of Part 816 Medically Managed Detoxification Services and inpatient medically supervised withdrawal services, Part 818 Chemical Dependence Inpatient Rehabilitation Services and Part 822 Chemical Dependence Outpatient and Opioid Treatment Services regarding BHOs.

These regulations are necessary because, to be effective and consistent with federal and state confidentiality laws, cooperation between BHOs and OASAS certified service providers will require timely communication regarding patient admissions, treatment progress and discharges.

4. Costs:

a. Costs to regulated parties, meaning providers, will be minimal.

b. Costs to the agency, state and local governments will be minimal.

5. Local Government Mandates:

New Part 801 will not place new mandates or administrative requirements on local governments. However, where local governments operate programs certified or funded by OASAS, they may incur minimal costs as indicated in #4 above.

6. Paperwork:

New Part 801 will require some additional paperwork for certified or funded providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control record keeping, it is not expected that new record keeping requirements will be excessive.

7. Duplications:

New Part 801 does not duplicate other state or federal requirements.

8. Alternatives:

An alternative to promulgation of the new Part 801 would be guidance from OASAS and OMH through contract language. However, promulgating a regulation reinforces the importance of compliance with the notice provisions which are essential to achieve the expected Medicaid savings goals of the MRT. OASAS has shared these proposed regulations with constituents in the following stakeholder organizations: the New York Association of Alcohol and Substance Abuse Providers (ASAP), the New York State Conference of Local Mental Hygiene Directors (CLMHD), the Healthcare Association of New York State (HANYS), the Greater New York Hospital Association (GNYHA), the Addiction Treatment Providers Association (ATPA), the Committee of Methadone Program Administrators of New York State (COMPA), and the OASAS Advisory Council.

9. Federal Standards:

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

10. Compliance Schedule:

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

Regulatory Flexibility Analysis

Types / Numbers:

The proposed new Part 801 will impact all approximately 1,550 providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS).

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be some additional paperwork for certified or funded providers to ensure that utilization requirements are met. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

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

Minimizing Adverse Economic Impacts:

As indicated, the only adverse impact anticipated as a result of the proposed regulations are minimal costs associated with additional paperwork requirements. The proposed amendments were presented to the OASAS Advisory Council and then distributed for comment to members of the provider/stakeholder community, and no concern was expressed about these requirements.

Participation of Affected Parties:

The proposed regulations were presented to the OASAS Advisory Council and then distributed for comment to members of the provider/stakeholder community. OASAS has shared this proposed regulation with the New York Association of Alcoholism and Substance Abuse Providers (ASAP), the New York State Conference of Local Mental Hygiene Directors (CLMHD), the Greater New York Hospital Association (GNYHA), the Addiction Treatment Providers Association (ATPA), the Committee on Methadone Program Administrators, Inc. (COMPA), and the OASAS Advisory Council.

Rural Area Flexibility Analysis

Types / Numbers:

The proposed new Part 801 will impact all (currently approximately 1,550) providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office"). Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be some minimal additional paperwork for certified or funded providers to ensure that utilization requirements are met. However, any such paperwork will be minimal and is necessary in order to implement a Medicaid Redesign initiative.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

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

Minimizing Adverse Economic Impacts:

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

Participation of Affected Parties:

The proposed amendments were presented to the OASAS Advisory Council and then distributed for comment to members of the provider/stakeholder community. OASAS has shared this proposed regulation with the New York Association of Alcoholism and Substance Abuse Providers (ASAP), the New York State Conference of Local Mental Hygiene Directors (CLMHD), the Greater New York Hospital Association (GNYHA), the Addiction Treatment Providers Association (ATPA), the Committee on Methadone Program Administrators, Inc. (COMPA), and the OASAS Advisory Council.

Job Impact Statement

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

New York State Bridge Authority

NOTICE OF ADOPTION

Amendment of the NYSBA Toll Schedule

I.D. No. SBA-43-11-00002-A

Filing No. 1433

Filing Date: 2011-12-29

Effective Date: 2012-01-30

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

Action taken: Amendment of sections 201.2, 201.4 and 201.5 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 538 and 528(8)

Subject: Amendment of the NYSBA Toll Schedule.

Purpose: To amend tolls for vehicular bridges controlled by the New York State Bridge Authority in order to provide additional revenue.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. SBA-43-11-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: John Bellucci, Chief of Staff, New York State Bridge Authority, Mid-Hudson Bridge Plaza, 475 Rte. 44/55, Highland, NY 12528, (845) 691-7245, email: info@nysba.state.ny.us

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Job Impact Statement

A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Department of Economic Development

EMERGENCY RULE MAKING

Excelsior Jobs Program

I.D. No. EDV-48-10-00010-E

Filing No. 1434

Filing Date: 2011-12-29

Effective Date: 2011-12-29

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

Action taken: Addition of Parts 190-196 to Title 5 NYCRR.

Statutory authority: Economic Development Law, art. 17; L. 2011, ch. 61; L. 2010, ch. 59

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 Excelsior Jobs Program which was created by Chapter 59 of the Laws of 2010 and recently amended by Chapter 61 of the Laws of 2011. The Excelsior Jobs Program will provide job creation and investment incentives to firms that create and maintain new jobs or make significant financial investment. The Excelsior Jobs Program is one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. Recent amendment to the law extends the current benefit period from five to ten years and offers an enriched package of tax credits. It is imperative that the amended Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

This emergency rule is necessary because, in addition to establishing the application process, standards for application evaluation and procedures for businesses claiming the tax credit, it now incorporates recent statutory amendments which are designed to strengthen the Program. Immediate adoption of this rule will enable the State to begin achieving its economic development goals.

It bears noting that section 356 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

Subject: Excelsior Jobs program.

Purpose: To update the provisions of the Excelsior Jobs Program.

Substance of emergency rule: The regulation creates new Parts 190-196 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the Excelsior Jobs Program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, certificate of tax credit, industry with significant potential for private sector growth and economic development in the State, preliminary schedule of benefits, regionally significant project and significant capital investment.

2) The regulation creates the application and review process for the Excelsior Jobs Program. In order to become a participant in the Program, an applicant must submit a complete application and agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the "Department"); (b) allowing the exchange of its tax and employer information between the

Department of Labor and the Department; (c) agreeing to be permanently decertified for empire zone benefits at any location or locations that qualify for excelsior jobs program benefits if admitted into the Excelsior Jobs Program for such location or locations; (d) providing, if requested by the Department, a plan outlining the schedule for meeting job and investment requirements as well as providing its tax returns, information concerning its projected investment, an estimate of the portion of the federal research and development tax credits attributable to its research and development activities in New York state, and employer identification or social security numbers for all related persons to the applicant.

3) Applicants must also certify that they are in substantial compliance with all environmental, worker protection and local, state and federal tax laws.

4) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 5 below). If it does not, the application shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility and a preliminary schedule of benefits. The preliminary schedule of benefits may be amended by the Commissioner provided he or she complies with the credit caps established in General Municipal Law section 359.

5) The regulation sets forth the eligibility criteria for the Program. The strategic industries are specifically delineated in the regulation as follows: (a) financial services data center or a financial services back office operation; (b) manufacturing; (c) software development; (d) scientific research and development; (e) agriculture; (f) back office operations in the state; (g) distribution center; or (h) in an industry with significant potential for private-sector economic growth and development in this state. Per recent statutory changes to the Program, when determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity. Per statutory change, participants may also begin to receive tax credits once the eligibility requirements are met and can continue to receive credits based on achieving interim milestones.

6) In addition, a business entity operating predominantly in manufacturing must create at least twenty-five net new jobs; a business entity operating predominately in agriculture must create at least ten net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least one hundred net new jobs; a business entity operating predominantly in scientific research and development must create at least ten net new jobs; a business entity operating predominantly in software development must create at least ten net new jobs; a business entity creating or expanding back office operations or a distribution center in the state must create at least one hundred fifty net new jobs; a business entity must be a Regionally Significant Project; or a business entity operating predominantly in one of the industries referenced above but which does not meet the job requirements must have at least fifty full-time job equivalents, and must demonstrate that its benefit-cost ratio is at least ten to one (10:1).

7) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations and may not owe past due state or local taxes. Also, the regulation explicitly excludes: a not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, and a business entity engaged predominantly in the retail or entertainment industry, and a company engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity from eligibility for this program.

8) The regulation sets forth the evaluation standards that the Commissioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) whether the Applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or (2) whether the Applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (3) the degree of economic distress in the area where the Applicant will locate the project identified in its application; or (4) the degree of Applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (5) the degree to which the project identified in the Application supports New York State's minority and women business enterprises; or (6) the degree to which the project identified in the Application supports the principles of Smart Growth; or (7) the estimated return on investment that the project identified in the Application will provide to the State; or (8) the overall economic impact that the project

identified in the Application will have on a region, including the impact of any direct and indirect jobs that will be created; or (9) the degree to which other state or local incentive programs are available to the Applicant; or (10) the likelihood that the project identified in the Application would be located outside of New York State but for the availability of state or local incentives; or (11) the recommendation of the relevant regional economic development council or the commissioner's determination that the proposed project aligns with the regional strategic priorities of the respective region.

9) The regulation requires an applicant to submit evidence of achieving job and investment requirements stated in its application in order to become a participant in the Program. After such evidence is found sufficient, the Department will issue a certificate of tax credit to a participant. This certificate will specify the exact amount of the tax credit components a participant may claim and the taxable year in which the credit may be claimed.

10) A participant's increase in employment, qualified investment, or federal research and development tax credit attributable to research and development activities in New York state above its projections listed in its application shall not result in an increase in tax benefits under this article. However, if the participant's expenditures are less than the estimated amounts, the credit shall be less than the estimate.

11) The regulation next delineates the calculation of the tax credits as described in statute. Of note are the following changes made as a result of recent changes to the statute: the Excelsior Jobs Program Credit has been amended to be calculated as the product of gross wages and 6.85 percent. The Excelsior Research and Development Tax Credit has been increased from ten to fifty percent of the participant's federal research and development tax credit. The Excelsior Real Property Tax Credit is now based on the value of the property after improvements have been made. Under the amended program, a participant may claim both the Excelsior Investment Tax Credit and the investment tax credit for research and development property. In addition, the current tax benefit period for all credits has been lengthened from five years to ten years.

12) The tax credit components are refundable. If a participant fails to satisfy the eligibility criteria in any one year, it loses the ability to claim the credit for that year.

13) Pursuant to the amended statute, the regulation authorizes utilities to offer excelsior job program rates for gas or electric services to participants in the program for up to ten years.

14) The regulation requires participants to keep all relevant records for their duration of program participation plus three years.

15) The regulation requires a participant to submit a performance report annually and states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

16) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or failing to meet the minimum job or investment requirements of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

17) The regulation lays out the appeal process for participant's who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at <http://www.esd.ny.gov/BusinessPrograms/Excelsior.html>.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDV-48-10-00010-P, Issue of December 1, 2010. The emergency rule will expire February 26, 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@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

Chapter 59 of the Laws of 2010 established Article 17 of the Economic Development Law, creating the Excelsior Jobs Program and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program. Chapter 61 of the Laws of 2011 recently amended the statute to strengthen the Program.

LEGISLATIVE OBJECTIVES:

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legisla-

tive findings and declarations that New York State needs, as a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the new economy. The Excelsior Jobs Program is created to support the growth of the State's traditional economic pillars including the manufacturing and financial industries and to ensure that New York emerges as the leader in the knowledge, technology and innovation based economy. The Program will encourage the expansion in and relocation to New York of businesses in growth industries such as clean-tech, broadband, information systems, renewable energy and biotechnology.

The emergency rule is specifically authorized by the Legislature.

NEEDS AND BENEFITS:

The emergency rule is required in order to immediately implement the statute contained in Article 17 of the Economic Development Law, creating and recently amending the Excelsior Jobs Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act.

New York is in the midst of a national economic slowdown. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and is having severe consequences on New York's immediate fiscal health and could harm its economic future.

The Excelsior Jobs Program will be one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. It is imperative that this Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program. The rule implements the amendments to the statute which extend the current tax benefit period from five to ten years and offer an enriched package of tax credits. In addition, the rule adds the recommendation of the relevant regional council as an evaluation criterion for determining whether to admit an applicant into the Program.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Excelsior Jobs Program, only voluntary participants.

B. Costs to the agency, the state, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. 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. There are no mandates on local governments with respect to the Excelsior Jobs Program. This emergency rule does not impose any costs to local governments for administration of the Excelsior Jobs Program.

PAPERWORK:

The emergency rule requires businesses choosing to participate in the Excelsior Jobs Program to establish and maintain complete and accurate books relating to their participation in the Excelsior Jobs Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the Program but instead simply requires that information currently established and maintained be shared with the Department in order to verify that the business has met its job creation and investment commitments.

DUPLICATION:

The emergency rule does not duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. The Department conducted outreach with respect to this rulemaking. Specifically, it contacted the Citizens Budget Commission, Partnership for New York City, the Buffalo Niagara Partnership and the New York State Economic Development Council and received comments from them. The Department carefully considered all comments made with respect to the regulation. Certain comments were incorporated into the rulemaking while others deemed inappropriate were not.

FEDERAL STANDARDS:

There are no federal standards in regard to the Excelsior Jobs 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 recordkeeping requirements on all businesses (small, medium and large) that choose to participate in the Excelsior Jobs 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 Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

2. Compliance requirements

Each business choosing to participate in the Excelsior Jobs 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 program and relating to annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

The information that businesses choosing to participate in the Excelsior Jobs Program would be information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

Businesses (small, medium or large) that choose to participate in the Excelsior Jobs Program must create new jobs and/or make capital investments in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job creation or investment commitments, such businesses would not receive financial assistance. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Excelsior Jobs Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

5. Economic and technological feasibility

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

6. Minimizing adverse impact

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

7. Small business and local government participation

DED is in 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 and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Excelsior Jobs Program is a statewide business assistance program. Strategic businesses in rural areas of New York State are eligible to apply to participate in the program entirely at their discretion. Municipalities are not eligible to participate in the Program. The emergency rule does not impose any special reporting, recordkeeping or other compliance requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the 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 Excelsior Jobs Program. The Excelsior Jobs Program will enable New York State to provide financial incentives to businesses in strategic industries that commit to create new jobs and/or to make significant capital investment. This Program, given its design and purpose, will have a substantial positive impact on job creation and employment opportunities. The emergency rule will immediately enable the Department to fulfill its mission of job creation and investment throughout the State and in economically distressed areas through implementation of this new economic development program. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to strategic industries that commit to creating new

jobs and/or to making significant capital investment in the State during these difficult economic times, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Code of Conduct

I.D. No. EDU-03-12-00003-P

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

Proposed Action: Amendment of section 100.2(l) of Title 8 NYCRR.

Statutory authority: Education Law, sections 11(1)-(7), 12(1) and (2), 13(1)-(3), 14(1) and (3), 101(not subdivided), 207(not subdivided), 305(1) and (2) and 2801(1)-(5); and L. 2010, ch. 482, sections 2 and 4

Subject: Code of Conduct.

Purpose: Conform Commissioners Regulations on Codes of Conduct to the Dignity for All Students Act (ch. 482, L. 2010).

Text of proposed rule: 1. Paragraph (2) of subdivision (l) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2012, as follows:

(2) Code of Conduct

(i) On or before July 1, 2001, each board of education and board of cooperative educational services shall adopt and provide for the enforcement of a written code of conduct for the maintenance of order on school property and at school functions, as defined in Education Law, [section] sections 11(1) and (2) and 2801(1), which shall govern the conduct of students, teachers, other school personnel, and visitors. Such a code shall be developed in collaboration with student, teacher, administrator, and parent organizations, school safety personnel and other school personnel and shall be approved by the board of education, or other governing body, or by the chancellor of the city school district in the case of the City School District of the City of New York. The City School District of the City of New York shall adopt a district-wide code of conduct and each community school district may, upon approval of the chancellor, adopt and implement additional policies, which are consistent with the city school district's district-wide code of conduct, to reflect the individual needs of each community school district. A school district or board of cooperative educational services shall adopt its code of conduct only after at least one public hearing that provides for the participation of school personnel, parents, students, and any other interested parties.

(ii) The code of conduct shall include, but is not limited to:

(a) provisions regarding conduct, dress and language deemed appropriate and acceptable on school property and at school functions, and conduct, dress, and language deemed unacceptable and inappropriate on school property and provisions regarding acceptable civil and respectful treatment of teachers, school administrators, other school personnel, students, and visitors on school property and at school functions, including the appropriate range of disciplinary measures which may be imposed for violation of such code, and the roles of teachers, administrators, other school personnel, the board of education and parents;

(b) provisions prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or

(2) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety.

Such conduct shall include, but is not limited to, threats, intimidation, or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based

on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

[(b)] (c) standards and procedures to assure security and safety of students and school personnel;

[(c)] (d) provisions for the removal from the classroom [and from], school property and school functions of students and other persons who violate the code;

[(d)] (e) provisions prescribing the period for which a disruptive pupil may be removed from the classroom for each incident, provided that no such pupil shall return to the classroom until the principal makes a final determination pursuant to Education Law section 3214(3-a)(c), or the period of removal expires, whichever is less;

[(e)] (f) disciplinary measures to be taken in incidents on school property or at school functions involving the possession or use of illegal substances or weapons, the use of physical force, vandalism, violation of another student's civil rights, harassment and threats of violence;

[(g)] (g) provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function pursuant to clause (b) of this subparagraph;

[(f)] (h) provisions for detention, suspension and removal from the classroom of students, consistent with Education Law section 3214 and other applicable Federal, State, and local laws including provisions for the school authorities to establish policies and procedures to ensure the provision of continued educational programming and activities for students removed from the classroom, placed in detention, or suspended from school, which shall include alternative educational programs appropriate to individual student needs;

[(g)] (i) procedures by which violations are reported, determined, discipline measures imposed and discipline measures carried out;

[(h)] (j) provisions ensuring such code and the enforcement thereof are in compliance with State and Federal laws relating to students with disabilities;

[(i)] (k) provisions setting forth the procedures by which local law enforcement agencies shall be notified of code violations which constitute a crime;

[(j)] (l) provisions setting forth the circumstances under and procedures by which persons in parental relation to the student shall be notified of code violations;

[(k)] (m) provisions setting forth the circumstances under and procedures by which a complaint in criminal court, a juvenile delinquency petition or person in need of supervision petition as defined in [articles] Articles three and seven of the Family Court Act will be filed;

[(l)] (n) circumstances under and procedures by which referral to appropriate human service agencies shall be made;

[(m)] (o) a minimum suspension period, for any student who repeatedly is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom, provided that the suspending authority may reduce such period on a case-by-case basis to be consistent with any other State and Federal Law. For purposes of this requirement, "repeatedly is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom" shall mean engaging in conduct which results in the removal of the student from the classroom by teacher(s) pursuant to the provisions of Education Law section 3214(3-a) and the provisions set forth in the code of conduct on four or more occasions during a semester, or three or more occasions during a trimester, as applicable;

[(n)] (p) a minimum suspension period for acts that would qualify the pupil to be defined as a violent pupil pursuant to Education Law section 3214(2-a)(a), provided that the suspending authority may reduce such period on a case-by-case basis to be consistent with any other State and Federal law;

[(o)] (q) a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, [and] which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; and

[(p)] (r) guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

(iii) Additional responsibilities.

(a) Each board of education and, in the case of the City School District of the City of New York, the chancellor of such city school district, and each board of cooperative educational services shall annually review

and update as necessary its code of conduct, taking into consideration the effectiveness of code provisions and the fairness and consistency of its administration. A school district may establish a committee pursuant to Education Law section 2801(5)(a) to facilitate the review of its code of conduct and the district's response to code of conduct violations. A board of education or board of cooperative educational services may adopt any revision to the code of conduct only after at least one public hearing that provides for the participation of school personnel, parents, students, and any other interested party. Each district shall file a copy of its code of conduct and any amendments with the commissioner, in a manner prescribed by the commissioner, no later than 30 days after their respective adoptions.

(b) Each board of education and board of cooperative educational services shall ensure community awareness of its code of conduct by:

(1) posting the complete code of conduct, respectively, on the Internet web site of the school or school district, or of the board of cooperative educational services, including any annual updates to the code made pursuant to clause (a) of this subparagraph and any other amendments to the code;

[(1)] (2) providing copies of a summary of the code of conduct to all students, in an age-appropriate version, written in plain-language, at a [general] school assembly to be held at the beginning of each school year;

[(2)] (3) [mailing] providing a plain language summary of the code of conduct to all persons in parental relation to students before the beginning of [the] each school year and making such summary available thereafter upon request;

[(3)] (4) providing each existing teacher with a copy of the complete code of conduct and a copy of any amendments to the code as soon as practicable following initial adoption or amendment of the code, and providing new teachers with a complete copy of the current code upon their employment; and

[(4)] (5) making complete copies available for review by students, parents or [other] persons in parental relation to students, [nonteaching] other school staff and other community members.

2. Section 119.5 of the Regulations of the Commissioner of Education is added, effective July 1, 2012, as follows:

119.5 Policies against discrimination and harassment. Each charter school shall include in its disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct:

(a) provisions, in an age-appropriate version and written in plain-language, prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or

(2) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety.

Such conduct shall include, but is not limited to, threats, intimidation, or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

(b) provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function as defined in Education Law sections 11(1) and (2), pursuant to subdivision (a) of this section, including but not limited to disciplinary measures to be taken; and

(c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8857, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Ken Slentz, Deputy Commissioner P-12 Education, State Education Department, State Education

Building 2M West, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: NYSEDP12@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 11, as added by section 2 of Chapter 482 of the Laws of 2010, establishes definitions for purposes of the new Article 2 of the Education Law added by such statute, relating to the Dignity for All Students Act ("Dignity Act").

Education Law section 12(1), as added by section 2 of the Chapter 482 of the laws of 2010, prohibits discrimination and harassment of students by students and school employees on school property or at school functions, on the basis of the student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex. Section 12(2) provides that an age-appropriate version of the policy outlined in section 12(1), written in plain-language, shall be included in the code of conduct adopted pursuant to Education Law section 2801 and a summary of such policy shall be included in any summaries required by such section 2801.

Education Law section 13 requires school districts to create policies to create a school environment that is free from discrimination and harassment, and create guidelines to be used in school training programs to discourage the development of discrimination or harassment, raise the awareness and sensitivity of employees to potential discrimination or harassment, and enable employees to prevent and respond to discrimination or harassment and guidelines relating to the development of nondiscriminatory instructional and counseling methods, and guidelines relating to nondiscriminatory instructional and counseling methods.

Education Law section 14 requires the Commissioner to provide direction, including model policies and, to the extent possible, direct services to school districts in preventing discrimination and harassment and fostering an environment in every school where all children can learn free of manifestations of bias. Section 14(3) authorizes the Commissioner to promulgate regulations to assist school districts in implementing Article 2 of the Education Law.

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 305(1) empowers the Commissioner of Education to be the chief executive officer of the State system of education and the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Board of Regents.

Education Law section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 2801 requires each board of education and each board of cooperative educational services (BOCES) to adopt and amend, as appropriate, a code of conduct for the maintenance of order on school property and at school functions.

Education Law section 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law.

Section 2 of Chapter 482 of the Laws of 2010 added a new Article 2 to the Education Law, relating to Dignity for All Students. Section 4 of Chapter 482 amended Education Law section 2801 to require that school district and BOCES codes of conduct include provisions to comply with Article 2 of the Education Law. Section 12(2) of Article 2 of the Education Law requires that an age appropriate version of the policy prohibiting harassment and discrimination against students in Section 12(1) be included in the code of conduct and any required summaries.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and will conform the Commissioner's regulations to Education Law section 2801, as amended by section 4 of Chapter 482 of the Laws of 2010, and section 12 of Article 2 of the Education Law, as added by Chapter 482 of the Laws of 2010.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement provisions of the Dignity for All Students Act ("Dignity Act", Chapter 482 of the Laws of 2010) by including provisions in the Commissioner's Regulations to ensure compliance with the new Article 2 of the Education Law, as added by the Dignity Act. Article 2 generally prohibits discrimination and harass-

ment of students by students and school employees on school property or at school functions, on the basis of the student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex. Education Law section 2801, as amended by the Dignity Act, requires that codes of conduct include provisions to comply with Article 2. Section 12(2) of Article 2 of the Education Law requires that an age appropriate version of the policy prohibiting harassment and discrimination against students in Section 12(1) be included in the code of conduct and any required summaries.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None. The proposed amendment is necessary to conform the Commissioner's Regulations to the Dignity Act and will not impose any additional costs on school districts, BOCES and charter schools beyond those imposed by the statute. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. For example, the proposed amendment replaces a requirement that a plain language summary of the code of conduct be mailed to all persons in parental relation, with a requirement that the summary be provided, thereby providing flexibility to determine how to provide the summaries in an efficient, cost-effective manner. In addition, the Department intends to establish a dedicated email address to receive codes of conduct, and updates and amendments to the codes, to relieve districts of the costs associated with mailing their codes to the Department.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional program, service, duty or responsibility beyond those by the statute.

Consistent with Education Law section 2801 and Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed amendment requires each school district and BOCES code of conduct to include:

- provisions prohibiting discrimination and harassment against any student by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or (2) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety. Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law section 11(6), or sex;
- provisions for responding to such acts of discrimination or harassment against students by employees or students on school property or at a school function;
- a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; and
- guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees, and including safe and supportive school climate concepts in the curriculum and classroom management.

The proposed amendment also requires that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct, provisions prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function; provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function; and (c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

6. PAPERWORK:

The proposed amendment requires:

- each school district to file its code of conduct and any amendments with the Commissioner, in a manner prescribed by the Commissioner, within 30 days after their respective adoptions;
- each school district and BOCES to post the complete code of conduct, and any updates and amendments to the code, on the school's or school district's Internet web site;
- each school district and BOCES to provide all students with copies of a summary of the code of conduct, in an age-appropriate version, written in plain-language, at a school assembly to be held at the beginning of each school year;
- each school district and BOCES to provide a plain language summary of the code of conduct to all persons in parental relation to students before the beginning of the school year, and make the summary available thereafter upon request.

7. DUPLICATION:

The proposed amendment does not duplicate existing State or Federal regulations, and is necessary to implement Chapter 482 of the Laws of 2010.

8. ALTERNATIVES:

The proposed amendment is necessary to implement provisions of the Dignity Act by including provisions in the Commissioner's Regulation section 100.2(l), relating to school district and BOCES code of conducts, to ensure compliance with the new Article 2 of the Education Law, as added by the Dignity Act. There are no viable alternatives to be considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Dignity Act and will not impose any additional compliance requirements or costs on school districts, BOCES and charter schools beyond those imposed by the statute. It is anticipated that school districts, BOCES and charter schools will be able to achieve compliance with proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small businesses:

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools and relates to implementation of codes of conduct and disciplinary rules and procedures for the maintenance of public order on school property and at school functions consistent with the Dignity for All Students Act ("Dignity Act" - L. 2010, Ch. 482). The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter school in the State. At present, there are 695 school districts (including New York City), 37 BOCES and approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

Consistent with Education Law section 2801 and Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed amendment requires each school district and BOCES code of conduct to include:

- provisions prohibiting discrimination and harassment against any student by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or (2) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety. Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law section 11(6), or sex;
- provisions for responding to such acts of discrimination or harassment against students by employees or students on school property or at a school function;
- a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; and

- guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees, and including safe and supportive school climate concepts in the curriculum and classroom management.

The proposed amendment further requires:

- each school district to file its code of conduct and any amendments with the Commissioner, in a manner prescribed by the Commissioner, within 30 days after their respective adoptions;
- each school district and BOCES to post the complete code of conduct, and any updates and amendments to the code, on the school's or school district's Internet web site;
- each school district and BOCES to provide all students with copies of a summary of the code of conduct, in an age-appropriate version, written in plain-language, at a school assembly to be held at the beginning of each school year;
- each school district and BOCES to provide a plain language summary of the code of conduct to all persons in parental relation to students before the beginning of the school year, and make the summary available thereafter upon request.

The proposed amendment also requires that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct, provisions prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function; provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function; and (c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

3. PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional services requirements.

4. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional compliance requirements or beyond those imposed by the statute. Because these statutory requirements apply, it is not possible to exempt them from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. For example, the proposed amendment replaces a requirement that a plain language summary of the code of conduct be mailed to all persons in parental relation, with a requirement that the summary be provided, thereby providing flexibility to determine how to provide the summaries in an efficient, cost-effective manner. In addition, the Department intends to establish a dedicated email address to receive codes of conduct, and updates and amendments to the codes, to relieve districts of the costs associated with mailing their codes to the Department.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. In addition, comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from charter schools by providing them with copies of the proposed amendment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES) and charter schools in the State, including those located in the 44 rural counties with less than 200,000 in-

habitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

Consistent with Education Law section 2801 and Article 2, as respectively amended and added by the Dignity for All Students Act ("Dignity Act") - Chapter 482 of the Laws of 2010, the proposed amendment requires each school district and BOCES code of conduct to include:

- provisions prohibiting discrimination and harassment against any student by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or (2) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety. Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law section 11(6), or sex;
- provisions for responding to such acts of discrimination or harassment against students by employees or students on school property or at a school function;
- a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; and
- guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees, and including safe and supportive school climate concepts in the curriculum and classroom management.

The proposed amendment further requires:

- each school district to file its code of conduct and any amendments with the Commissioner, in a manner prescribed by the Commissioner, within 30 days after their respective adoptions;
- each school district and BOCES to post the complete code of conduct, and any updates and amendments to the code, on the school's or school district's Internet web site;
- each school district and BOCES to provide all students with copies of a summary of the code of conduct, in an age-appropriate version, written in plain-language, at a school assembly to be held at the beginning of each school year;
- each school district and BOCES to provide a plain language summary of the code of conduct to all persons in parental relation to students before the beginning of the school year, and make the summary available thereafter upon request.

The proposed amendment also requires that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct, provisions prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function; provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function; and (c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

The proposed amendment will not impose any additional professional services requirements.

3. COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools. Where possible, the regulations have incorporated existing requirements and eliminated

redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. For example, the proposed amendment replaces a requirement that a plain language summary of the code of conduct be mailed to all persons in parental relation, with a requirement that the summary be provided, thereby providing flexibility to determine how to provide the summaries in an efficient, cost-effective manner. In addition, the Department intends to establish a dedicated email address to receive codes of conduct, and updates and amendments to the codes, to relieve districts of the costs associated with mailing their codes to the Department. The statute which the proposed amendment implements applies throughout the State including rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to provide exemptions from the rule's provisions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. The proposed amendments were developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations.

Job Impact Statement

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools and relates to implementation of codes of conduct and disciplinary rules and procedures for the maintenance of public order on school property and at school functions consistent with the Dignity for All Students Act (L. 2010, Ch. 482). The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Commercial and Recreational Harvest Regulations for Tautog (Blackfish)

I.D. No. ENV-03-12-00008-EP

Filing No. 1442

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Proposed Action: Amendment of Part 40 of Title 6 NYCRR.

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

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

Specific reasons underlying the finding of necessity: These regulations are necessary for New York to remain in compliance with the Fishery Management Plan (FMP) for tautog as adopted by the Atlantic States Marine Fisheries Commission (ASMFC), to avoid potential Federal sanctions for lack of compliance with such plan, and to optimize recreational fishing opportunities available to New Yorkers.

Each member state of ASMFC is expected to promulgate regulations that comply with FMPs adopted by ASMFC. These regulations are needed to properly manage the State's recreational fisheries and prevent the State from exceeding the fishing mortality rate identified for the species by the FMP. Failure by a state to adopt, in a timely manner, necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of Federal sanctions on the particular fishery in that state. New York State must adopt regulations that are in compliance with the FMP and prevent the recreational harvest of tautog from exceeding the State's assigned limits for that species.

The promulgation of this regulation as an emergency rule making is necessary because the normal rule making process would not promulgate these regulations in the time frame necessary to meet the January 1, 2012 deadline specified in the ASMFC's implementation schedule. Commercial harvesters of blackfish work throughout the winter and the increase in minimum size limit must be in effect to reduce mortality. In addition, the regulations currently in place include a January 17 season opening for the recreational fishery. Emergency rule making would ensure that the regulations are in place before then, altering the fishing season and reducing the potential for confusion. These regulations are necessary to prevent overfishing on tautog by New York State anglers and harvesters. This is a valuable species that could yield greater economic benefits once the stock is rebuilt. If New York does not promulgate the new regulations in time we may be found out of compliance with the ASMFC, resulting in Federal sanctions.

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

Purpose: To reduce harvest of Tautog in order to remain in compliance with the ASMFC and allow for the overfished stock to recover.

Text of emergency/proposed rule: Existing subdivision 40.1(f) of 6 NYCRR is amended to read as follows:

Species Striped bass through Red drum remain the same. Species Tautog is amended to read as follows:

40.1(f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Tautog	[Jan. 17 - April 30 and] Oct. [1]8 - Dec. [20]4	[14]16" TL	4

Species American eel through Oyster toadfish remain the same.

Existing subdivisions 40.1(g) through 40.1(h) remain the same.

Existing subdivision 40.1(i) is amended to read as follows:

Species Striped bass through Red drum remain the same. Species Tautog is amended to read as follows:

40.1(i) Table B - Commercial Fishing.

Species	Open Season	Minimum Length	Possession Limit
Tautog	April 8 to last day of Feb.	[14]15" TL	25 per vessel (except, 10 per vessel when fishing lobster pot gear and more than six lobsters are in possession)

Species American eel through Oyster toadfish remain the same.

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 March 28, 2012.

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0436, email: swheins@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) sections 13-0105 and 13-0340-d authorize the Department of Environmental Conservation (DEC or 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 quota managed marine species, preserve the States' marine resources, and protect the

interests of both commercial and recreational fishermen. All member states must promulgate any necessary regulations that implement the provisions of the FMPs to remain in compliance with 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 the FMP for tautog, the ASMFC mandates New York reduce its exploitation of tautog by commercial and recreational harvesters by 47.8% in 2012. Under existing regulations, it is likely that New York would overharvest the 2012 allowable take of tautog by fishermen. The proposed regulations will decrease the duration of the 2012 recreational tautog season and increase the minimum size limit to prevent New York State recreational anglers from overharvesting the fish. In addition, commercial fishermen will also experience an increase in minimum size limit. According to a report released by National Oceanic and Atmospheric Administration Fisheries, recreational fishing in New York generated \$424 million in total sales in 2006. Tautog is a popular fish taken by recreational harvesters in New York during a time of year when there are fewer other species to fish for. It is also commercially valuable, specifically when sold in the live markets.

The promulgation of this regulation is necessary for DEC to remain in compliance with the FMP for tautog. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC. The proposed rule will prevent New York State users of the resource from over-exploiting tautog while allowing limited harvest. New York State would remain in compliance with the FMP.

Specific amendments to the current regulations regarding tautog include the following:

1. Recreational: Implement an open season for the tautog fishery from October 8 through December 4, a 16.0 inch minimum size limit, and a 4-fish possession limit. This represents a loss of 128 days from the fishing season, a 2.0 inch increase in minimum size, and no change to the bag limit.

2. Commercial: Implement an open season for the tautog fishery from April 8 to the last day of February, a 15.0 inch minimum size limit, and 25 fish per vessel trip limit (except, 10 per vessel when fishing lobster pot gear and more than six lobsters are in possession). This represents a 1.0 inch increase in minimum size and no additional changes to season and trip limit for the commercial fishery.

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, the more restrictive management measures will decrease angler participation in the recreational fishery and reduce commercial catch. This is likely to decrease revenues for party/charter boat operators, sales at bait and tackle shops, and income earned by commercial fishermen.

(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 (no amendment to tautog regulations) - The “no action” alternative would leave current tautog regulations in place. Under existing regulations, it is likely that New York recreational anglers will exceed the fishing mortality rate deemed acceptable by the ASMFC's Amendment VI. If New York doesn't take steps to reduce harvest, the state could be found out of compliance with the Fishery Management Plan by the Atlantic States Marine Fisheries Commission and subject to federally imposed sanctions. This alternative was rejected.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and 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.

Regulatory Flexibility Analysis

1. Effect of rule:

The Atlantic State Marine Fisheries Commission (ASMFC) facilitates cooperative management of marine and anadromous fish species among the fifteen Atlantic Coast member states. The principal mechanism for implementation of cooperative management of migratory fish is the ASMFC's Interstate Fishery Management Plans (FMPs) for individual species or groups of fish. The FMPs are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

ASMFC requires New York State to reduce its tautog exploitation by 56 percent and this will impact the State's recreational and commercial fishing industries. Those most affected by the proposed rule are commercial fishermen, recreational anglers, licensed party and charter boat businesses, and retail and wholesale marine bait and tackle shops operating in New York State. In 2010, the State issued 990 food fish licenses to resident commercial fishermen and these individuals may be affected by an increase in their minimum size limit. There may be additional economic effects experienced by the 423 holders of food fish and crustacean dealer/shipper licenses. There were 501 licensed party and charter boats in 2010, and an unknown number of bait and tackle shops. Approximately 230,000 recreational marine fishing licenses were sold in 2010. Local party and charter boat businesses and bait and tackle shops will lose customers who target tautog during the late fall, winter, and early spring or that are discouraged by more restrictive regulations. Party and charter boat businesses and bait and tackle shops may rely on the patronage of recreational anglers who target tautog for the income it provides and may see a reduction in their earnings once the regulations are in place.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by the proposed regulations may reduce the income of party and charter businesses and marine bait and tackle shops because of the reduction in the number of days available for recreational fishers to take tautog. Commercial fishermen may experience smaller catches because they will then be required to throw back fish smaller than 15 inches.

There is no additional technology required for small businesses, and this action does not apply to local governments; there are no economic or technological impacts for either.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary for DEC to maintain compliance with the FMPs for tautog and to avoid a punitive closure of the fisheries and the economic hardship that would ensue with such a closure. Since these regulatory amendments are consistent with federal and Interstate FMPs, DEC anticipates that New York State will remain in compliance with the FMPs.

The department consulted with the Marine Resources Advisory Council (MRAC) and other individuals who chose to share their views on tautog recreational and commercial management measures. There was no consensus but a majority was in favor of the proposed regulation.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail bait and tackle shops, commercial fishing operations and other fishery support industries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The department received recommendations from MRAC, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon comments received from recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners,

recreational anglers and state law enforcement personnel. There was no special effort to contact local governments because the proposed rule does not affect them.

8. Cure period or other opportunity for ameliorative action:

Pursuant to SAPA 202-b(1-a)(b), no such cure period is included in the rule because of the potential adverse impact on the resource. Cure periods for the illegal taking of fish or wildlife are neither desirable nor recommended. Immediate compliance is required to ensure the general welfare of the public and the resource is protected.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The tautog fishery is entirely located within the marine and coastal district, and is not located adjacent to any rural areas of the State. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The promulgation of this regulation is necessary for the Department of Environmental Conservation (DEC) to maintain compliance with the Fishery Management Plan for tautog, to avoid potential Federal sanctions for lack of compliance with such plan, and to optimize recreational and commercial fishing opportunities available to New Yorkers. The proposed rule will reduce the recreational season for tautog by 128 days and decrease the opportunities commercial and recreational fishermen will have to take fish home because of changes to minimum size limits.

Many currently licensed party and charter boat owners and operators, commercial fishermen, as well as bait and tackle businesses, will be affected by these regulations. Due to the reduction in the number and appeal of fishing days for tautog, there may be a corresponding reduction of the number of fishing trips and bait and tackle sales during the upcoming fishing season.

2. Categories and numbers affected:

In 2010, there were 990 people licensed to harvest finfish commercially, 432 licensed shipper/dealers and 501 licensed party and charter businesses in New York State. There were also a number of retail and wholesale marine bait and tackle shop businesses operating in New York; however, DEC does not have a record of the actual number. The number of recreational fishers in New York has been estimated by the National Marine Fisheries Service to be just over 714,000 in 2010. However, this Job Impact Statement does not include them in this analysis, since fishing is recreational for them and not related to employment.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area includes all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the State, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge.

4. Minimizing adverse impact:

In the development of the proposed rule making, DEC consulted with the Marine Resources Advisory Council and many individuals who chose to share their views on tautog fishery management measures to the DEC. In the long-term, the maintenance of sustainable fisheries will have a positive affect on employment for the fisheries in question, including commercial participants, party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the tautog resource is essential to the survival of the party and charter boat businesses and bait and tackle shops that are sustained by these fisheries. In addition, sale of tautog may be a significant portion of some commercial fishermen's income. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild stocks and maintain them for future utilization.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

CO₂ Emissions from Major Electric Generating Facilities

I.D. No. ENV-03-12-00009-P

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

Proposed Action: Amendment of Part 200; and addition of Part 251 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305 and 19-0312; and Energy Section Law, sections 3-101 and 3-103

Subject: CO₂ emissions from major electric generating facilities.

Purpose: To promulgate regulations targeting reductions in emissions of CO₂ from major electric generating facilities.

Public hearing(s) will be held at: 3:00 p.m., March 5, 2012 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 3:00 p.m., March 6, 2012 at Department of Public Service, 90 Church St., 4th Fl., New York, NY; 3:00 p.m., March 8, 2012 at Department of Environmental Conservation, Region 9 Hearing Rm., 270 Michigan Ave., Buffalo, NY.

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

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

Text of proposed rule: (Existing Sections 200.1 through 200.8 remain unchanged.)

Existing Section 200.9, Table 1 is amended to add the following:

Regulation	CFR Cite	Availability
251.5(a)	40 CFR part 75 (July 1, 2007)	*
251.5(b)(1)	40 CFR 75.13(July 1, 2007), page 220	*
	40 CFR 75.71(July 1, 2007), pages 326-328	*
	40 CFR 75.72(July 1, 2007), pages 328-331	*
	appendix G of 40 CFR part 75(July 1, 2007), pages 455-457	*
251.5(b)(2)	40 CFR part 75(July 1, 2007)	*
251.5(c)	appendix D of 40 CFR part 75(July 1, 2007), pages 409-438	*
	appendix E of 40 CFR part 75(July 1, 2007), pages 438-443	*
251.5(d)(1)	40 CFR part 75(July 1, 2007)	*
	subpart D of 40 CFR part 75(July 1, 2007), pages 262-279	*
	appendix D of 40 CFR part 75(July 1, 2007), pages 409-438	*
	appendix E of 40 CFR part 75(July 1, 2007), pages 438-443	*
251.5(d)(2)	40 CFR part 75(July 1, 2007)	*
251.6(a)	40 CFR 75.73(July 1, 2007), pages 331-335	*
251.6(b)	40 CFR 75.62(July 1, 2007), page 317	*
251.6(c)	40 CFR 75.63(July 1, 2007), pages 317-318	*
	40 CFR 75.73(c) (July 1, 2007), page 332	*
	40 CFR 75.73(e) (July 1, 2007), page 333	*
251.6(e)(2)	subpart H of 40 CFR part 75(July 1, 2007), pages 323-344	*
	40 CFR 75.64(July 1, 2007), pages 318-320	*
	subpart G of 40 CFR part 75(July 1, 2007), pages 313-323	*
251.6(f)	40 CFR part 75(July 1, 2007)	*

(Existing Section 200.10 through Section 200.16 remains unchanged.)
6 NYCRR Part 251, CO₂ Performance Standards for Major Electric Generating Facilities

Section 251.1 Definitions.

(a) For the purpose of this Part, the general definitions of Parts 200 and 201 of this Title apply.

(b) For the purposes of this Part, the following definitions also apply:

(1) 'Electric generating facility'. A facility which sells its power to the electrical grid and that utilizes boilers, combustion turbines, waste to energy sources, and/or stationary internal combustion engines to produce electricity.

(2) 'Gasifier'. An emission source that converts a hydrocarbon feedstock into a fuel.

(3) 'Major electric generating facility'. An electric generating facility with a generating capacity of at least 25 megawatts (MW).

Section 251.2 Applicability.

(a) 'New Sources'. The provisions of this Part apply to owners or operators of new major electric generating facilities that commence construction after the effective date of this Part.

(b) 'Existing Sources'. The provisions of this Part apply to owners or operators of existing electric generating facilities that commence construction for an increase in capacity of at least 25 MW at the facility after the effective date of this Part. Only those emission source(s) involved in the increase in capacity at the electric generating facility shall be subject to the emission limits established in Section 251.3 of this Part.

Section 251.3 Emission limits. Facilities subject to this Part must comply with the applicable carbon dioxide (CO₂) emission limit established in this Section. These emission limits are measured on a 12-month rolling average basis, calculated by dividing the annual total of CO₂ emissions over the relevant 12-month period by either the annual total (gross) MW generated (output-based limit) or the annual Btu input (input-based limit) over the same 12-month period.

(a) Owners or operators of a source of one of the following types, except for those emission sources directly attached to a gasifier, are required to meet an emission rate of 925 pounds of CO₂ per MW hour gross electrical output (output-based limit) or 120 pounds of CO₂ per million Btu of input (input-based limit):

(1) boilers that are permitted to fire greater than 70 percent fossil fuel;

(2) combined cycle combustion turbines; or

(3) stationary internal combustion engines that fire only gaseous fuel.

(b) Owners or operators of a source of one of the following types, except for those emission sources directly attached to a gasifier, are required to meet an emission rate of 1450 pounds of CO₂ per MW hour gross electrical output (output-based limit) or 160 pounds of CO₂ per million Btu of input (input-based limit):

(1) simple cycle combustion turbines; or

(2) stationary internal combustion engines that fire either liquid fuel or liquid and gaseous fuel simultaneously.

(c) Owners or operators of any other emission source that is not subject to a specific CO₂ emission limit in Subdivision (a) or (b) of this Section are required to propose and meet a case-specific emission limit for CO₂. This proposal must be based on an analysis of existing control technologies and operating efficiencies of existing sources, and other appropriate considerations relevant to the source's CO₂ emission profile. The proposed emission limit must achieve the maximum degree of CO₂ emission reduction for new sources, and shall not be less stringent than the CO₂ emission control or operating efficiency that is achieved in practice by the best controlled similar source(s). The proposal must be submitted to the department for review and approval. In no case will the department approve a proposal in which greater than 50 percent of the heat input is derived from solid fossil fuel or oil, unless the CO₂ emission rate associated with that input meets the CO₂ emission limit in Subdivision (a) of this Section. For purposes of this Subdivision, emission sources that are directly attached to a gasifier must include the CO₂ emissions from the gasifier in the case-specific CO₂ emission limit.

Section 251.4 Permit requirements. An owner or operator of a facility subject to this Part must submit an application for a permit or permit modification, as appropriate, pursuant to Part 201 of the Title. As part of the application, an owner or operator of a facility subject to a specific CO₂ emission limit in Subdivision 251.3(a) or (b) of this Part must specify which form of CO₂ emission limit the owner or operator will comply with in the permit, either the output-based limit or the input-based limit.

Section 251.5 Monitoring.

(a) 'General requirements'. The owner or operator of an emission source subject to this Part shall comply with any applicable monitoring, recordkeeping, and reporting requirements as provided in this Section and all applicable sections of 40 CFR part 75.

(b) 'Initial installation and certification procedures'. The owner or operator of each emission source subject to this Part must meet the following requirements.

(1) Install all CEMS required under this Part for monitoring CO₂ mass emissions and heat input. This includes all CEMS required to monitor CO₂ concentration, stack gas flow rate, O₂ concentration, heat input, and fuel flow rate, as applicable, in accordance with 40 CFR 75.13, 75.71, and 75.72, and all portions of appendix G of 40 CFR part 75, except for equation G-1 in 40 CFR part 75.

(2) Successfully complete all certification tests required under subdivision (c) of this section and meet all other requirements of this Part and 40 CFR part 75 applicable to the CEMS under Paragraph(1) of this Subdivision.

(3) Record, report and quality-assure the data from the CEMS under Paragraph (1) of this Subdivision.

(c) 'Initial certification and recertification procedures'. The owner or operator of an emission source subject to this Part shall comply with the initial certification and recertification procedures for a CEMS and an alternative monitoring system under appendices D and E of 40 CFR part 75.

(d) 'Out-of-control periods'.

(1) Whenever any CEMS fails to meet the quality assurance and quality control requirements or data validation requirements of 40 CFR part 75, data shall be substituted using the applicable procedures in subpart D, appendix D, or appendix E of 40 CFR part 75.

(2) Whenever both an audit of a CEMS and a review of the initial certification or recertification application reveal that any CEMS should not have been certified or recertified because it did not meet a particular performance specification or other requirement under Subdivision (c) of this Section or the applicable provisions of 40 CFR part 75, both at the time of the initial certification or recertification application submission and at the time of the audit, the Department will issue a notice of disapproval of the certification status of such CEMS. For the purposes of this paragraph, an audit shall be either a field audit or an audit of any information submitted to the Department or the administrator. By issuing the notice of disapproval, the Department revokes prospectively the certification status of the CEMS. The data measured and recorded by the CEMS shall not be considered valid quality-assured data from the date of issuance of the notification of the revoked certification status until the date and time that the owner or operator completes subsequently approved initial certification or recertification for the CEMS. The owner or operator shall follow the initial certification or recertification procedures in Subdivision (c) of this Section for each disapproved CEMS.

Section 251.6 Recordkeeping and reporting.

(a) 'General provisions'. The owner or operator shall comply with all recordkeeping and reporting requirements in this section and any applicable recordkeeping and reporting requirements under 40 CFR 75.73. Each submission required under this Part shall be submitted, signed, and certified by the responsible official. Each such submission shall include the following certification statement by the responsible official: "I am authorized to make this submission on behalf of the owners and operators of the emission source or emission sources for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

(b) 'Monitoring plans'. The owner or operator of an emission source subject to this Part shall comply with requirements of 40 CFR 75.62.

(c) 'Certification reports'. The owner or operator shall submit certification reports to the Department within 45 days after completing all initial certification or recertification tests required under Subdivision 251.5(c) of this Part including the information required under 40 CFR 75.63 and 40 CFR 75.73 (c) and (e).

(d) 'Vendor certified fuel receipts'. The owner or operator that utilizes vendor certified fuel receipts to monitor the Btu content of a fuel must maintain these receipts in a bound log book.

(e) 'Semi-annual reports'. The owner or operator shall submit Semi-annual reports, as follows:

(1) The owner or operator shall report the CO₂ mass emissions data and heat input data in a format appropriate for comparison to the emission limitation applicable to the emission source, unless otherwise prescribed by the Department for each calendar quarter beginning with the calendar quarter corresponding to, the earlier of the date of provisional certification or the applicable deadline for initial certification under Section 251.5 of this Part.

(2) The owner or operator shall submit each quarterly report to the Department within 30 days following the end of the calendar quarter covered by the report. Quarterly reports shall be submitted in the manner specified in subpart H of 40 CFR part 75 and 40 CFR 75.64. Quarterly reports shall include all of the data and information required in subpart H of 40 CFR part 75 for each emission source (or group of emission sources using a common stack) as well as information required in subpart G of 40 CFR part 75, except for opacity and SO₂ provisions.

(f) 'Compliance certification'. The owner or operator shall submit to the Department a compliance certification in support of each quarterly report based on reasonable inquiry of those persons with primary responsibility for ensuring that all of the emission source's emissions are correctly and fully monitored. The certification shall state that the monitoring data submitted were recorded in accordance with the applicable requirements of this Part and 40 CFR part 75, including the quality assurance procedures and specifications.

(g) 'Data retention'. The owner or operator of a source subject to this Part must maintain copies of all records, either on-site at the facility that contains the subject source or at another location acceptable to the Department, for a minimum of five years.

Section 251.7 Severability. Each provision of this Part shall be deemed severable, and in the event that any provision of this Part is held to be invalid, the remainder of this Part shall continue in full force and effect.

Text of proposed rule and any required statements and analyses may be obtained from: Michael Jennings, NYSDEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 251GHG@gw.dec.state.ny.us

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

Public comment will be received until: March 15, 2012.

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

Summary of Regulatory Impact Statement

INTRODUCTION

The Legislature recently passed the "Power NY Act" (A.8510/S.5844), which includes the reauthorization of a revised Public Service Law (PSL) Article X (Article X), regarding the siting of power plants. Governor Cuomo signed the Power NY Act into law on August 4, 2011 (chapter 388, laws of 2011). The legislation also adds a new Section 19-0312 to the Environmental Conservation Law (ECL), which includes a requirement for the Department of Environmental Conservation (Department) to promulgate regulations targeting reductions in emissions of carbon dioxide (CO₂) from major electric generating facilities (defined as facilities that have a nameplate capacity of at least 25 megawatts (MW)). This regulation must be promulgated by the Department within one year of the statute's effective date, meaning by August 4, 2012, pursuant to the statutory text. Moreover, the availability to applicants of the process for siting power plants under Article X is partially dependent on the promulgation of this regulation by the Department. See PSL sections 161(1) and 162(1) and (4)(d).

Therefore, the Department is proposing to adopt a new 6 NYCRR Part 251, CO₂ Performance Standards for Major Electric Generating Facilities and revisions to 6 NYCRR Part 200, General Provisions. The revisions to Part 200 incorporate references to federal rules. This is not a mandate on local governments. It applies equally to any entity that proposes to construct a new major electric generating facility or to expand an existing electric generating facility by increasing its electrical output capacity by at least 25 MW. Part 251 does not mandate any particular project or activity by any local government.

STATUTORY AUTHORITY

The statutory authority to promulgate Part 251 is found primarily in ECL Section 19-0312. This section not only provides statutory authority for Part 251; ECL Section 19-0312 also explicitly requires the Department to promulgate a regulation, by August 4, 2012, targeting reductions in emissions of CO₂ from major electric generating facilities. The promulgation of Part 251 by the Department will therefore serve to fulfill this statutory requirement. The statutory authority to promulgate Part 251 also derives from the Department's obligation to prevent and control air pollution, as set out in the ECL at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, and 19-0305.

LEGISLATIVE OBJECTIVES

The Power NY Act included the reauthorization of a revised Article X, providing a process for the siting of major electric generating facilities. Pursuant to Article X, a Certificate of Environmental Compatibility and Public Need (Certificate) is required from the New York State Board on

Electric Generating Siting and the Environment (Board) prior to commencing construction of a new major electric generating facility, or increasing the capacity of an existing electric generating facility by more than 25 MW. The requirements and process for obtaining a Certificate from the Board are generally set forth in Article X, as well as in regulations to be promulgated by the Department of Public Service (DPS). Moreover, as a component of the Power NY Act, the Department is also responsible for promulgating regulations regarding the analyzing of environmental justice issues, which is being done through the promulgation of a new 6 NYCRR Part 487.

This rulemaking implements the CO₂ performance standard component of the overall process contemplated in the Power NY Act for the siting of major electric generating facilities. In addition to having to obtain a Certificate from the Board under Article X in order to commence construction, new major electric generating facilities (and increases in capacity of at least 25 MW at existing electric generating facilities) will also need to demonstrate compliance with Part 251 and obtain a permit from the Department that incorporates Part 251's requirements prior to commencing construction. Part 251 will serve to prevent the construction of new high-carbon sources of energy, including new coal-fired facilities that do not utilize carbon capture and sequestration (CCS) or some other advanced CO₂ emission reduction technology, working in conjunction with other State programs such as the Regional Greenhouse Gas Initiative (RGGI), in order to minimize CO₂ emissions from the power sector in the State.

With numerous legislative enactments, the Legislature has directed and empowered the Department to promote the safety, health and welfare of the public, and protect the State's natural environment. There is strong scientific evidence that the earth's climate is changing and that greenhouse gases (GHGs) from fossil fuel combustion and other human activities are the major contributor to this change. Climate change represents an enormous environmental challenge for the State because, unabated, it will have serious adverse impacts on the State's natural resources, public health and infrastructure.

Among the GHGs, CO₂ is the chief contributor to climate change. Emission sources that fire carbon-containing material, such as fossil fuel, emit significant quantities of CO₂. Electricity generation is responsible for approximately 19 percent of all GHGs emitted in New York State. In 2010, electric generating units in the State subject to RGGI emitted approximately 42 million tons of CO₂ into the atmosphere. In December 2009, the U.S. Environmental Protection Agency (EPA) issued findings concluding that current and projected concentrations of GHGs in the atmosphere endanger the public health and welfare of current and future generations.¹ Article 19 of the ECL requires the Department promulgate regulations targeting reductions in emissions of CO₂, a GHG, from major electric generating facilities.

NEEDS AND BENEFITS

As noted, Article 19 of the ECL requires the Department to promulgate regulations targeting reductions in emissions of CO₂ from major electric generating facilities, in order to reduce GHG emissions in New York State. This regulation targets an easily achievable, first-tier target for GHG emission reduction by establishing CO₂ emission standards for new major electric generating facilities, and applicable expansions at existing electric generating facilities.

Stakeholder Outreach

The Department held a stakeholder meeting on October 20, 2011 to discuss the likely elements of the proposed Part 251 and to obtain feedback. The stakeholder group consisted of the regulated community (electric generating facility representatives) to be affected by the proposed regulation, consultants (both technical and legal), and interested environmental advocate groups. The Department also conducted additional informal stakeholder outreach throughout October and November 2011 in order to obtain input used in the development of Part 251.

CO₂ Emission Standards and Requirements

The proposed regulation will establish CO₂ emission standards for all new major electric generating facilities, and for increases in capacity of at least 25 MW at existing electric generating facilities. Except for emission sources directly attached to a gasifier, owners or operators of boilers that fire a minimum of 70 percent fossil fuel, combined cycle combustion turbines, or stationary internal combustion engines that fire only gaseous fuel are required to meet a limit of either 925 pounds of CO₂ per MW hour (lbs/MW-hr) gross electrical output (output-based limit) or 120 pounds per million British thermal unit of input (lbs/mmBtu - input-based limit). Except for emission sources directly attached to a gasifier, owners or operators simple cycle combustion turbines, or stationary internal combustion engines that fire either liquid fuel or liquid and gaseous fuel simultaneously, are required to meet a CO₂ emission limit of either 1450 lbs/MW-hr (output-based limit) or 160 lbs/mmBtu (input-based limit). As part of an application for a permit or permit modification, an owner or operator will choose whether to include the relevant output- or input-based limit in the permit for purposes of compliance. Owners or operators of any other

source that is not subject to one of the specific CO₂ emission limits described above, including emission sources directly attached to a gasifier, are required to propose a case-specific emission limit for CO₂. This proposal will be submitted to the Department for review and approval. This includes, for example, biomass-fired facilities and waste-to-energy (WTE) facilities.

COSTS

Potential Impacts on Electricity Prices and Reliability

The cost of electricity should not increase substantially as a direct result of this proposed regulation. New, large-scale, coal- or oil-fired electric generation facilities are not expected to be constructed in New York, regardless of whether or not the Department ultimately adopts Part 251. If, however, a new coal-fired unit is proposed, it would have to apply 50 to 60 percent CCS or other carbon control technology in order to comply with the CO₂ emission limits in Part 251. The required application of CCS technology would create a significant increase in capital and operation costs when compared to a base coal plant without CCS technology.

This proposed rulemaking will necessitate that additional energy demand be met with less carbon-intensive fuels, such as natural gas, or by renewable energy such as wind power. The bulk of new fossil fuel-fired generation has been and is expected to be gas-fired, combined-cycle units, even absent Part 251. New York State programs to increase the use of renewable energy and decrease energy demand may reduce projected demand for natural gas, and minimize the impact of any potential rise in the cost of fuel for an electric generating facility combusting natural gas. As new gas-fired combined cycle units replace less efficient existing natural gas-fired units, natural gas demand may also decrease.

Costs to the Regulated Community

The Department has determined that new combined cycle combustion turbines, new natural gas-fired boilers, new natural gas-fired stationary internal combustion engines, new oil-fired simple cycle combustion turbines, and new oil-fired stationary internal combustion engines can meet the proposed CO₂ emission standards in Part 251. This is also true for increases in capacity of at least 25 MW at existing facilities that utilize the equipment and fuel listed above. For facilities that propose a project that utilizes the equipment and fuel listed above, the Department has calculated the increase in cost from this regulation to be zero.

New coal-fired and oil-fired boilers will not be able to meet the proposed CO₂ emission standard without the installation of controls (such as CCS). Coal-fired boilers would need to install 50 to 60 percent CCS or otherwise reduce their CO₂ emissions by 50 to 60 percent in order to meet the proposed CO₂ emission standard. Oil-fired boilers would need to install 33 to 40 percent CCS or otherwise reduce their CO₂ emissions by 33 to 40 percent in order to meet the proposed CO₂ emission standard. Initial installation costs of CCS units on either coal- or oil-fired boilers will vary greatly, depending on the size of the system needed for capture and the distance the captured CO₂ must be piped before sequestration. Depending on the CCS scenario, the initial project cost may increase as little as 10 percent up to 100 percent in the worst case scenario. The increase in cost to operations and maintenance of new coal-fired emission sources will be approximately 86 percent (56 dollars per MW-hr). This will project to be at least 50 million dollars per year increase in maintenance and operations costs for a 100 MW coal-fired boiler. It has been estimated that new oil-fired projects will have similarly associated cost increases. The Department also estimates that applicable increases in capacity at existing facilities that modify existing coal-fired or oil-fired boilers will incur similar costs for installation, maintenance, and operation of a retrofitted CCS system.

For other sources, the case-by-case analysis is based on an analysis of existing control technologies and operating efficiencies already installed or used in practice on existing emission sources, and other appropriate considerations relevant to the source's CO₂ emission profile. The proposed emission limit must achieve the maximum degree of CO₂ emission reduction for new emission sources, and cannot be less stringent than the CO₂ emission control or operating efficiency that is achieved in practice by the best controlled similar source(s). This requirement promotes the installation of the most modern and efficient equipment. Provided that a proposed project utilizes modern and efficient equipment, and proposes and meets a CO₂ emission limit approved by the Department, the cost of this regulation will be zero.

Costs to the Department

The Department will not incur additional costs associated with the implementation of the proposed regulation and can properly administer the proposed regulation with the application of existing resources. Current Department staff will have to review permit applications and monitoring plans which will now include Part 251 requirements. The Department will use existing staff to execute and modify permits and inspect the subject sources, including the continuous emission monitors.

PAPERWORK

This rule will impose minimal additional paperwork for recordkeeping

and monitoring to demonstrate compliance with 12-month rolling average CO₂ emission standards. Facilities subject to this regulation are already required to meet emission standards for other air contaminants, for example, oxides of nitrogen, and thus have systems in place to monitor emissions of air contaminants and submit annual and semi-annual reports to the Department. Depending on the source, the facility owner may need to modify the data acquisition handling system software, in order to compute and report CO₂ monitoring data in pounds per gross electric output rate in terms of megawatt/hr, or fuel input rate in terms of million Btu per hour. The records and reports will be required to be kept and submitted in the same formats used to track other pollutants with emission standards and will be submitted electronically accompanied by paper summary reports. Therefore, minimal additional costs for recordkeeping and reporting are projected.

LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Local governments have no additional compliance obligations as compared to other subject entities. However, the promulgation of Part 251 may impact decision making by local governments which operate sources subject to the rule. Local governments which operate coal-fired electric generating units may not be able to undertake certain applicable expansion projects that would rely on additional coal-firing, until CCS is available, and instead may elect to replace an existing coal-fired unit with one designed to utilize a less carbon-intensive fuel. Parameters and items to be considered when designing a new facility (unit type and size, fuel type and supply, power needs, etc.) would be considered regardless of the existence of the proposed rule and therefore this rule does not impose additional requirements. With the commercial demonstration of CCS, even more options for power generation will become available to municipal governments.

DUPLICATION

Facilities subject to Part 251 will also be subject to the Part 242 (RGGI) requirements. Monitoring and recordkeeping requirements for Part 242 do not conflict with the requirements of this proposed regulation. Therefore, this proposed regulation does not duplicate any existing monitoring or recordkeeping requirements.

ALTERNATIVES

The following alternatives have been evaluated to address the goals of Part 251 as set forth above:

(1) Take no Action: The establishment in regulation of CO₂ emission standards for major electric generating facilities is required by section 19-0312 of the ECL. Therefore, the "Take no action" alternative is not available to the Department under the statutory language, and has been rejected.

(2) Establish specific CO₂ emission standards for each source and fuel type: The Department has determined that the establishment of CO₂ emission standards for each source and fuel type would not promote or achieve the goal of reducing CO₂ emissions from new major electric generating facilities as required by section 19-0312.3 of the ECL: "No later than 12 months after the effective date of this section, the commissioner shall promulgate rules and regulations targeting reductions in emissions of carbon dioxide that would apply to major electric generating facilities that commenced construction after the effective date of the regulations." Therefore, the "Establish specific CO₂ emission standards for each source and fuel type" alternative has been rejected.

(3) Exempt sources that fire biomass or WTE facilities: This option was proposed by the Department at the October 20, 2011 stakeholder meeting. The stakeholders overwhelmingly rejected this alternative, suggesting that it could give an unfair competitive advantage to electric generating facilities that fire either biomass or waste over traditional fossil fuel-fired sources. The argument was also made that the carbon emissions from these sources were just as "detrimental" to the environment as carbon emissions from fossil fuel fired electric generating facilities. Therefore, the "Exempt sources that fire biomass or WTE facilities" alternative was rejected based on stakeholder comments.

FEDERAL STANDARDS

As result of several actions by EPA, GHGs, including CO₂, became "subject to regulation" under the Clean Air Act (Act) as of January 2, 2011. EPA modified the relevant applicability thresholds for GHGs for purposes of Prevention of Significant Deterioration (PSD) and Title V permitting under the Act in the GHG Tailoring Rule.² The Department has since incorporated these modified applicability thresholds for GHGs into its 6 NYCRR Parts 200, 201, and 231. Most notably, this means that new major stationary sources, and major modifications at existing stationary sources, are subject to best available control technology (BACT) requirements for GHGs under the PSD permitting program, provided that the source emits GHGs above the relevant applicability threshold. A source that, for PSD purposes, is a new major stationary source, or a major modification at an existing stationary source, may also be subject to Part 251. Generally speaking, a new natural gas-fired combined cycle facility that satisfies BACT for GHGs is likely to also comply with the emission

limit in Part 251. There are currently no specific CO₂ emission standards for stationary sources in the federal regulations. Therefore, the proposed Part 251 CO₂ emission standards are more stringent than the current federal standards. However, EPA is committed, pursuant to a litigation settlement, to propose a new source performance standard (NSPS) for GHG emissions from power plants. If adopted, such a GHG NSPS would likely apply to sources of the type that will be subject to Part 251. The Department will continue to monitor the development of power plant GHG NSPS by EPA.

COMPLIANCE SCHEDULE

Part 251 will apply to the owner or operator of any new major electric generating facility that commences construction after the effective date of Part 251, and to any existing electric generating facility that commences construction for an increase in electrical output capacity by more than 25 MW after the effective date of Part 251. The Department intends to promulgate Part 251 by August 4, 2012, in accordance with ECL section 19-0312.

¹ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496, December 15, 2009.

² Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514, June 3, 2010.

Regulatory Flexibility Analysis

EFFECT OF RULE ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

There are currently three municipally owned major electric generating facilities in New York State. The Samuel A. Carlson Generating Station is owned by the Jamestown Board of Public Utilities (BPU). The BPU consists of four coal-fired stoker boilers and a natural gas-fired combustion turbine. The Village of Freeport owns and operates two natural gas-fired combustion turbines. Finally, Rockville Center owns and operates stationary internal combustion engines. None of these existing facilities will be subject to Part 251, unless and until such facilities propose to undertake a project that would increase capacity by at least 25 MW.

Currently, none of these facilities have a proposed project submitted to the Department for review. However, these facilities would become subject to Part 251 if they were to add new emission source(s) at the facility with at least 25 MW in electrical output capacity, or otherwise modify an existing emission source such that the facility's capacity is increased by at least 25 MW. If they undertake such a project, only the new or modified emission source(s) involved in the increase in capacity would be subject to the carbon dioxide (CO₂) emission limits of Part 251.

None of the existing facilities mentioned above are owned or operated by a small business. The Department does not expect that a small business will construct a new facility that would be subject to Part 251 in the future. Sources of applicable size and capacity are not generally constructed by small businesses, due to the significant capital costs necessary to construct such a facility.

COMPLIANCE REQUIREMENTS

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. Facilities subject to 6 NYCRR Part 251 will be required to meet a 12-month rolling average CO₂ emission limit. This rule will impose minimal additional paperwork for recordkeeping and monitoring to demonstrate compliance with 12-month rolling average CO₂ emission standards. Facilities subject to this regulation are already required to meet emission standards for other air contaminants, for example, oxides of nitrogen, and thus have systems in place to monitor emissions of air contaminants and submit annual and semi-annual reports to the Department. Depending on the source, the facility owner may need to modify the data acquisition handling system software, in order to compute and report CO₂ monitoring data in pounds per gross electric output rate in terms of megawatt/hr, or fuel input rate in terms of million Btu per hour. Many facilities subject to Part 251 will also be subject to Part 242, and would already have to compute and report CO₂ emissions data under Part 242. The additional paperwork for recordkeeping and reporting for this proposed rule will be minimal as data is submitted electronically accompanied by paper summary reports. The records and reports will be required to be kept and submitted in the same formats used to track other pollutants with emission standards. The additional requirements imposed by this rule are not expected to be unduly burdensome.

PROFESSIONAL SERVICES

Each electric generating facility is unique in setup and site layout and requires site-specific considerations in the planning, design, construction, and installation of new emissions sources or modifications to existing emission sources. If the City of Jamestown, the Village of Freeport, Rockville Center, or any other municipally-owned facility does propose to construct a new emission source(s), or expand by modifying existing

equipment, the professional services that would be required will consist of engineering services from an environmental consulting firm. These professional services would be required whether or not the Department ultimately adopts Part 251.

COSTS

The Department has determined that new combined cycle combustion turbines, new natural gas-fired boilers, new natural gas-fired stationary internal combustion engines, new oil-fired simple cycle combustion turbines, and new oil-fired stationary internal combustion engines can meet the proposed CO₂ emission standards in Part 251. This is also true for increases in capacity of at least 25 MW at existing facilities that utilize the equipment and fuel listed above. For facilities that propose a project that utilizes the equipment and fuel listed above, the Department has calculated the increase in cost from this regulation to be zero.

New coal-fired and oil-fired boilers will not be able to meet the proposed CO₂ emission standard without the installation of controls, such as carbon capture and sequestration (CCS) or some other advanced carbon reduction technology. Coal-fired boilers would need to install 50 to 60 percent CCS or otherwise reduce their CO₂ emissions by 50 to 60 percent in order to meet the proposed CO₂ emission standard. Oil-fired boilers would need to install 33 to 40 percent CCS or otherwise reduce their CO₂ emissions by 33 to 40 percent in order to meet the proposed CO₂ emission standard. Initial installation costs of CCS units on either coal- or oil-fired boilers will vary greatly depending on the size of the system needed for capture and the distance the captured CO₂ must be piped before sequestration. Depending on the CCS scenario, the initial project cost may increase as little as 10 percent up to 100 percent in the worst case scenario. The increase in cost to operations and maintenance of new coal-fired emission sources will be approximately 86 percent (56 dollars per MW-hr). This will project to be an increase of at least 50 million dollars per year in maintenance and operations costs for a 100 MW coal-fired boiler. It has been estimated that new oil-fired projects will have similarly associated cost increases. The Department also estimates that projects at existing facilities that modify existing coal-fired or oil-fired boilers will incur similar costs for installation, maintenance, and operation of a retrofitted CCS system.

For other sources, the case-by-case analysis is based on an analysis of existing control technologies and operating efficiencies already installed or used in practice on existing emission sources, and other appropriate considerations relevant to the source's CO₂ emission profile. The proposed emission limit must achieve the maximum degree of CO₂ emission reduction for new emission sources, and cannot be less stringent than the CO₂ emission control or operating efficiency that is achieved in practice by the best controlled similar source(s). This requirement promotes the installation of the most modern and efficient equipment. Provided that a proposed project utilizes modern and efficient equipment, and proposes and meets a CO₂ emission limit approved by the Department, the cost of this regulation will be zero.

MINIMIZING ADVERSE IMPACTS

The Department has considered the issues and determined that Part 251 will not have an adverse impact on small businesses or local governments. The ability of a new or modified source to meet the requirements of Part 251 will not be influenced by whether the source is owned by a local government or small business, as compared to some other entity. The proposed regulation establishes specific CO₂ emission standards for base load fossil fuel-firing emission sources and fossil fuel-firing peaking emission sources, as well as a case-specific CO₂ emission limit for any other affected emission source. The rule only applies to new facilities, or to increases in capacity of at least 25 MW at existing facilities, and therefore allows ample time to design systems that comply with applicable emission limits. Also, the rule has been designed such that it can be met by electric generating systems that are commercially available. In particular, the CO₂ emission standards for base load facilities can be met by natural gas-firing combined cycle plants, and the standard was established with an allowance for minimal oil-firing (up to 45 days). Likewise, the CO₂ emission standards for peaking emission sources were established with an allowance for up to 100 percent oil-firing. Because most of the new electric generating facilities anticipated to be built in the State are already of a type that would comply with Part 251, any adverse impact will be minimized. For facilities subject to a case-specific CO₂ emission standard, the proposed emission limit must achieve the maximum degree of reduction for new sources and shall not be less stringent than the emission control or operating efficiency that is achieved in practice by the best controlled similar source(s).

In satisfying the requirements of section 202-b for minimizing adverse impacts to small business, the State Administrative Procedures Act (SAPA) requires that each proposal address the following:

(1) 'Establishment of differing compliance requirements or reporting times.' The compliance and reporting times are consistent with other air permitting regulations and quarterly, semi-annual and annual reporting that affected facilities would already be subject to.

(2) 'Use of performance rather than design standards.' Part 251 is a unit-specific rule making based on performance standards and technology currently available. Part 251 restricts emissions of CO₂ at subject facilities, but does not dictate what design or control strategies facilities must implement to achieve compliance with applicable rates.

(3) 'Exemption from coverage by the rule for small business and local governments.' The Department has determined that Part 251 should apply to sources regardless of ownership. CO₂ emissions may be significant from municipally-owned power stations and facilities and the objectives of this rule would not be met if certain owners or operators were exempted from its provisions. Moreover, any facility subject to Part 251 would also require a Certificate from the Siting Board pursuant to Public Service Law Article X (Article X), regardless of ownership.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The State Administrative Procedures Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rule making process and or public hearings. The Department held a stakeholder meeting on October 20, 2011 to discuss the likely elements of the proposed Part 251 and to obtain feedback. The Department also conducted additional stakeholder outreach during the development of Part 251, prior to its formal proposal for public comment. This additional outreach included a presentation to the New York Independent System Operator (NYISO) Environmental Advisory Committee on October 21, 2011. These meetings and presentations also included question and answer sessions which allowed the Department to obtain additional feedback and input from stakeholders prior to proposing Part 251. Moreover, the Department discussed the forthcoming Part 251 rulemaking at several events regarding Article X and the implementation of the Power NY Act, including at the Business Council's 2011 Annual Industry-Environment Conference on October 27, 2011, and at the Alliance for Clean Energy New York's 5th Annual Fall Conference & Membership Meeting on October 26, 2011. The Department also conducted additional informal stakeholder outreach throughout October and November 2011 in order to obtain input used in the development of Part 251. The Department will hold public hearings on Part 251 and small businesses and local governments will be able to comment on the proposed rule during the notice and comment period.

CURE PERIOD OR AMELIORATIVE ACTION

No additional cure period or other additional opportunity for ameliorative action is included in Part 251. First, because of the nature of Part 251 as a performance standard that only applies to certain new or expanded facilities, Part 251 will not result in immediate violations or impositions of penalties for existing facilities. Any new or existing facility that may be subject to Part 251 will also need to first obtain a Certificate from the Board pursuant to Article X, and submit an application to the Department for a permit or permit modification, as appropriate. Because facilities must already comply with these procedures before commencing construction, there is no need to provide for any additional cure period or other additional opportunities for ameliorative action. Second, Part 251 is intended, in large part, to prevent new or expanded major electric generating facilities that would have substantial emissions of CO₂. Providing for an additional curing period or other opportunity for ameliorative action in Part 251 may undercut this objective by allowing for new or expanded carbon-intensive facilities to be built in the interim. Finally, pursuant to the Power NY Act, the Legislature established that the promulgation of Part 251 is a prerequisite to the availability of the process under Article X for the siting of major electric generating facilities. Any additional curing period may therefore impact or delay the ability to build new or expanded major electric generating facilities in the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

The proposed rule (6 NYCRR Part 251) is not expected to have a substantial adverse impact on rural areas in New York State. The proposed rulemaking will apply statewide and thus all rural areas of New York State will be affected.

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

COMPLIANCE REQUIREMENTS

Facilities subject to Part 251 will be required to meet a 12-month rolling average CO₂ emission limit. This rule will impose minimal additional paperwork for recordkeeping and monitoring to demonstrate compliance with 12-month rolling average CO₂ emission standards. Facilities subject to this regulation are already required to meet emission standards for other air contaminants, for example, oxides of nitrogen, and thus have systems in place to monitor emissions of air contaminants and submit annual and semi-annual reports to the Department. Depending on the source, the fa-

cility owner may need to modify the data acquisition handling system software, in order to compute and report CO₂ monitoring data in pounds per gross electric output rate in terms of megawatt/hr, or fuel input rate in terms of million Btu per hour. Many facilities subject to Part 251 will also be subject to Part 242, and would already have to compute and report CO₂ emissions data under Part 242. The additional paperwork for recordkeeping and reporting for this proposed rule will be minimal as data is submitted electronically accompanied by paper summary reports. The records and reports will be required to be kept and submitted in the same formats used to track other pollutants with emission standards. The additional requirements imposed by this rule are not expected to be unduly burdensome.

COSTS

The Department has determined that new combined cycle combustion turbines, new natural gas-fired boilers, new natural gas-fired stationary internal combustion engines, new oil-fired simple cycle combustion turbines, and new oil-fired stationary internal combustion engines can meet the proposed CO₂ emission standards in Part 251. This is also true for increases in capacity of at least 25 MW at existing facilities that utilize the equipment and fuel listed above. For facilities that propose a project that utilizes the equipment and fuel listed above, the Department has calculated the increase in cost from this regulation to be zero.

New coal-fired and oil-fired boilers will not be able to meet the proposed CO₂ emission standard without the installation of controls, such as carbon capture and sequestration (CCS) or some other advanced carbon reduction technology. Coal-fired boilers would need to install 50 to 60 percent CCS or otherwise reduce their CO₂ emissions by 50 to 60 percent in order to meet the proposed CO₂ emission standard. Oil-fired boilers would need to install 33 to 40 percent CCS or otherwise reduce their CO₂ emissions by 33 to 40 percent in order to meet the proposed CO₂ emission standard. Initial installation costs of CCS units on either coal- or oil-fired boilers will vary greatly depending on the size of the system needed for capture and the distance the captured CO₂ must be piped before sequestration. Depending on the CCS scenario, the initial project cost may increase as little as 10 percent up to 100 percent in the worst case scenario. The increase in cost to operations and maintenance of new coal-fired emission sources will be approximately 86 percent (56 dollars per MW-hr). This will project to be an increase of at least 50 million dollars per year in maintenance and operations costs for a 100 MW coal-fired boiler. It has been estimated that new oil-fired projects will have similarly associated cost increases. The Department also estimates that projects at existing facilities that modify existing coal-fired or oil-fired boilers will incur similar costs for installation, maintenance, and operation of a retrofitted CCS system.

For other sources, the case-by-case analysis is based on an analysis of existing control technologies and operating efficiencies already installed or used in practice on existing emission sources, and other appropriate considerations relevant to the source's CO₂ emission profile. The proposed emission limit must achieve the maximum degree of CO₂ emission reduction for new emission sources, and cannot be less stringent than the CO₂ emission control or operating efficiency that is achieved in practice by the best controlled similar source(s). This requirement promotes the installation of the most modern and efficient equipment. Provided that a proposed project utilizes modern and efficient equipment, and proposes and meets a CO₂ emission limit approved by the Department, the cost of this regulation will be zero.

MINIMIZING ADVERSE IMPACT

The Department has considered the issues and determined that Part 251 will not have an adverse impact on rural areas. The ability of a new or expanded source to meet the requirements of Part 251 will not be influenced by the location of the facility in a rural area, as compared to a suburban or urban area. Facilities proposed in rural areas that utilize the equipment type and fuel listed above will be able to comply with the relevant CO₂ emission limit, and thus will not be adversely impacted by Part 251. Just like coal-fired or oil-fired facilities in suburban or urban areas, coal-fired or oil-fired facilities proposed to be located in rural areas would have to install CCS or some other advanced carbon control technology in order to comply with Part 251, as described above.

The proposed regulation establishes specific CO₂ emission standards for base load fossil fuel-firing emission sources and fossil fuel-firing peaking emission sources, as well as a case-specific CO₂ emission limit for any other affected emission source. The rule only applies to new facilities, or to increases in capacity of at least 25 MW at existing facilities, and therefore allows ample time to design systems that comply with applicable emission limits. Also, the rule has been designed such that it can be met by electric generating systems that are commercially available. In particular, the CO₂ emission standards for base load facilities can be met by natural gas-firing combined cycle plants, and the standard was established with an allowance for minimal oil-firing (up to 45 days). Likewise, the CO₂ emission standards for peaking emission sources were established with an al-

lowance for up to 100 percent oil-firing. Because most of the new electric generating facilities anticipated to be built in the State are already of a type that would comply with Part 251, any adverse impact will be minimized. For facilities subject to a case-specific CO₂ emission standard, the proposed emission limit must achieve the maximum degree of reduction for new sources and shall not be less stringent than the emission control or operating efficiency that is achieved in practice by the best controlled similar source(s).

RURAL AREA PARTICIPATION

The State Administrative Procedures Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rule making process and or public hearings. The Department held a stakeholder meeting on October 20, 2011 to discuss the likely elements of the proposed Part 251 and to obtain feedback. The Department also conducted additional stakeholder outreach during the development of Part 251, prior to its formal proposal for public comment. This additional outreach included a presentation to the New York Independent System Operator (NYISO) Environmental Advisory Committee on October 21, 2011. These meetings and presentations also included question and answer sessions which allowed the Department to obtain additional feedback and input from stakeholders prior to proposing Part 251. Moreover, the Department discussed the forthcoming Part 251 rulemaking at several events regarding Article X and the implementation of the Power NY Act, including at the Business Council's 2011 Annual Industry-Environment Conference on October 27, 2011, and at the Alliance for Clean Energy New York's 5th Annual Fall Conference & Membership Meeting on October 26, 2011. The Department also conducted additional informal stakeholder outreach throughout October and November 2011 in order to obtain input used in the development of Part 251. The Department will hold public hearings on Part 251 in upstate and other rural areas and will notify interested parties of this proposed rulemaking.

Job Impact Statement

NATURE OF IMPACT

The Department is not currently aware of any proposed projects in the State that will be negatively affected by the proposed new 6 NYCRR Part 251, CO₂ Performance Standards for Major Electric Generating Facilities. There are currently no permit applications or permit modifications pending before the Department for facilities that would be subject to Part 251 and that would be unable to meet the carbon dioxide (CO₂) emission limits established in the regulation. Therefore, the proposed Part 251 will not have an adverse impact on employment opportunities at any specific currently proposed projects or facilities.

The proposed rule could potentially impact the installation of new coal-fired or oil-fired electric generating facilities, as well as expansions at existing facilities that utilize coal-firing or oil-firing. New, large-scale, coal-fired or oil-fired electric generating facilities are not expected to be built in the State, for a variety of reasons, even without the promulgation of Part 251. Therefore, Part 251 is not anticipated to have an adverse impact on employment opportunities in the state.

A project sponsor considering construction or expansion of a facility utilizing coal or oil electric generating facility might decide to not go forward with an expansion project utilizing coal or oil, or instead might have to utilize natural gas or some other fuel or technology in order to comply with the CO₂ emission limits in Part 251. Likewise, an applicant might decide not to build a new major electric generating facility that would have utilized coal or oil, because such a facility would not be able to comply with the CO₂ emission limits in Part 251 without utilizing carbon capture and sequestration (CCS) or some other carbon reduction technology. If a project was not built specifically because of Part 251, then Part 251 may have adverse impacts on employment opportunities in the State, but this is an extremely unlikely scenario.

On the other hand, a coal-fired or oil-fired electric generating facility that is constructed or expanded and subject to Part 251 would have to employ a new advanced technology such as CCS. This might create more jobs for an area, based on the level of controls needed to achieve compliance with the proposed CO₂ emission standards. By utilizing CCS or some other new carbon reduction technology, the project would likely require more employees than a conventional facility without such technology. Therefore, under this potential scenario, the proposed rule could actually have a slight positive impact on employment opportunities in New York State. Similarly, the biomass-fired facilities, waste-to-energy (WTE) facilities, or other facilities subject to a case-specific CO₂ emission limit under Part 251, the installation of the most stringent existing control technologies and operating efficiencies may require additional employees as compared to a higher emitting or less efficient facility. In any case, Part 251 is unlikely to adversely impact employment opportunities in the state.

CATEGORIES AND NUMBERS OF EMPLOYMENT OPPORTUNITIES AFFECTED

Existing electric generating facilities that continue to operate under current permits will not be subject to additional requirements through this

rulemaking and thus there should not be any adverse impact to employment opportunities for these facilities as a result of proposed Part 251. Should the facility owner or operator decide to expand their electric generating facility, with regard to plant design and fuel selection, new construction and additional labor force may be needed in order to meet the requirements of this regulation, especially in regards to implementing CCS or other advanced carbon reduction technology. This would create job opportunities in the area the plant is located.

REGIONS OF ADVERSE IMPACT

Because the Department is not currently aware of any proposed projects that would be subject to Part 251 and unable to meet the CO₂ emission limits established in the regulation, the Department is unable to specify which regions of the State may be impacted by the proposed regulation. Any potential positive or adverse impacts on job opportunities would be focused on the region in which an electric generating facility is proposed, including the region in which any potential CCS is utilized in order to comply with Part 251. Therefore, any region located in New York State may or may not be adversely impacted by this proposed regulation.

MINIMIZING ADVERSE IMPACT

The proposed regulation establishes specific CO₂ emission standards for base load fossil fuel-firing emission sources and fossil fuel-firing peaking emission sources, as well as a case-specific CO₂ emission limit for any other affected emission source. The rule only applies to new facilities, or to increases in capacity of at least 25 MW at existing facilities, and therefore allows ample time to design systems that comply with applicable emission limits. Also, the rule has been designed such that it can be met by electric generating systems that are commercially available. In particular, the CO₂ emission standards for base load facilities can be met by natural gas-firing combined cycle plants, and the standard was established with an allowance for minimal oil-firing (up to 45 days). Likewise, the CO₂ emission standards for peaking emission sources were established with an allowance for up to 100 percent oil-firing. Because most of the new electric generating facilities anticipated to be built in the State are already of a type that would comply with Part 251, any adverse impact will be minimized. For facilities subject to a case-specific CO₂ emission standard, the proposed emission limit must achieve the maximum degree of reduction for new sources and shall not be less stringent than the emission control or operating efficiency that is achieved in practice by the best controlled similar source(s).

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Analysis of Environmental Justice Issues Associated with the Siting of Major Electric Generating Facilities

I.D. No. ENV-03-12-00010-P

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

Proposed Action: Addition of Part 487 to Title 6 NYCRR.

Statutory authority: Public Service Law, art. 10, and sections 164(1)(f), (g) and (h); and L. 2011, ch. 388

Subject: Analysis of environmental justice issues associated with the siting of major electric generating facilities.

Purpose: To promulgate regulations for the analysis of environmental justice issues associated with the siting of a major electric generating facility.

Public hearing(s) will be held at: 3:00 p.m., March 5, 2012 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 3:00 p.m., March 6, 2012 at Department of Public Service, 90 Church St., 4th Fl., New York, NY; 3:00 p.m., March 8, 2012 at Department of Environmental Conservation, Region 9 Hearing Rm., 270 Michigan Ave., Buffalo, 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 (Full text is posted at the following State website: www.dec.ny.gov): Section 487.1 states the purpose of Part 487 is to establish a regulatory framework for undertaking an EJ analysis associated with the siting of a major electric generating facility in New York State pursuant to Article 10 of the Public Service Law. The regulations are intended to enhance public participation and review of environmental

impacts of proposed major electric generating facilities upon EJ communities and reduce disproportionate environmental impacts in overburdened communities. They are not intended to, nor shall they be construed to create any right to judicial review involving the compliance or noncompliance of any person with Part 487.

Section 487.2 states that Part 487 applies to all persons seeking a Certificate of Environmental Compatibility and Public Need pursuant to Public Service Law Article 10.

Section 487.3 sets forth specific definitions that apply to Part 487. The substantive definitions are:

‘Adjacent communities’ means the geographic area contiguous to and surrounding the Impact Study Area of a radius equal to the radius of the Impact Study Area, up to a maximum one mile radius. If the Impact Study Area is a one-half mile radius, the ‘adjacent communities’ shall be represented by the next one-half mile radius around the Impact Study Area; if the Impact Study Area is a two mile radius, the ‘adjacent communities’ shall be represented by the next one mile radius around the Impact Study Area.

‘Comparison Area’ means a geographic area used to analyze and compare physical conditions and impacts against the Impact Study Area.

‘Environmental justice area’ or ‘EJ area’ means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

‘Environmental Setting’ means the descriptive information that portrays or captures various aspects of the existing environmental condition within an area including existing burdens relating to the environment and public health.

‘Impact Study Area’ means the geographic area of at least a one-half mile radius around the location of a proposed major electric generating facility in which the population is likely to be affected by at least one potentially significant adverse environmental impact resulting from the construction and/or operation of the facility that is different in type, scope, or magnitude compared to the population located in the broader geographic area surrounding the facility.

‘Low-income community’ means a census block group, or contiguous area with multiple census block groups, where 23.59% or more of the population have an annual income that is less than the poverty threshold; except that the percentage population and income threshold may be revised to reflect updated demographic data.

‘Minority community’ means a census block group, or contiguous area with multiple census block groups, where the minority population is equal to or greater than 51.1% in an urban area or 33.8% in a rural area; except that the specific percentages may be revised to reflect updated demographic data.

‘Minority population’ means a population that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander, or American Indian.

‘Pre-application’ or ‘pre-application process’ means the period or procedures pursuant to Public Service Law section 163 during which an applicant must file with the Board a preliminary scoping statement; intervenor funding is disbursed for early public involvement; there is an opportunity for interested persons to comment on the preliminary scoping statement; and interested persons may enter into stipulations.

(v) ‘Reasonably available’ means obtainable from existing data, studies and records, without requiring collection of new data.

Section 487.4 establishes that the Impact Study Area for the proposed facility is a minimum of a one-half mile radius around the proposed location of the facility; but can be increased based on site-specific factors.

Section 487.5 requires the applicant to determine whether the Impact Study Area contains one or more EJ areas by identifying if there is a minority or low-income community within the Impact Study Area. If no area meeting the definition of minority or low-income community is present within the Impact Study Area, an EJ area is present if: (1) a census block group or contiguous area with multiple census block groups has a minority or low-income population that is above 85% of the stated thresholds for constituting a minority or low-income community, and (2) reasonably available air quality data and health outcome data reveals that the Impact Study Area may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies, when compared to the county as a whole, or if the Impact Study Area is in the City of New York, when compared to the city as a whole. If an EJ area is present the applicant must undertake a full EJ analysis.

Section 487.6 sets forth the general requirements and procedures for completing an applicant’s EJ analysis. This section outlines the information which an applicant must include in its preliminary scoping statement if no EJ area is present within the Impact Study Area and the more detailed information that must be included if an EJ area is present. It requires that

the applicant initiate its EJ analysis early in the pre-application process to facilitate an expeditious pre-application process and enable early and meaningful public involvement. This section includes an outline of the information that the applicant must include in its final EJ analysis submitted with its application. The applicant's final EJ analysis must be clearly and concisely written in plain language so that it can be read and understood by the public and include sufficient detail about the nature and magnitude of any significant and adverse disproportionate environmental impacts of the proposed facility to enable the New York State Board on Electric Generation Siting and the Environment to make explicit findings related to EJ issues.

Section 487.7 explains how an applicant that is required to complete a full EJ analysis and whose proposed facility is an air emission source, must conduct its required cumulative impact analysis of air quality. The analysis must be in accordance with an air modeling protocol approved by the Department and shall consider the impacts of the proposed facility with respect to air pollutants on ambient air quality within a circular area extending from the location of the proposed facility to the larger of the following distances, to be referred to as the EJ Air Impact Area (EJAIA): (1) one-half mile; (2) the Impact Study Area; or (3) the distance to the furthest receptor location of maximum impact for any pollutants modeled for the proposed facility. The analysis shall include all criteria air pollutants emitted from the proposed facility, except that ozone precursor emissions will be addressed pursuant to the provisions of 6 NYCRR Part 231; mercury, as applicable, and to the extent that emissions data are reasonably available and acceptable to the Department; and a limited set of non-criteria pollutants selected from those identified in the applicant's preliminary scoping statement based on which non-criteria pollutants have projected concentrations that may exceed quantified public health-based air criteria, as determined by the Department in consultation with the Department of Health, and to the extent that emissions data are reasonably available and acceptable to the Department. The sources to be explicitly modeled in the analysis shall include the proposed facility and: (1) any additional facility for which an application has been submitted and determined to be in compliance with PSL section 164 and which is located in the EJAIA plus 6 miles, (2) any major stationary source located in the EJAIA plus 6 miles that has not yet commenced operations and which has received a permit from the Department at least sixty days prior to the date of the applicant's filing of an application pursuant to PSL section 164, (3) any other permitted stationary source located within the EJAIA that emits an air pollutant in an amount at or above the significant project thresholds, and (4) on a site-specific basis, at the Department's discretion, any air emission source which is located contiguous to the proposed facility and for which the necessary emissions data is reasonably available and acceptable to the Department.

Section 487.8 defines the Comparison Areas against which the Impact Study Area is to be compared and contrasted as (1) the county in which the facility is proposed to be located, and (2) adjacent communities. In addition, if the proposed facility is located in New York City, the city as a whole must be used as a third Comparison Area.

Section 487.9 explains how the applicant must prepare the comprehensive demographic, economic and physical descriptions of the Impact Study Area and the Comparison Areas, which must accurately represent the community character and environmental setting of each area. The comprehensive descriptions shall include reasonably available data on population, racial and ethnic characteristics, income levels, and physical conditions, including public health; air quality, including National-Scale Air Toxics Assessment data; the number and concentration of specific industrial facilities or sites; open space; historic and cultural resources and community or neighborhood character, including existing patterns of population concentration, distribution, or growth; visual and aesthetic resources; ambient sound level; and vehicle and pedestrian traffic. The applicant shall also identify and evaluate the potential significant adverse environmental and public health impacts of the proposed facility on the Impact Study Area, during both its construction and operation, incorporating results from the applicant's cumulative impact analysis of air quality pursuant to Section 487.7 and its evaluation of expected environmental and public health impacts of the facility required pursuant to paragraph (b) of subdivision 1 of Public Service Law section 164 and add those impacts to the existing physical conditions in the Impact Study Area to obtain a comprehensive description of the physical conditions of the Impact Study Area that would result from the construction and operation of the proposed facility.

Section 487.10 explains how an applicant must compare and contrast the physical conditions in the Impact Study Area, including the impacts from construction and operation of the proposed facility, to the physical conditions in each of the Comparison Areas to evaluate whether any significant and adverse disproportionate environmental impacts in the Impact Study Area may result from the construction and/or operation of the proposed facility. In the event that the applicant's evaluation indicates that

the facility will result in or contribute to any significant and adverse disproportionate environmental impacts in the Impact Study Area, the applicant shall identify measures that it will take to avoid, offset or minimize each impact and include in its evaluation a discussion of the effect these measures would have on the applicant's conclusions about any significant and adverse disproportionate environmental impacts in the Impact Study Area. The applicant shall avoid any disproportionate impact to the maximum extent practicable for the duration that the Certificate is issued. If the applicant cannot avoid the impact, the applicant shall minimize the impact to the maximum extent practicable. If the impact cannot be avoided or minimized, the applicant shall offset the impact, with priority given to offset measures that will benefit the area where the degree of significant and adverse disproportionate impact is greatest.

Section 487.11 requires the applicant to prepare a Statement of Environmental Justice Issues, summarizing its final EJ analysis, including the evaluation of any significant and adverse disproportionate environmental impacts in the Impact Study Area. The statement must provide a detailed explanation of the rationale for any conclusions made, identify the individual studies and investigations relied upon in conducting the EJ analysis, and articulate why any measure to avoid, minimize, or offset any impact will remedy in whole or in part any identified significant and adverse disproportionate impact, including how the measure can be verified and its cost.

Text of proposed rule and any required statements and analyses may be obtained from: Melvin Norris, NYSDEC Office of Environmental Justice, 625 Broadway, Albany, NY 12233-1500, (518) 402-8556, email: EJcomments@gw.dec.state.ny.us

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

Public comment will be received until: March 15, 2012.

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

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

Summary of Regulatory Impact Statement

1. Statutory Authority:

Public Service Law (PSL) Article 10 (Article 10) requires the Department to promulgate regulations for the analysis of environmental justice issues associated with siting a major electric generating facility (EJ regulations). Paragraphs (f), (g), and (h) of PSL section 164(1) set forth specific requirements an applicant must include in its EJ analysis in accordance with the EJ regulations.

2. Legislative Objectives:

Article 10 is intended to streamline the siting process for energy sources having a capacity 25 megawatts or more, and to improve public participation in power plant siting decisions. Article 10 is also intended to reduce disproportionate environmental impacts in overburdened communities.

Article 10 requires that the Department's EJ regulations include the requirements that an applicant analyze cumulative impacts to air quality; prepare a comprehensive demographic, economic and physical description of the community in which the facility is located, compared and contrasted with the county and adjacent communities; and evaluate any significant and adverse disproportionate environmental impacts of the proposed facility during its construction and operation. Article 10 delegates to the Department to establish in EJ regulations how an applicant must comply with these requirements.

These proposed regulations are intended to ameliorate certain negative impacts of power plants to be located in overburdened EJ communities through an augmented review (i) of the existing environmental conditions of the community in which the proposed facility is to be located, and (ii) the expected environmental and public health impacts of the proposed facility on that community. The Department is applying the plain language of the statutory provisions, where applicable, but is proposing additional requirements as necessary to ensure the applicant undertakes a meaningful EJ analysis, including a thorough evaluation of any significant and adverse disproportionate environmental impacts, to enable the Board to make its findings on EJ issues.

Section 487.1 states the purpose of the EJ regulations is to establish a regulatory framework for an EJ analysis to enhance public participation and review of environmental and public health impacts upon EJ communities and reduce disproportionate environmental impacts in overburdened communities. They are not intended to create any right to judicial review involving the compliance or noncompliance of any person with the regulations.

Section 487.2 confirms the regulations apply only to persons seeking a Certificate authorizing the construction of a major electric generating facility pursuant to Article 10.

Section 487.3 sets forth the applicable definitions, many of which are used in Article 10 or the Department's Commissioner Policy 29, Environmental Justice and Permitting (CP-29). The definitions for "minority community" and "low-income community" may be revised prior to adoption of these regulations because updated demographic data for New York are not yet available.

Section 487.4 requires the applicant to define the Impact Study Area, or area most likely to be affected by the proposed facility's adverse impacts. It will encompass at least a one-half mile radius around the location of the proposed facility, and may be increased by the applicant based on site-specific factors to capture the area that may be most affected by the facility's significant adverse impacts.

Section 487.5 instructs the applicant to determine if an EJ area is present within the Impact Study Area. If an EJ area is present, the applicant must undertake a full EJ analysis. This threshold inquiry is consistent with the intent of Article 10's EJ provisions and CP-29. The applicant must also complete a full EJ analysis for any reasonable and available alternate location it identifies if that location's Impact Study Area contains an EJ area.

Section 487.6 sets forth the general requirements and procedures for completing an EJ analysis. The applicant must initiate its EJ analysis as early as practicable during the pre-application process to facilitate an expeditious process and assure early and meaningful public involvement. The EJ analysis must be written clearly and concisely in plain English and contain all relevant and material facts in sufficient detail to enable the Board to make explicit findings related to EJ issues.

Section 487.7 explains how to perform the cumulative impact analysis of air quality required pursuant to PSL section 164(1)(g). This analysis is geared to assessing EJ-specific impacts and is only required if the proposed facility is likely to affect an EJ area. It is required in addition to any other air quality analysis that may be required for the proposed facility under applicable regulations.

Section 487.8 establishes the "Comparison Areas," against which the Impact Study Area is to be compared and contrasted, as the county in which the facility is proposed to be located and the adjacent communities. If the facility is proposed to be located in one of the five boroughs of New York City, a third Comparison Area will be the entire city.

Section 487.9 describes how the applicant must prepare the comprehensive demographic, economic and physical descriptions of the Impact Study Area and Comparison Areas pursuant to PSL section 164(1)(h). The descriptions will include reasonably available information on population, racial and ethnic characteristics, income levels, open space, and public health, including publicly available data on asthma and cancer. Consistent with the language in paragraph (h) that the descriptions be comprehensive, they must include information beyond the list of minimum requirements, particularly with respect to physical conditions. The applicant must identify and evaluate the facility-related impacts in the Impact Study Area and add them to existing physical conditions to obtain a comprehensive description of the Impact Study Area that would result from the construction and operation of the proposed facility.

Section 487.10 requires the applicant to compare and contrast the physical conditions of the Impact Study, including the impacts from construction and operation of the proposed facility, to the physical conditions in each Comparison Area to evaluate whether the proposed facility will result in or contribute to any significant and adverse disproportionate environmental impacts in the Impact Study Area, as required pursuant to PSL section 164(1)(h) and (f). If the applicant's evaluation indicates the facility would result in a significant and adverse disproportionate environmental impact, the applicant must discuss any measures that it will take to avoid, offset or minimize the impact to the maximum extent practicable and the effect of those measures.

Section 487.11 requires the applicant to prepare a Statement of Environmental Justice Issues that summarizes the applicant's final EJ analysis.

3. Needs and Benefits:

These EJ regulations are being proposed to fulfill a statutory obligation of the Department; therefore, there is a need to promulgate these regulations.

The intent of these regulations is to promote the fair treatment and meaningful involvement of all people in facility siting by requiring a heightened analysis of environmental impacts and additional protections against significant and adverse disproportionate environmental impacts in low-income and/or minority EJ areas, which have historically been overburdened by the adverse environmental and public health impacts of industrial facilities.

Accordingly, the proposed regulations require, in EJ areas only, a heightened analysis of environmental impacts and additional protections against significant and adverse disproportionate environmental impacts. In this manner, the proposed regulations - like CP-29 -- provide additional protections to EJ areas with the ultimate goal of equal environmental treatment of all communities.

This approach is also consistent with the 2009 New York State Energy Plan, which specifically addresses EJ in an Environmental Justice Issue Brief. The EJ Issue Brief recognizes that low-income communities and minority communities have historically been overburdened as a result of air pollution from energy-generating facilities, small stationary sources, and dense traffic and states that "[t]o reduce the risk of overburdening communities of color and low income communities in the future, siting procedures should provide for thorough environmental review and effective participation of concerned stakeholders in the decision-making processes."

These regulations are consistent with recommendations of New York State's Environmental Justice Interagency Task Force, June 10, 2009 report of Draft Recommendations. The first recommendation of the Task Force is to provide for increased community representation and access to decision making processes, recognizing that "[a] basic tenet of environmental justice is that low-income communities and minority communities have often been left out of government decision making as a result of a historical lack of access to government."

These regulations will result in a broader and more detailed evaluation of environmental and public health impacts of the proposed facility that will benefit the community as a whole in addition to any affected EJ area, and will facilitate the applicant's consultation with the public during the Article 10 proceedings. The applicant's EJ analysis will inform the Board's finding of whether the applicant has avoided, offset, or minimized any significant and adverse disproportionate environmental impact to the maximum extent practicable, which is mandatory before the Board may grant a Certificate.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule. The Department estimates that costs to the industry of completing an EJ analysis will be incremental because of the large costs already associated with complying with the Clean Air Act, Environmental Conservation Law Article 19, and other requirements of Article 10, and because persons seeking permits for power plants in the absence of Article 10 have been addressing EJ concerns pursuant to the State Environmental Quality Review Act and CP-29. The cost to the applicant of conducting the analysis of cumulative impacts on air quality is estimated to range from \$0 to \$30,000 depending on a number of factors. The Department is unable to estimate the specific costs of any other elements of the applicant's EJ analysis. If the Impact Study Area does not contain an EJ area, the applicant's cost would be less and limited to the costs associated with defining the Impact Study Area and determining that no EJ area is present. The cost of the EJ analysis would be minimal in comparison to the total cost of siting a major electric generating facility.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule. The majority of costs for the Department, the Department of Public Service (DPS), and the Department of Health are expected to be personal service costs, particularly the need for staff to participate in the Article 10 proceedings. There will be incremental costs associated with these EJ regulations.

These regulations will not impose any costs on local governments, unless a local government itself is the applicant for a Certificate pursuant to Article 10. In this case, costs similar to those discussed for regulated parties will apply.

5. Local Government Mandates:

These regulations will not impose any program, service, duty, or responsibility upon, or mandate the expenditure of funds by, any sector of local government.

6. Paperwork:

There are no specific paperwork requirements in these regulations except for the Statement of Environmental Justice Issues summarizing the applicant's final EJ analysis and justifying its conclusions.

7. Duplication:

There are no relevant rules, statutes, or other legal requirements of the State or federal government that duplicate, overlap, or conflict with these regulations. Likewise, there are no duplicative relevant federal requirements.

8. Alternative Approaches:

The Department is statutorily required to promulgate these EJ regulations; therefore, a "no action" approach is not available. The Department considered the "Final Report of the New York State Department of Environmental Conservation Disproportionate Adverse Environmental Impact Analysis Work Group" and sought and considered input received from stakeholders during the development of these regulations. The Department also reviewed the efforts of EPA and other states, particularly California.

9. Federal Standard:

There is no federal regulatory framework for analyzing EJ issues applicable to the siting of power plants; therefore, these regulations do not exceed any minimum standards of the federal government.

10. Compliance Schedule:

There is no period of time required to enable the industry to achieve compliance with these regulations. Regulated persons will need to comply as soon as the Board begins accepting preliminary scoping statements from persons seeking a Certificate pursuant to Article 10.

Regulatory Flexibility Analysis

1. Effect of Rule:

The Department of Environmental Conservation (Department) proposes new regulations in 6 NYCRR Part 487 to implement the requirement in the Power NY Act of 2011 (Chapter 388 of the Laws of 2011) that the Department promulgates rules and regulations for the analysis of environmental justice (EJ) issues (EJ regulations) within 12 months. These EJ regulations will not have any substantial adverse effects on small businesses and local governments.

These EJ regulations will apply only to persons seeking a Certificate of Environmental Compatibility and Public Need (Certificate) authorizing the construction of a major electric generating facility pursuant to Article 10 of the Public Service Law (PSL) (Article 10). For the most part, major electric generating facilities are large corporations; however, because Article 10 defines a "major electric generating facility" as an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts (25 megawatts) or more, smaller businesses, particularly wind energy developers, will fall under the jurisdiction of Article 10 and subsequently these proposed regulations. Twenty-five megawatts of wind capacity is enough to supply at least 6,000 homes. The Department expects that a wind energy project with this capacity would not often, if ever, meet the definition of a small business because it is unlikely that a wind energy project in New York State would be independently owned and operated given the cost of constructing a wind plant of this size. According to the American Wind Energy Association, a national trade association representing the wind energy industry, a wind plant typically costs approximately \$1,000 per kilowatt of installed capacity, so a 25 megawatt wind plant would cost more than \$2 million.

As of Fall 2011, the Department knows of sixteen wind energy projects currently operating in New York State with a rated capacity of about 1,339.2 megawatts. These projects are located in Clinton, Erie, Franklin, Herkimer, Lewis, Madison, Steuben, and Wyoming counties. The Department is aware of approximately 30 wind projects that are under active review or have obtained permits but have not yet begun construction. Pursuant to PSL § 162(4)(d), Article 10 does not apply to projects for which an application for the applicable permit has already been made. Some of these projects that have applied for but not yet obtained permits may elect to become subject to the provisions of Article 10 pursuant to PSL § 162(5).

These EJ regulations will not directly affect any sector of local government, unless the local government itself will be the applicant for a Certificate authorizing the construction of a major electric generating facility. The number and type of local governments that may apply for a Certificate under Article 10 cannot be estimated. The Department is unaware of any local government wind projects being considered at this time. Any municipality in which a major electric generating facility is proposed to be located that is not an applicant for a Certificate will benefit from the public participation and intervenor funding provisions of Article 10 and these EJ regulations to the extent they result in an augmented review of environmental and health impacts of the proposed facility in that municipality. The number of local governments that will be affected by these EJ regulations as beneficiary of an augmented environmental review will be dependent on how many major electric generating facilities are proposed to be sited pursuant to Article 10 and how many will be proposed to be sited in an EJ area. The Department of Public Service (DPS) has estimated that approximately 6 to 8 facilities per year may be proposed for siting under Article 10, but this estimate is speculative.

2. Compliance Requirements:

The only persons required to comply with these EJ regulations will be those in the energy industry proposing to construct a 25 megawatt or more capacity major electric generating facility or to increase the capacity of an existing electric generating facility by 25 megawatts or more. These persons are generally well funded companies given the substantial costs of complying with the provisions of Article 10, including intervenor fees and obtaining necessary air and other permits from the Department. The additional EJ analyses and evaluations that a small business will need to undertake to comply with these regulations will not be significant in relation to the analyses and evaluations necessary to comply with the provisions of Article 10 (implemented through regulations being promulgated by DPS).

No sector of local government is required to undertake any affirmative acts to comply with these regulations unless the local government will be an applicant for a Certificate. The compliance requirements for a local government in this case would be the same as those for a small business.

3. Professional Services:

Any small business subject to these EJ regulations is likely to require

professional services to comply with these regulations, which will not differ in type from the professional services needed to comply with Article 10. It is anticipated that the small business will use the same professional services that it employs to comply with the other requirements of Article 10. It is not anticipated that the costs to a small business for the professional services necessary to comply with these regulations will be significant in relation to the costs of complying with the other requirements of Article 10.

Local governments, except those that are applicants for a Certificate, are not required to take any affirmative acts to comply with these regulations; therefore, local governments will not have the need for professional services to comply with these regulations. A local government that is an applicant for a Certificate would have the same need for professional services as a small business to comply with these regulations. The municipality in which the facility is proposed to be located (except if the municipality is an applicant for a Certificate) is entitled to intervenor funding under Article 10 which may be used to obtain professional services to assist the municipality in participating in the Article 10 siting process, including review of an applicant's EJ analysis; however, these regulations do not require that a municipality participate.

4. Compliance Costs:

The costs to small businesses and local governments to comply with these EJ regulations if they apply are limited to the costs associated with any studies, analyses and evaluations required to support an EJ analysis as a required part of an application for a Certificate. There are no recurring costs to small businesses or local governments associated with these regulations. The costs associated with undertaking an EJ analysis are expected to be minimal in comparison to the costs associated with the other requirements of Article 10. There will be no costs to local governments that are not applicant for a Certificate.

5. Economic and Technological Feasibility:

There should be no economic or technological feasibility issues associated with compliance with these EJ regulations by small business or local governments. The analyses and evaluations required by these regulations do not differ significantly from the analyses and evaluations required to comply with the other requirements of Article 10.

6. Minimizing Adverse Impact:

These EJ regulations are not anticipated to have any adverse economic impact on small businesses or local governments that are required to comply with these regulations as they will not impose significant costs above and beyond those associated with meeting all of the other requirements of Article 10. These regulations do not include significant requirements beyond those that are expressly required by statute to be included in the EJ regulations pursuant to Article 10. Where additional requirements are included in these regulations they are limited to those that are necessary to ensure a complete and thorough evaluation of any significant and adverse disproportionate impacts as a result of the facility.

7. Small Business and Local Government Participation:

The Department participated in outreach to the regulated community while developing these regulations, including the solicitation of comments from the energy industry. The only small businesses that may be impacted by these regulations are wind energy developers. The Department met with the Alliance for Clean Energy New York, Inc. (ACE NY) to discuss how these regulations may impact wind energy projects in New York and presented its proposed regulatory approach at ACE NY's Fall Conference on October 26, 2011 and encouraged comments and suggestions from conference participants.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The Department of Environmental Conservation (Department) proposes new regulations in 6 NYCRR Part 487 for the analysis of environmental justice (EJ) issues (EJ regulations). These regulations will apply statewide to persons seeking a Certificate of Environmental Compatibility and Public Need (Certificate) authorizing the construction of a major electric generating facility pursuant to Article 10 of the Public Service Law (PSL) (Article 10). A major electric generating facility is defined as an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts (25 megawatts) or more. The Department anticipates that most of the major electric generating facilities that will be sited in rural areas will be wind energy projects. The Department knows of sixteen wind energy projects currently operating in New York State and they are located in Clinton, Erie, Franklin, Herkimer, Lewis, Madison, Steuben, and Wyoming counties. According to 2010 U.S. Census figures, all of these counties, except for portions of Erie County, are considered rural areas.

2. Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

These EJ regulations do not include any reporting or recordkeeping requirements. The impact of these regulations upon a regulated energy developer will not be significantly different in a rural area than in an urban

or suburban area. These regulations, for the most part, will affect large energy companies and the ability to comply with these regulations is not expected to be affected by the fact that a major electric generating facility is proposed to be located in a rural area. Similarly, the need for an applicant to contract for professional services is not expected to be affected by the fact that a facility is proposed to be located in a rural area. Applicants for a Certificate must comply with all of the requirements of Article 10 which will not differ for applicants proposing to locate a facility in a rural area. The additional requirements to comply with these EJ regulations are not significant when compared to the requirements of complying with the other requirements of Article 10. If the facility is proposed to be located in a rural area in which no EJ area is present, the requirements to comply with these regulations are substantially fewer.

3. Costs:

The cost to comply with these proposed EJ regulations in rural areas will not differ substantially from the costs of complying with these regulations in urban or suburban areas. These costs cannot be quantified at this time; however, the Department anticipates that the cost of complying with the EJ regulations will be insignificant in relation to the total costs of complying with the other requirements of Article 10. The costs of complying with these regulations are limited to the costs associated with any studies, analyses and evaluations required to support an EJ analysis as a required part of an application for a Certificate. If the facility is proposed to be located in a rural area in which no EJ area is present, the costs to comply with these regulations are substantially less. There are no recurring costs associated with these regulations.

4. Minimizing Adverse Impact:

The Department does not expect these proposed EJ regulations to have a negative impact on rural areas in the State as they will not impose significant costs above and beyond those associated with meeting all of the other requirements of Article 10.

5. Rural Area Participation:

The Department participated in outreach to the regulated community while developing these regulations, including the solicitation of comments from the energy industry. The energy developers that are most likely to locate facilities in rural areas are wind energy developers. The Department met with the Alliance for Clean Energy New York, Inc. (ACE NY) to discuss how these regulations may impact wind energy projects in New York and presented its proposed regulatory approach at ACE NY's Fall Conference on October 26, 2011 and encouraged comments and suggestions from conference participants.

Job Impact Statement

1. Nature of Impact:

The Department of Environmental Conservation (Department) proposes to add new regulations in 6 NYCRR Part 487 for the analysis of environmental justice (EJ) issues (EJ regulations). These regulations will apply statewide. The Department does not expect the proposed regulations to have a negative impact on jobs and employment opportunities in the State.

2. Categories and Numbers Affected:

These EJ regulations will not negatively affect employment opportunities and are not anticipated to create jobs.

3. Regions of Adverse Impact:

There are no regions of the State expected to be negatively impacted by these EJ regulations.

4. Minimizing Adverse Impact:

These EJ regulations are not expected to have an adverse impact on jobs and employment.

5. Self-Employment Opportunities:

Constructing a major electric generating facility requires significant capital. Therefore, companies directly impacted by these proposed regulations are not expected to involve many self-employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Protected Native Plants List

I.D. No. ENV-03-12-00011-P

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

Proposed Action: Repeal of section 193.3; and addition of new section 193.3 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 9-0105(1), (3) and 9-1503

Subject: Protected Native Plants List.

Purpose: To protect endangered, threatened, rare and exploitably vulnerable plants by updating the plant lists.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov/animals/7135.html): The existing Section 193.3 will be repealed and a new Section 193.3 will be adopted. The new section will update the lists of endangered, threatened, rare or exploitably vulnerable plants to reflect changes in plant populations since the lists were last updated in 2000. The updated lists are based upon the current existing definitions of endangered, threatened, rare and exploitably vulnerable plants, as defined in Section 193.3.

The regulations are authorized by Environmental Conservation Law (ECL), section 9 1503, which authorizes the Department to promulgate and adopt a list, or lists, of protected native plants which, by reason of their endangered, threatened, rare or exploitably vulnerable status, should not be picked or removed from their habitat.

Endangered species are listed in 6 NYCRR Section 193.3 subdivision (a), threatened species in subdivision (b), rare species in subdivision (c) or exploitably vulnerable species in subdivision (d) of this regulation. All of these plants are protected native plants pursuant to ECL section 9 1503. The common names contained on these lists are included for informational purposes only. The scientific names shall be used for the purpose of determining any violation. Site means a colony or colonies of plants separated from other colonies by at least one half mile.

Endangered native plants listed are in danger of extirpation throughout all or a significant portion of their ranges within the State and require remedial action to prevent such extinction. Listed plants are those with five or fewer extant sites, or fewer than 1,000 individuals, or restricted to fewer than four U.S.G.S. 7 ½ minute series maps, or species listed as endangered by the United States Department of Interior in the Code of Federal Regulations. (Please note: the list of 352 plants designated as endangered are omitted for this summary).

The listed threatened native plants are likely to become endangered within the foreseeable future throughout all or a significant portion of their ranges within the State. Listed plants are those with six to fewer than 20 extant sites, or 1,000 to fewer than 3,000 individuals, or restricted to not less than four or more than seven U.S.G.S. 7 ½ minute series maps, or species listed as threatened by the United States Department of Interior in the Code of Federal Regulations. (Please note: The list of 155 plants designated as threatened are omitted for this summary).

Rare native plants have from 20 to 35 extant sites or 3,000 to 5,000 individuals statewide. (Please note: The list of 86 plants designated as rare are omitted for this summary).

Exploitably vulnerable native plants are likely to become threatened in the near future throughout all of a significant portion of their ranges within the State if causal factors continue unchecked. (Please note: The list of 149 plants designated as exploitably vulnerable are omitted for this summary).

It is a violation for any person, anywhere in the State, to pick, pluck, sever, remove, damage by the application of herbicides or defoliants, or carry away, without the consent of the owner, any protected plant. Each protected plant so picked, plucked, severed, removed, damaged or carried away shall constitute a separate violation.

The proposed revisions to the endangered, threatened, rare or exploitably vulnerable lists are the result of new information compiled by the Natural Heritage Program in its database. The Natural Heritage Program is a partnership between the New York State Department of Environmental Conservation and the Nature Conservancy. Through field inventories, analysis and a comprehensive database, the Natural Heritage Program keeps track of the status of rare plants in New York State. It is this database that is the basis for the Protected Native Plants regulation. The proposed rank changes are based on information contained in the Natural Heritage Program database and reflect the numbers of plants or the numbers of sites or locations of listed species. When new populations of species are found or when existing populations grow in number, plants may meet the criteria of a lower rank, or may be removed from the lists. Plants may increase in number due to the discovery of new sites or populations, environmental factors such as climate change, decrease of herbivores or better protection of habitat. Plants that were previously thought to have been extirpated in the State may have been re-discovered and then need to be added to one of the lists, based on their numbers. Two examples of this are plants that were re-discovered this past summer. Small whorled pagonia (*Isotria medeoloides*) had not been seen in the State for decades, even after years of searching the most likely sites. It is Federally listed as threatened. It has now been found again in New York. It will be added to the endangered list. Northeastern bulrush (*Scirpus ancistrochaetus*) is a Federally endangered plant that was thought to have been extirpated with little chance of ever finding it again in New York State. It was also found during a field survey this summer. It will be added to the endangered list. When existing populations decrease in numbers, or when entire sites or populations disappear, plants may meet the criteria of a higher rank. Plants may decrease in numbers due to environmental factors such as climate change, increase in herbivores, or destruction of habitats.

The proposed changes include 33 plants being moved from the endangered to the threatened list, two plants being moved from the endangered to the rare list, 30 plants from the endangered list being removed from all lists and 28 unlisted plants being added to the endangered list. Twenty plants are being moved from the threatened to the endangered list, 23 plants are being moved from the threatened to the rare list, seven threatened plants are being removed from all lists and nine unlisted plants are being added to the threatened list. Six plants are being moved from the rare to the threatened list, and 48 unlisted plants are now on the rare list. One exploitably vulnerable plant is being moved to the threatened list.

There wasn't significant movement from one list to another. Most of the unlisted plants were added to the lists because of extensive field surveys and technological advances such as Geographic Information Systems and aerial mapping which allow better prediction of potential sites based on specific habitat requirements of plant species compared to the past when these tools were not available.

Many plants were removed from the lists due to an increase in their numbers, but many other plants were added to the lists because their populations have decreased. Plants that were thought to have been extirpated from the State have been found and are being added to the lists.

New York State is unique since it is a crossroads of plant distribution with a great variety of ecosystems, from the Long Island beaches to the Adirondack's high peaks. The State is on the boundary of many plant's ranges; the southern edge of many northern and even Arctic species; the northern limit for many southern species; and the eastern limit for many Midwestern prairie species. Because of this distribution, New York State has a long list of plants that, while common in many other locations, are rare in New York.

The new Protected Native Plant lists have 124 scientific name changes. These changes were made to reflect new taxonomical information or the reclassification of plant families and genera. The International Code of Botanical Nomenclature is the internationally recognized authority for the naming of plants. The New York State Botanist at the State Museum approves the names of plants in New York State, based on the international classification.

Text of proposed rule and any required statements and analyses may be obtained from: Douglas Schmid, NYS DEC, 625 Broadway, Albany, NY 12233, (518) 402-9425, email: daschmid@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

The regulations are authorized by Environmental Conservation Law (ECL) section 9-1503, allowing the Department of Environmental Conservation (Department) to promulgate and adopt a list, or lists, of protected native plants which, by reason of their endangered, threatened, rare, or exploitably vulnerable status, should not be picked or removed from their natural habitat. The Department has adopted lists of protected native plants under this section of the law. This rule updates the lists to reflect changes in plant populations since the lists were last updated in 2000. These regulations are also authorized by ECL section 9-0105(1), which states that the Department has the power, duty, and authority to "exercise care, custody, and control" of certain State lands, and to "make necessary rules and regulations to secure proper enforcement" of the provisions of section 9-0105(3).

2. Legislative objectives:

The legislature recognized that historically, plants are the property of the landowner, unlike animals, which are the property of the State. Consequently, the legislature's objective in the statute was to give the landowner additional rights, over and above trespass laws, to approve or deny others the right to take plants from their property. The legislature further recognized that certain plants are threatened with extinction by unauthorized removal from landowner's lands. In giving the Department authority to give plants additional protection, the legislature recognized various classes of plants based on their rareness and exploitability. The legislature recognized that these classes of plants may require special protection.

3. Needs and benefits:

New York State has a Protected Native Plants list that lists endangered, threatened, rare or exploitably vulnerable plants. Plants of many species have become rare and some extirpated in New York due to exploitation and loss of habitat. The Protected Native Plants list was developed in 1989 to give landowners additional rights to prevent or prosecute unlawful taking of listed plants and to help in the conservation and preservation of plants. However, the status and knowledge of the distribution of many

plant species has changed dramatically since the list was last revised eleven years ago. Many plants need additional protection over and above trespass laws of the State. Furthermore, as important as increasing landowner's rights to protect plants, official designation needs to be given to truly rare plants. An official list of endangered, threatened, rare or exploitably vulnerable plants under this section is beneficial to landowners and for plant conservation and preservation. The ability to enforce the regulation reduces the occurrence of unlawful taking of plants and, since the collection of plants contributes to their extirpation, the enforcement of the regulation leads to plant conservation and preservation.

The updated lists will be based upon the current existing definitions of endangered, threatened, rare or exploitably vulnerable plants, as defined in Section 193.3. The proposed revisions are the result of new information compiled by the Natural Heritage Program in its database.

The Natural Heritage Program is a partnership between the New York State Department of Environmental Conservation and the Nature Conservancy. Through field inventories, analysis and a comprehensive database, the Natural Heritage Program keeps track of the status of rare plants in New York State. It is this database that is the basis for the Protected Native Plants regulation. The proposed rank changes are based on information contained in the Natural Heritage Program database and reflect the numbers of plants or the numbers of sites or locations of listed species. When new populations of species are found or when existing populations grow in numbers, plants may meet the criteria of a lower rank, or may be removed from the lists. Plants may increase in numbers due to the discovery of new sites or populations, environmental factors such as climate change, decrease of herbivores or better protection of habitat. Plants that were previously thought to have been extirpated in the State may have been re-discovered and need to be added to one of the lists, based on their numbers. Two examples of this are plants that were re-discovered this past summer. Small whorled pagonia (*Isoetes medeoloides*) had not been seen in the State for decades, even after years of searching the most likely sites. It is Federally listed as threatened. It has now been found again in New York. It will be added to the endangered list. Northeastern bulrush (*Scirpus ancistrochaetus*) is a Federally endangered plant that was thought to have been extirpated with little chance of ever finding it again in New York State. It was also found during a field survey this summer. It will be added to the endangered list.

When existing populations decrease in numbers, or when entire sites or populations disappear, plants may meet the criteria of a higher rank. Plants may decrease in numbers due to environmental factors such as climate change, increase in herbivores, or destruction of habitats. The State lists of endangered, threatened, rare or exploitably vulnerable plants have similar State rankings under the Natural Heritage Program.

The proposed changes include 33 plants being moved from the endangered to the threatened list, two plants being moved from the endangered to the rare list, 30 plants from the endangered list being removed and not being added to any other list and 28 unlisted plants being added to the endangered list.

Twenty plants are being moved from the threatened to the endangered list, 23 plants are being moved from the threatened to the rare list, seven threatened plants are being removed from all lists and nine unlisted plants are being added to the threatened list. Six plants are being moved from the rare to the threatened list, and 48 unlisted plants are now on the rare list that were previously unlisted. One exploitably vulnerable plant is being moved to the threatened list.

There wasn't significant movement from one list to another. Most of the unlisted plants were added to the lists because of extensive field surveys utilizing technological advances such as Geographic Information Systems and aerial mapping which allow better prediction of potential sites based on specific habitat requirements of plant species compared to the past when these tools were not available.

The new Protected Native Plant lists have 124 scientific name changes. These changes were made to reflect new taxonomical information or the reclassification of plant families and genera. The International Code of Botanical Nomenclature is the internationally recognized authority for the naming of plants. The New York State Botanist at the State Museum also approves the names of plants in New York State, based on the international classification.

A letter informing interested parties of the Department's intent to revise the current list of protected native plants was sent out to provide an opportunity for individuals to comment about the proposal or to request information regarding the rulemaking process. This letter went out in March of 2011 to the following groups/institutions and organizations: NYS DOT-Eastern Zone, Adirondack Mountain Club, TNC-Eastern NY Chapter, Bard College Field Station, individuals at the Herbarium at the Brooklyn Botanic Garden, Van Cortlandt and Pelham Bay Parks, NYS-Office of Parks, Recreation and Historic Preservation, Institute of Ecosystem Studies, Millbrook, NY, Department of Biology at Queens College (CUNY), Biology Department at SUNY ESF, Herbarium at NY Botanical Garden,

Cornell University, Fresh Water Institute at Rensselaer Polytechnic Institute, Mohonk Preserve, Department of Biology at St. Johns University, NYC Parks Department Natural Resources Group, Bagdon Environmental Associates in Delmar, NY, NY, Buffalo Museum of Science, Finger Lakes Community College, Terrestrial Environmental Specialists, NYS Museum, Rice Creek Field Station at SUNY Oswego, Olive Natural Heritage Society, Biological Sciences at SUNY Albany, LA Group, Matthew D. Rudikoff Associates in Beacon, NY, Energy Environmental Analysts in Garden City, NY, Ecology and Environment in Lancaster, NY, APA, SUNY Oneonta Faculty and the Department of Biological Sciences at SUNY Plattsburgh. There were no responses received as a result of this outreach, except for one question that was procedural in nature.

4. Costs:

This rulemaking will impose no costs on the regulated public. It will impose no costs on the Department, since existing staff and public information and education programs will be used to publicize and enforce the regulation. There will be no cost to local government.

5. Local government mandates:

The regulations will impose no program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

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

7. Duplication:

Other rules and legal requirements of the State and Federal governments would not duplicate, overlap or conflict with the regulations.

8. Alternatives:

The no action alternative is not feasible since the existing regulation does not reflect the current population levels of numerous plants in New York State. Removal of plants that are not currently listed are not subject to penalties under the ECL. In the eleven years since the regulations were updated there have been numerous changes in the number of plants on the lists. Many plants currently identified as endangered, threatened, rare, or exploitably vulnerable need to be moved from one list to another or removed from the lists to properly show their current status.

9. Federal standards:

The proposed regulations do not exceed any minimum standards of the Federal government. Federally listed endangered and threatened plants are listed by definition as endangered or threatened under this regulation.

10. Compliance schedule:

The regulations will become effective on the date of publication of the rulemaking in the New York State Register. No time is needed for regulated persons to achieve compliance with the regulations. Once the regulations are adopted they are effective immediately. The Department will seek to educate the public about the regulations through information posted on the Departments' web site. Regional office staff will be notified by e-mail.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not submitted with this notice because the rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The purpose of the proposed regulation is to provide protection to endangered, threatened, rare and exploitably vulnerable plants by updating the existing Protected Native Plant lists to reflect current population data, in addition to updating scientific names to reflect current taxonomic nomenclature.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on rural areas. The purpose of the proposed regulation is to provide protection to endangered, threatened, rare and exploitably vulnerable plants by updating the existing Protected Native Plant lists to reflect current population data in addition to updating scientific names to reflect current taxonomic nomenclature.

Job Impact Statement

A Job Impact Statement is not submitted with this notice since the proposed regulation is not expected to create an adverse impact on jobs and employment opportunities in New York State. The purpose of the proposed regulation is to provide protection to endangered, threatened, rare and exploitably vulnerable plants by updating the existing Protected Native Plant lists to reflect current population data, in addition to updating scientific names to reflect current taxonomic nomenclature.

Department of Financial Services

EMERGENCY RULE MAKING

Life Settlements

I.D. No. DFS-03-12-00002-E

Filing No. 1431

Filing Date: 2011-12-28

Effective Date: 2011-12-28

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

Action taken: Addition of Part 381 (Regulation 198) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 301 and 302; Insurance Law, sections 2137, 7803, 7804 and 7817 as added by L. 2009, ch. 499 and L. 2009, ch. 499, section 21

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

Specific reasons underlying the finding of necessity: This Part sets forth the license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries and financial accountability requirements for life settlement providers as required under sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. These sections, along with other sections of the new life settlement legislation, became effective May 18, 2010.

These sections of the Insurance Law require licensing and registration of life settlement providers, life settlement intermediaries and life settlement brokers. In order to license and register these persons, the fees associated with the licensing and registration, as well as financial accountability requirements which life settlement providers must demonstrate at licensing, must first be established by regulation as required by the legislation. The licensing of these entities is a critical aspect of the new life settlement law in order to properly safeguard the public in life settlement transactions.

Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary, or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established and maintained in effect on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby engaging in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to continue to accept applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable to accept applications for licensure, a competitive disadvantage for applicants seeking such licensure could result.

This regulation has been in effect on an emergency basis since April 23, 2010. The emergency action was necessary to establish fees and financial accountability standards in order to commence licensing life settlement providers, intermediaries and brokers, to ensure the implementation of Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. This regulation was promulgated on an emergency basis on April 23, 2010, July 19, 2010, October 14, 2010, January 11, 2011, April 11, 2011, July 8, 2011, and September 29, 2011.

The proposed rule will be published in the December 28, 2011 edition of the State Register. Pending adoption of the permanent proposal, Insurance Regulation 198 must remain in effect on an emergency basis for the general welfare.

Subject: Life Settlements.

Purpose: To implement chapter 499 of the Laws of 2009's provisions of license fees and financial accountability requirements.

Text of emergency rule: Chapter XV of Title 11 is renamed "Life Settlements".

Section 381.1 License fees and financial accountability requirements for life settlement providers.

(a) The application for a license as a life settlement provider shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$10,000.

(b) The financial accountability of a life settlement provider required in accordance with section 7803(c)(2)(E) of the Insurance Law, to assure the faithful performance of its obligations to owners and insureds on life settlement contracts subject to Article 78 of the Insurance Law, shall be in an amount at least equivalent to \$250,000, shall be maintained at all times and may be evidenced in one of the following manners:

(1) Assets in excess of liabilities in an amount at least equal to \$250,000 as reflected in the applicant's financial statements;

(2) A surety bond in an amount at least equal to \$250,000 placed in trust with the superintendent issued by an insurer licensed in this State to write fidelity and surety insurance under section 1113(a)(16) of the Insurance Law; or

(3) Securities placed in trust with the superintendent consisting of securities of the types specified in section 1402(b)(1) and (2) of the Insurance Law, estimated at an amount not exceeding their current market value, but with a total par value not less than \$250,000; provided that:

(i) If the life settlement provider is incorporated in another state, the securities allowed for placement in the trust may consist of direct obligations of that state; and

(ii) If the aggregate market value of the securities in trust falls below the required amount, the superintendent may require the life settlement provider to deposit additional securities of like character.

(c) The application for the biennial renewal of a life settlement provider license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$5,000.

Section 381.2 License fees for life settlement brokers.

(a) The application for a license as a life settlement broker shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.

(b) The application for the biennial renewal of a life settlement broker license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.

Section 381.3 Registration fees for life settlement intermediaries.

(a) The application for registration as a life settlement intermediary shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$7,500.

(b) The application for the biennial renewal of a life settlement intermediary registration shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$2,500.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 26, 2012.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 202, 301, and 302 of the Financial Services Law ("FSL"), section 301 of the Insurance Law, sections 2137, 7803, 7804, and 7817 of the Insurance Law as added by Chapter 499 of the Laws of 2009, and section 21 of Chapter 499 of the Laws of 2009.

Section 202 of the Financial Services Law establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services.

FSL section 301 establishes the powers of the Superintendent generally. FSL 302 and section 301 of the Insurance Law, in material part, authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, the Banking Law, the Financial Services Law, or any other law of this state and to prescribe regulations interpreting the Insurance Law.

Section 2137 of the Insurance Law, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement

brokers. Section 2137(h)(8) requires licensing and renewal fee be determined by the Superintendent, provided that such fees do not exceed that which is required for the licensing and renewal of an insurance producer with a life line of authority.

Section 7803 of the Insurance Law, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement providers. Section 7803(c)(1) requires the application for a life settlement provider's license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(h)(1) provides that an application for renewal of the license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(c)(2)(E) requires a life settlement provider to demonstrate financial accountability as evidenced by a bond or other method for financial accountability as determined by the Superintendent pursuant to regulation.

Section 7804 of the Insurance Law, as added by Chapter 499 of the Laws of 2009, sets forth the registration requirements for life settlement intermediaries. Section 7804(c)(1) requires the application for a life settlement intermediary registration be accompanied by a fee in an amount to be established by the Superintendent. Section 7804(i)(1) provides that an application for renewal of the registration be accompanied by a fee in an amount to be established by the Superintendent.

Pursuant to State Administrative Procedure Act section 202, the implementation of the fee requirements under sections 2137, 7803 and 7804 of the Insurance Law requires the promulgation of regulations.

Section 7817 of the Insurance Law, as added by Chapter 499 of the Laws of 2009, authorizes the Superintendent to promulgate regulations necessary for the implementation of provisions of Insurance Law Article 78.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions.

2. Legislative objectives: Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, which became effective May 18, 2010, require the licensing of life settlement providers and life settlement brokers and the registration of life settlement intermediaries. Such sections also provide that the license and registration fees charged these persons and the financial accountability requirements that life settlement providers must demonstrate at licensing shall be established by the Superintendent.

Section 21(6) of Chapter 499 of the Laws of 2009 and section 7817 of the Insurance Law authorize the Superintendent to promulgate rules and regulations necessary for the implementation of provisions of Chapter 499 of the Laws of 2009. This rule is necessary to implement sections 2137, 7803 and 7804 of the Insurance Law.

3. Needs and benefits: Sections 2137, 7803, and 7804 of the Insurance Law requires that the Superintendent establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers. Since such constitutes rulemaking under the State Administrative Procedure Act, these fees and accountability requirements must be established by regulation to permit the Department to accept applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers.

Therefore, adoption of this rule establishing license and registration fees and financial accountability requirements is necessary for the implementation of the life settlement legislation.

4. Costs: The rule requires an initial license application fee of \$10,000 for life settlement providers and an initial registration application fee of \$7,500 for intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

In developing the license and renewal fees for life settlement providers, life settlement intermediaries and life settlement brokers, the following were considered:

- New York Insurance Law section 332 provides that the expenses of the Department for any fiscal year, including all direct and indirect costs, shall be assessed by the Superintendent pro rata upon all domestic insurers and licensed United States branches of alien insurers domiciled in New York. Life settlement providers and life settlement intermediaries are not subject to this assessment. As a result, these expenses will be borne by insurers through the section 332 assessments, since fees collected by the Superintendent are turned over to the State's general fund, and do not directly reimburse the expenses of the Department. Nonetheless, the Superintendent believes that it is

appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration. Several factors were considered in arriving at appropriate fees:

- Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.
- Initial and renewal licensing fees charged to life settlement providers are set at rates greater than initial and renewal registration fees charged to life settlement intermediaries. The differences in such fees reflect the lesser time-based expenses associated with the registration of intermediaries than associated with provider licensing.
- New Insurance Law sections 2137 provides that the licensing or renewal fees prescribed by the Superintendent for a life settlement broker shall not exceed the licensing or renewal fee for an insurance producer with a life line of authority. In accordance with the statute, this rule sets the licensing and renewal fee for a life settlement broker at \$40, which is equal to the current licensing or renewal fee of an insurance producer with a life line of authority.

In developing the financial accountability requirements that a life settlement provider must comply with, the Superintendent considered the cash outlay of each offered compliance option. The establishment of a surety bond requires the purchase of the surety bond. The deposit of securities with the Superintendent requires the establishment of a custodian account and incurrence of the associated expenses. The maintenance of a required level of assets in excess of liabilities may require the addition of capital where such level is not currently maintained.

The rule does not impose additional costs to the Department of Financial Services or other state government agencies or local governments.

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

6. Paperwork: No additional paperwork should result from the provisions set by this rule.

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

8. Alternatives: In the development of the licensing and registration fees imposed on life settlement providers and life settlement intermediaries, the Department's draft proposal was premised on the Superintendent retaining the fees to cover Department costs, and the fees were significantly higher than as included in the regulation. However, as noted, such fees are turned over to the State's general fund and thus do not directly reimburse the Department for its expenses.

The Department solicited comments from interested parties on the draft rule, which contained the higher fees. An outreach draft of the rule was posted on the Department's website for a two-week public comment period and a meeting was held at the Department on April 6, 2010 to discuss the rule with interested parties. The Life Insurance Settlement Association (LISA), a life settlement industry trade association, and other life settlement interested parties commented that the intended fees would present a financial barrier for some life settlement providers wishing to compete in the New York marketplace. LISA, as well as other interested parties, took the position that a decreased number of licensed providers in New York inhibits fair competition and industry growth, which would ultimately harm New York policyholders seeking the assistance of the secondary market for life insurance because of the lack of competition. In response to these comments, the initial license fee for life settlement providers was reduced from \$20,000 to \$10,000 and the initial registration fee for life settlement intermediaries was reduced from \$10,000 to \$7,500.

The Life Insurance Council of New York (LICONY), a life insurance trade association, has expressed support of a licensing and registration fee structure set at a level that is sufficient so that participating entities are paying for the regulation of their industry. The Superintendent attempted to balance the competing interests discussed above to arrive at a fee schedule that would be fair and equitable.

With regard to financial accountability requirements, the outreach draft posted to the Department's website for public comment had provided two options - surety bond and security deposit - to comply with such demonstration. After consideration of the comments received from LISA

and other life settlement industry interested parties indicating that these options would create a financial barrier for some providers wishing to enter and operate in the New York market, the Superintendent added a third option that provides a less costly and less capital restrictive compliance alternative. The third option allows a life settlement provider to satisfy the financial accountability requirements by demonstrating that its assets exceed its liabilities by an amount no less than \$250,000. These financial accountability requirements are on a par with the requirements in many other states.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: This regulation has been in effect on an emergency basis since April of 2010. The emergency action was necessary to establish fees and financial accountability standards in order to commence licensing life settlement providers and brokers and registration application for life settlement intermediaries, to ensure the implementation of sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. The adoption of this rule will continue the fees and financial accountability requirements currently in effect by the emergency regulation.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements for life settlement providers.

This rule is directed to life settlement providers, life settlement brokers and life settlement intermediaries. Some of these entities may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to conduct life settlement business, none of which are local governments.

2. Compliance requirements: The affected parties will need to accompany their applications along with fees as prescribed by this rule. Also, each life settlement provider applying for license has to comply with financial accountability requirements by demonstrating that its assets exceeds its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: The regulation requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must comply with financial accountability requirements by demonstrating that its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

5. Economic and technological feasibility: The affected parties will need to pay licensing and registration fees as prescribed by the rule.

6. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some small-business life settlement providers and life settlement intermediaries wishing to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the licensing and registration fees, alternatives (such as

the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to small-business life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on small-business life settlement providers and intermediaries were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comment received by the Department from interested parties in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance in the rule.

7. Small business and local government participation: Affected small businesses had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19, 2010 and to participate (in person or by conference call) in a meeting held at the Department on April 6, 2010 to discuss the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: There may be some life settlement providers, life settlement brokers, and life settlement intermediaries that do business in rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting or recordkeeping requirements on public or private entities in rural areas. The affected parties that do business in rural areas will need to comply with the license and registration fees and financial accountability requirements imposed by the rule.

3. Costs: The rule requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

4. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some life settlement providers and life settlement intermediaries doing business in rural areas that wish to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to rural area life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on life settlement providers and intermediaries doing business in rural areas were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comments received from interested parties by the Department in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less

costly and less capital restrictive alternative to the other two methods of compliance included in the rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19, 2010 and to participate (in person or by teleconference) in the Department meeting on April 6, 2010 with interested parties to discuss the rule.

Job Impact Statement

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities. This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements that life settlement providers must demonstrate at licensing. Additional licensing and registration requirements will be established by related rulemakings in the near future.

NOTICE OF ADOPTION

Filing and Certification of Call Reports

I.D. No. BNK-37-11-00004-A

Filing No. 1432

Filing Date: 2011-12-28

Effective Date: 2012-01-18

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

Action taken: Amendment of Part 23; and addition of Part 342 to Title 3 NYCRR.

Statutory authority: Banking Law, sections 14(1)(l), 37 and 204

Subject: Filing and certification of call reports.

Purpose: Requires all banks, trust companies, private bankers, savings banks, savings and loan associations and branches and agencies of foreign banking organizations to file and certify the correctness of call reports.

Text of final rule: Amendments to General Regulations of the Banking Board

Part 23

CALL REPORTS

(Statutory authority: Banking Law §§ 14(1)(l), 37)

23.1 Call Reports

(a) Section 14(1)(l) of the Banking Law empowers the Banking Board to prescribe the form and contents of periodical reports of condition ("Call Reports") to be rendered to the Superintendent by banks, trust companies and private bankers. [A periodical report of condition shall be deemed rendered to the superintendent if the superintendent shall have such access as he or she deems appropriate at either the principal office of the bank or trust company, or through the facilities of the Federal Deposit Insurance Corporation or Federal Reserve Board, as the case may be, to such reports of condition as have been rendered to the Federal Deposit Insurance Corporation or Federal Reserve Board, as the case may be, in compliance with their rules and regulations. With respect to reports of banks and trust companies not otherwise reporting to the Federal Reserve or FDIC, such reports shall be rendered to the superintendent on the forms prescribed by the Banking Board.]

(b) Such reports shall be in the form and shall include the content required by the Consolidated Reports of Condition and Income promulgated by the Federal Financial Institutions Examination Council ("FFIEC"), whether or not such reporting entity is otherwise required to file a Call Report with a federal banking regulator. Forms and instructions for such reports may be found on the website of the FFIEC (www.ffiec.gov/).

23.2 Filing; Deemed Filing

[A reporting entity that is not required to file a periodical report of condition with a federal banking regulator shall file such report, either electronically or in hard copy, with the Superintendent.]

(a) A reporting entity shall render a periodical report of condition, either electronically or in hard copy, to the Superintendent.

(b) A Call Report shall be deemed rendered to the Superintendent if the Superintendent shall have such access as he or she deems appropriate through the facilities of the Federal Deposit Insurance Corporation or Federal Reserve Board, as the case may be (the "appropriate federal regulatory authority"), to such Call Reports as have been rendered to such appropriate federal regulatory authority, in compliance with rules and regulations of such appropriate federal regulatory authority.

23.3 Certification

By virtue of filing its Call Report with the appropriate federal regulatory authority, the reporting entity, through its Chief Financial Officer (or equivalent officer), and its attesting directors or trustees, shall be deemed to have made the appropriate certification set forth below; provided, however, that if there is a change in the wording of the attestation required in the applicable form of Call Report promulgated by the FFIEC, a comparable change shall be deemed to have been made in such form of certification:

(a) CFO (or equivalent):

I attest that the Reports of Condition and Income (including the supporting schedules) for this report date have been prepared in conformance with the instructions issued by the appropriate federal regulatory authority and are true and correct to the best of my knowledge and belief.

(b) Each director or trustee:

I attest to the correctness of the Reports of Condition and Income (including the supporting schedules) for this report date and declare that the Reports of Condition and Income have been examined by me and to the best of my knowledge and belief have been prepared in conformance with the instructions issued by the appropriate federal regulatory authority and are true and correct.

23.4 Corrected Filings

If the reporting entity files a corrected Call Report with the appropriate federal regulatory authority, it will immediately notify the Superintendent in writing of such corrected filing.

New Superintendent's Regulations

Part 342

CALL REPORTS

(Statutory authority: Banking Law §§ 37, 204, 255, 404)

342.1 Call Reports

(a) Section 204 of the Banking Law requires every foreign banking corporation doing business in this state to make written reports to the Superintendent under oath showing the amount of its assets and liabilities and containing such other matters as the superintendent shall prescribe.

(b) Section 255 of the Banking Law requires savings banks to make a written report to the superintendent annually which shall contain a statement of its condition and shall include such information and be in such form as the superintendent may prescribe. This section also requires savings banks to make such other special reports as the superintendent shall from time to time require.

(c) Section 404 of the Banking Law requires every savings and loan association to make a written report to the superintendent annually which shall contain a statement of its condition and shall include such information and be in such form as the superintendent may prescribe. This section also requires savings and loan associations to make such other special reports as the superintendent shall from time to time require.

(d) Such reports shall be in the form and shall include the content required by the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks or the Consolidated Report of Condition and Income promulgated by the Federal Financial Institutions Examination Council ("FFIEC"), whichever is applicable, whether or not such reporting entity is otherwise required to file a report of condition with a federal banking regulator. Forms and instructions for such reports may be found on the website of the FFIEC (<http://www.ffiec.gov/>).

342.2 Filing; Deemed Filing

(a) A reporting entity shall render a periodical report of condition, either electronically or in hard copy, to the superintendent.

(b) A periodical report of condition shall be deemed rendered to the superintendent if the superintendent shall have such access as he or she deems appropriate through the facilities of the Federal Deposit Insurance Corporation or the Federal Reserve Board, as the case may be (the "appropriate federal regulatory authority"), to such reports of condition as have been rendered to the appropriate federal regulatory authority, in compliance with the rules and regulations of such appropriate federal regulatory authority.

342.3 Certification

By virtue of filing its periodical report of condition with the appropriate federal regulatory authority, the reporting entity, through its Chief Financial Officer (or equivalent officer), and its attesting senior executive officer, shall be deemed to have made the appropriate certification set forth below; provided, however, that if there is a change in the wording of the attestation required in the applicable form of Call Report promulgated by the FFIEC, a comparable change shall be deemed to have been made in such form of certification:

(a) CFO (or equivalent):

I attest that this Report of Assets and Liabilities or Report of Condition, whichever is applicable, (including the supporting schedules and supplement) for this report date has been prepared in conformance with the instructions issued by the appropriate federal regulatory authority and is true and correct to the best of my knowledge and belief.

(b) Attesting Senior Executive Officer of foreign bank branch or agency or Each Director or Trustee of Savings Bank or Savings and Loan Association

I attest to the correctness of this Report of Assets and Liabilities or Report of Condition, whichever is applicable, (including the supporting schedules and supplement) for this report date and declare that it has been examined by me and to the best of my knowledge and belief has been prepared in conformance with the instructions issued by the appropriate federal regulatory authority and is true and correct.

342.4 Corrected Filings

If the reporting entity files a corrected Report of Assets and Liabilities or Report of Condition with the appropriate Federal regulatory authority, it will immediately notify the superintendent in writing of such corrected filing.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 23.3 and 342.3.

Text of rule and any required statements and analyses may be obtained from: Sam L. Abram, Assistant Counsel, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1658, email: sam.abram@dfs.ny.gov

Revised Regulatory Impact Statement

1. Statutory authority.

Section 14(1)(l) of the Banking Law authorizes the Banking Board to adopt rules and regulations to, among other things, prescribe the form and contents of periodical reports of condition to be rendered to the Superintendent by banks and trust companies.

Section 37(4) of the Banking Law authorizes the Superintendent to prescribe the form and content of all periodical and special reports, except as otherwise expressly provided in the Banking Law.

Section 204 of the Banking Law requires every foreign banking corporation licensed by the Superintendent to engage in business in this state to make written reports to the Superintendent at such times and in such form as the Superintendent shall prescribe, under the oath of one of its officers, managers or agents transacting business in this state, showing the amount of its assets and liabilities and containing such other matters as the Superintendent shall prescribe.

Section 255 of the Banking Law requires every savings bank, on or before the first day of February in each year, to make a written report to the Superintendent which shall contain a statement of its condition as of the morning of the first day of January of such year and shall contain such information and be in such form as the Superintendent may prescribe. That section also requires every savings bank to make such other special reports to the Superintendent as he may from time to time require, in such form and as of such date as may be prescribed by him.

Section 404 of the Banking Law requires every savings and loan association, on or before the first day of February in each year, to make a written report to the Superintendent which shall contain a statement of its condition as of the morning of the first day of January of such year and shall contain such information and be in such form as the Superintendent may prescribe. That section also requires every savings and loan association to make such other special reports to the Superintendent as he may from time to time require, in such form and as of such date as may be prescribed by him.

2. Legislative objectives.

The periodic reports of condition filed by regulated banking organizations are generally referred to as "call reports".

The provisions of the Banking Law cited in the previous section reflect the Legislature's understanding that the Department and other bank supervisory agencies use call reports in connection with the on-site examination of regulated banking organizations and for analysis of their operations. Call report data is also used by the Department, as well as other public and private sector organizations, in tracking conditions in the banking system and the financial markets.

Periodic, consistent and accurate data about the financial condition of regulated institutions is an essential tool of effective bank supervision and regulation. The Banking Law provisions requiring regulated institutions to render call reports to the Department recognize this fundamental element of banking regulation.

By having the individuals signing the call report, as well as the institution, certify the accuracy and completeness of the report directly to the Department, whether the entity files its call report with its primary federal regulator or directly with the Department, these amendments further the underlying legislative objective.

3. Needs and benefits.

As noted in the previous section, the Department and other bank supervisory agencies use call reports in connection with the on-site examination of regulated banking organizations and for analysis of their operations. Call report data is also used by the Department in the process of assessing regulated institutions for the expenses of the Department pursuant to Section 17 of the Banking Law, and is used by the Department as well as other public and private sector organizations, in tracking conditions in the banking system and the financial markets. For all of these purposes, consistent and accurate periodic data about the financial condition of regulated institutions is essential.

Most banking institutions regulated by the Department, including licensed branches and agencies of foreign banking organizations, are required to file call reports with their primary federal regulator on forms specified by the Federal Financial Institutions Examination Council (FFIEC). The regulatory changes here proposed will have the effect of (1) formalizing the requirement that such reports also be filed with the Department, (2) formalizing the requirement that those relatively few banking institutions regulated by the Department which are not required to file call reports with a federal regulator file such reports with the Department using the same forms as the federal filers, and (3) requiring that banking institutions filing call reports with the Department provide the same certification as to the accuracy and completeness of the reports that federal filers provide to their principal federal regulator.

Taken together, these requirements will ensure that the Department has an explicit and direct legal basis on which to take appropriate enforcement action against any of its regulated banking institutions which fails to file a call report or files a report which is not true and correct, or against any individual who certifies an inaccurate report.

4. Costs.

Most banking institutions regulated by the State are already required to file call reports in the form specified by the FFIEC with their principal federal regulator. The Department has access to such reports through the Board of Governors of the Federal Reserve System ("Federal Reserve") or the Federal Deposit Insurance Corporation ("FDIC"), as the case may be.

Existing Part 23 minimizes the cost and burden of compliance with the State's reporting requirements by providing that a call report is deemed rendered to the Superintendent if appropriate access to the institution's federally filed call report is available.

The amendments to Part 23 and new Part 342 retain this basic approach. They provide, among other things, that entities which are not federal filers should file their call reports with the Department on the FFIEC forms. Acceptance of the FFIEC forms by the Department will minimize the cost and burden associated with the reporting process. These forms are well known throughout the banking industry and have very detailed and extensive instructions. Moreover, accounting software and other forms of technical assistance in filling out the forms is readily available from accounting and consulting firms that work with the industry.

While the proposed amendments require that call reports be certified to the Department as true and correct, they do so in a way that minimizes regulatory cost and burden. Federal filers are deemed to have made the appropriate certification to the Department by virtue of filing their reports of condition with the appropriate federal entity. Any future changes in the attestation required by the federal call report forms will also change the applicable deemed certification made to the Department. Entities that are not federal filers will also file using the FFIEC call report forms, which include a form of certification.

5. Local government mandates.

None.

6. Paperwork.

Under the regulation, entities that are federal filers are deemed to have met the State filing requirement so long as the Department has adequate access to the federally filed call reports. At present, the Department can access the complete reports of federal filers as soon as the reports are filed.

The regulation gives entities that are not federal filers the option of filing their reports with the Department electronically.

7. Duplication.

The regulation effectively avoids duplication by specifying that Department access to an institution's federal call report filing satisfies State filing and certification requirements.

8. Alternatives.

The Department could continue its present regulatory regime, under which a call report is deemed rendered to the Department as long as the Department has appropriate access to the federally filed report.

Under that regime, however, it is not entirely clear that the individuals certifying that the report is true and correct are making the certification to the Department as well as to the federal regulatory agency with which the report is filed.

While the Department could presumably take enforcement action regarding failure to file a true and correct call report under various provisions of the Banking Law, these amendments make it clear that the individuals signing the call report, as well as the institution, are directly certifying its accuracy and completeness to the Department.

The Department could have developed its own call report form, including its own form of certification, for use by institutions that do not file federally. However, as discussed in Section 4 on "Costs" above, acceptance of the FFIEC forms by the Department should reduce the cost and burden associated with the reporting process. These forms are well known throughout the banking industry and have very detailed and extensive instructions. Moreover, accounting software and other forms of technical assistance in filling out the forms are readily available from accounting and consulting firms that work with the industry.

9. Federal standards.

Federally insured depository institutions, as well as U.S. branches and agencies of foreign banking organizations, are required to file call reports on the forms specified by the FFIEC with their appropriate federal regulator.

The regulation permits institutions subject to a federal filing requirement to use compliance with that requirement to satisfy the state's requirement. It permits institutions which are not federal filers to file using the FFIEC forms.

10. Compliance schedule.

The regulatory changes are effective upon adoption.

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

The changes made to the last published rule simply provide that any future changes in the attestation required by the federal call report forms will also change the applicable deemed certification made to the Department.

Such changes do not affect the accuracy of the above impact statements as attached to the Notice of Proposed Rule Making.

Assessment of Public Comment

One comment was received from association of banking organizations doing business in the state. While appreciative of the Department's intention to minimize the regulatory cost and burden of the proposed call report certification requirement by incorporating the language of the comparable current federal certifications, the commenter expressed concern that future changes in the federal certification language could lead to inconsistencies between the required state and federal certifications.

To deal with this possible future problem, the Department has adopted the commenter's suggestion and added language to automatically conform the deemed certifications in the regulations to future changes in the federal certification forms.

**REGULATORY IMPACT
STATEMENT,
REGULATORY FLEXIBILITY
ANALYSIS, RURAL AREA
FLEXIBILITY ANALYSIS
AND/OR
JOB IMPACT STATEMENT**

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. DFS-02-12-00004-E

This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement pertain(s) to a notice of Emergency rule making, I.D. No. DFS-02-12-00004-P, printed in the *State Register* on January 11, 2012.

Regulatory Impact Statement

1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Subprime Lending Reform Law (Ch. 472, Laws of 2008, hereinafter, the "Subprime Law"), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers (MLS) are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2)(b-1) and 595-b.)

Subsection (1) of Section 590 of the Banking Law was amended by the Subprime Law to add the definitions of "mortgage loan servicer" and "servicing mortgage loans". (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from engaging in the business of servicing mortgage loans without first being registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). The registration requirements do not apply to an "exempt organization," licensed mortgage banker or registered mortgage broker.

This new paragraph also authorizes the Superintendent to refuse to register an MLS on the same grounds as he or she may refuse to register a mortgage broker under Banking Law Section 592-a(2).

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations. (Note that under Section 89 of Part A of Chapter 62 of the Laws of 2011, the functions and powers of the banking board have been transferred to the Superintendent.)

New Paragraph (d) was added to Subsection (5) of Section 590 by the Subprime Law and requires mortgage loan servicers to engage in the servicing business in conformity with the Banking Law, such rules and regulations as may be prescribed by the Superintendent, and all applicable federal laws, rules and regulations.

New Subsection (1) of Section 595-b was added by the Subprime Law and requires the Superintendent to promulgate regulations and policies governing the grounds to impose a fine or penalty with respect to the activities of a mortgage loan servicer. Also, the Subprime Law amends the penalty provision of Subdivision (1) of Section 598 to apply to mortgage loan servicers as well as to other entities.

New Subdivision (2) of Section 595-b was added by the Subprime Law and authorizes the Superintendent to prescribe regulations relating to disclosure to borrowers of interest rate resets, requirements for providing payoff statements, and governing the timing of crediting of payments made by the borrower.

Section 596 was amended by the Subprime Law to extend the Superintendent's examination authority over licensees and registrants to cover mortgage loan servicers. The provisions of Banking Law Section 36(10) making examination reports confidential are also extended to cover mortgage loan servicers.

Similarly, the books and records requirements in Section 597 covering licensees, registrants and exempt organizations were amended by the Subprime Law to cover servicers and a provision was added authorizing the Superintendent to require that servicers file annual reports or other regular or special reports.

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Subprime Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for MLS registration applications and for MLS branch applications are established in accordance with Banking Law Section 18-a.

2. Legislative Objectives.

The Subprime Law is intended to address various problems related to residential mortgage loans in this State. The Subprime Law reflects the view of the Legislature that consumers would be better protected by the supervision of mortgage loan servicing. Even though mortgage loan servicers perform a central function in the mortgage industry, there has heretofore been no general regulation of servicers by the state or the Federal government.

The Subprime Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Superintendent.

The mortgage servicing statute has two main components: (i) the first component addresses the registration requirement for persons engaged in the business of servicing mortgage loans; and (ii) the second authorizes the Superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

The regulations implement the first component of the mortgage servicing statute - the registration of mortgage servicers. In doing so, the rule utilizes the authority provided to the Superintendent to set standards for the registration of such entities. For example, the rule requires that a potential loan servicer would have to provide, under Sections 418.11 to 418.13 of the proposed regulations, evidence of their character and fitness

to engage in the servicing business and demonstrate to the Superintendent their financial responsibility. The rule also utilizes the authority provided by the Legislature to revoke, suspend or otherwise terminate a registration or to fine or penalize a registered mortgage loan servicer.

Consistent with this requirement, the rule authorizes the Superintendent to refuse to register an applicant if he/she shall find that the applicant lacks the requisite character and fitness, or any person who is a director, officer, partner, agent, employee, substantial stockholder of the applicant has been convicted of certain felonies. These are the same standards as are applicable to mortgage bankers and mortgage brokers in New York. (See Section 418.7.)

Further, in carrying out the Legislature's mandate to regulate the mortgage servicing business, Section 418.8 sets out certain application requirements for prior approval of a change in control of a registered mortgage loan servicer and notification requirements for changes in the entity's executive officers and directors. Collectively, these various provisions implement the intent of the Legislature to register and supervise mortgage loan servicers.

3. Needs and Benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure actions filed in 2007, or approximately 1,000 per week. That number increased in 2008, averaging approximately 1,100 per week in the first quarter. This is a crisis and the problems that have affected so many have been found to affect not only the origination of residential mortgage loans, but also their servicing and foreclosure. The Subprime Law adopted a multifaceted approach to the problem. It affected a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loan servicers.

Currently, the Department of Financial Services (formerly the Banking Department) regulates the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; and erroneously force-placing insurance when borrowers already have insurance.

While establishing minimum standards for the business conduct of servicers is the subject of another regulation currently being developed by the Department, Section 418.2 makes it clear that persons exempted by from the registration requirement must notify the Department that they are servicing mortgage loans and must otherwise comply with the regulations.

As noted above, these regulations relate to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It is intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers.

Further, consumers in this state will also benefit under these regulations because in the event there is an allegation that a mortgage servicer is involved in wrongdoing and the Superintendent finds that there is good cause, or that there is a substantial risk of public harm, he or she can suspend such mortgage servicer for 30 days without a hearing. And in other cases, he or she can suspend or revoke such mortgage servicer's registration after notice and a hearing. Also, the requirement that servicers meet minimum financial standards and have performance and other bonds will act to ensure that consumers are protected.

As noted above, the MLS regulations are being divided into two parts in order to facilitate meeting the statutory requirement that all MLSs be registered by July 1, 2009. The Department will separately propose regulations dealing with business conduct and consumer protection requirements for MLSs.

All Exempt Organizations, mortgage bankers and mortgage brokers that perform mortgage loan servicing with respect to New York mortgages must notify the Superintendent that they do so, and will be required to comply with the conduct of business and consumer protection rules applicable to MLSs.

Under Section 418.2, a person servicing loans made under the Power New York Act of 2011 will not thereby be considered to be engaging in the business of servicing mortgage loans. Consequently, a person would not be subject to the rules applicable to MLSs by reason of servicing such loans.

4. Costs.

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The amount of the application fee for MLS registration and for an MLS branch application is \$3,000.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System are set by that body. MLSs will also incur administrative costs associated with preparing applications for registration.

The ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, and, through the timely response to consumers' inquiries, should assist in decreasing the number of foreclosures in this state.

The regulations will not result in any fiscal implications to the State. The Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

5. Local Government Mandates.

None.

6. Paperwork.

An application process is being established for potential mortgage loan servicers to apply for registration electronically through the National Mortgage Licensing System and Registry (NMLSR) - a national system, which currently facilitates the application process for mortgage brokers, bankers and loan originators. Therefore, the application process would be virtually paperless; however, a limited number of documents, including fingerprints where necessary, would have to be submitted to the Department in paper form.

The specific procedures that are to be followed in order to apply for registration as a mortgage loan servicer are detailed in Supervisory Procedure MB 109.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

An exemption was created under Section 418.13, from the otherwise applicable net worth and surety bond requirements, for entities that are subject to the capital requirements applicable to insured depository institutions and are considered adequately capitalized.

8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimis amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

The procedure for suspending servicers that violate certain financial responsibility or customer protection requirements, which provides a 90-day period for corrective action, during which there can be an investigation and hearing on the existence of other violations, provides flexibility to the process of enforcing compliance with the statutory requirements.

9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies. However, although not a registration process, in order for any mortgage loan servicer to service loans on behalf of certain federal instrumentalities such servicers have to demonstrate that they have specific amounts of net worth and have in place Fidelity and E&O bonds.

These regulations exceed those minimum standards, in that, a mortgage loan servicer will now have to demonstrate character and general fitness in order to be registered as a mortgage loan servicer. In light of the important role of a servicer - collecting consumers' money and acting as agents for mortgagees in foreclosure transactions - the Department believes that it is imperative that servicers be required to meet this heightened standard.

10. Compliance Schedule.

The emergency regulations will become effective on December 22, 2011. Similar emergency regulations have been in effect since July 1, 2009.

The Department expects to approve or deny applications within 90 days of the Department's receipt (through NMLSR) of a completed application.

A transitional period is provided for mortgage loan servicers which were doing business in this state on June 30, 2009 and which filed an application for registration by July 31, 2009. Such servicers will be deemed

in compliance with the registration requirement until notified by the Superintendent that their application has been denied.

Additionally, the version of Part 418 adopted on an emergency basis effective August 5, 2011 requires holders of mortgage servicing rights to register as mortgage loans servicers even where they have sub-contracted servicing responsibilities to a third-party servicer. Such servicers have been given additional time to file an application for registration.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The emergency rule will not have any impact on local governments. It is estimated that there are approximately 120 mortgage loan servicers in the state which are not mortgage bankers, mortgage brokers or exempt organizations, and which are therefore required to register under the Subprime Lending Reform Law (Ch. 472, Laws of 2008) (the "Subprime Law") Of these, it is estimated that a very few of the remaining entities will be deemed to be small businesses.

2. Compliance Requirements:

The provisions of the Subprime Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of Financial Services (formerly the Banking Department) of servicers who are not mortgage bankers, mortgage brokers or exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Subprime Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Subprime Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. The emergency MLS Registration Regulations here adopted implement that statutory requirement by providing a procedure whereby MLSs can apply to be registered and standards and procedures for the Department to approve or deny such applications. The emergency regulations also set forth financial responsibility standards applicable to applicants for MLS registration, registered MLSs and servicers which are exempted from the registration requirement.

Additionally, the regulations set forth standards and procedures for Department action on applications for approval of change of control of an MLS. Finally, the emergency regulations set forth standards and procedures for, suspension, revocation, expiration, termination and surrender of MLS registrations, as well as for the imposition of fines and penalties on MLSs.

3. Professional Services:

None.

4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of \$3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

5. Economic and Technological Feasibility:

The emergency rule-making should impose no adverse economic or technological burden on mortgage loan servicers who are small businesses. The NMLS is now available. This technology will benefit registrants by saving time and paperwork in submitting applications, and will assist the Department by enabling immediate tracking, monitoring and searching of registration information; thereby protecting consumers.

6. Minimizing Adverse Impacts:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLS, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

As noted above, most servicers are not small businesses. As regards servicers that are small businesses and not otherwise exempted, the regulations give the Superintendent of Financial Services (formerly the Superintendent of Banks) the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

7. Small Business and Local Government Participation:

Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community

outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

Rural Area Flexibility Analysis

Types and Estimated Numbers. The New York State Department of Financial Services (formerly the Banking Department) anticipates that approximately 120 mortgage loan servicers may apply to become registered in 2009. It is expected that a very few of these entities will be operating in rural areas of New York State and would be impacted by the emergency regulation.

Compliance Requirements. Mortgage loan servicers in rural areas which are not mortgage bankers, mortgage brokers or exempt organizations must be registered with the Superintendent to engage in the business of mortgage loan servicing. An application process will be established requiring a MLS to apply for registration electronically and to submit additional background information and fingerprints to the Mortgage Banking unit of the Department.

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations authorize the Superintendent of Financial Services (formerly the Superintendent of Banks) to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which service not more than \$4,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden which those requirements might otherwise impose on entities operating in rural areas.

Costs. The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The application fee for MLS registration will be \$3,000. The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry ("NMLSR") are set by that body. Applicants for mortgage loan servicer registration will also incur administrative costs associated with preparing applications for registration.

Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations.

Minimizing Adverse Impacts. The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLSR, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. In addition, servicers that operate in rural areas and are not otherwise exempted, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

Rural Area Participation. Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan Servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not

expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Department of Financial Services (formerly the Banking Department) and exempt from the new registration requirement. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

Department of Health

EMERGENCY RULE MAKING

Hospital Quality Contribution

I.D. No. HLT-43-11-00017-E

Filing No. 1429

Filing Date: 2011-12-28

Effective Date: 2011-12-28

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

Action taken: Amendment of Subpart 86-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-d-1

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

Specific reasons underlying the finding of necessity: Emergency regulations are expressly authorized by the provisions of Public Health Law section 2807-d-1. The proposed emergency regulation will implement statutory action to change the rate of the Hospital Quality Contribution from 1.6% to 2.4% for collections during the period of July 1, 2011 through March 31, 2012. The rate will then be reduced to 1.6% effective April 1, 2012 and for each year thereafter.

The change in rate is designed to collect the required thirty million dollars needed for the Medical Indemnity Fund. The contribution is applied to general hospital revenue that is received for the provision of inpatient obstetrical patient care services.

The original rate of 1.6% was calculated on a full annual amount and on both inpatient obstetrical and newborn revenues. The first Hospital Quality Contribution, for the period July 1, 2011 through March 31, 2012, is not a full annual collection period.

The Department will conduct a reconciliation for the Hospital Quality Contribution after all collections have been processed for the period of July 1, 2011 through March 31, 2012. If the collection amount exceeds or is less than expected, the rate will be reevaluated.

Subject: Hospital Quality Contribution.

Purpose: To collect thirty million dollars annually for the Medical Indemnity Fund.

Text of emergency rule: Subpart 86-1 of 10 NYCRR is amended by adding a new section 86-1.41, to read as follows:

86-1.41 Hospital Quality Contribution.

(a) For the period July 1, 2011 through March 31, 2012 a quality contribution shall be imposed on the inpatient revenue of each general hospital that is received for the provision of inpatient obstetrical patient care services in an amount equal to 2.4% of such revenue, as defined in § 2807-d(3)(a) of the Public Health Law.

(b) For the period on and after April 1, 2012, a quality contribution shall be imposed on the inpatient revenue of each general hospital that is received for the provision of inpatient obstetrical patient care services in an amount equal to 1.6% of such revenue, as defined in § 2807-d(3)(a) of the Public Health Law.

(c) For the purposes of computing revenue subject to this section, inpatient obstetrical patient care services shall also include services related to the care of newborns, but shall exclude neonatal intensive care services.

(d) *The funds collected pursuant to this section shall be subject to and administered in accordance with the provisions of § 2807-d-1 of the Public Health Law.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-43-11-00017-P, Issue of October 26, 2011. The emergency rule will expire February 25, 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

Regulatory Impact Statement

Statutory Authority:

Authorization for the collection of "Hospital Quality Contributions" is set forth in section 2807-d-1 of the Public Health Law (PHL), as enacted as part of the 2011-12 state budget and effective for periods on and after July 1, 2011. That statute set the Hospital Quality Contribution at 1.6% of each hospital's revenue for inpatient obstetrical care services, but provided that the percentage could be increased or decreased by regulation if such an increase or decrease was required to maintain total annual collections at a level of \$30 million.

Legislative Objectives:

The express provisions of PHL section 2807-d-1 requires the Department to collect thirty million dollars for the state fiscal year beginning April 1, 2011 and each state fiscal year thereafter for the Medical Indemnity Fund.

Needs and Benefits:

Since PHL section 2807-d-1 is not effective until on and after July 1, 2011 the Hospital Quality Contributions will only be collected for nine months of the 2011-12 state fiscal year. The 1.6% set forth in the statute was computed so as to generate \$30 million over a period of twelve months. To generate \$30 million over only nine months the Department of Health has determined that the percentage needs to be increased from 1.6% to 2.4%. The proposed regulation therefore effectuates this increase for the nine month period of July 1, 2011 through March 31, 2012.

Costs:

There are no additional administrative costs to the implementation of and continuing compliance with this amendment. There are no additional costs to the Department of Health, state government, or local governments for the implementation of and continuing compliance of this amendment.

Local Government Mandates:

The proposed amendment does not impose any new programs, services, duties or responsibilities upon and 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 the 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 2807-d-1 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:

Section 86-1.41 requires the Department of Health to adjust the Hospital Quality Contribution rate to collections to 2.4% for the period of July 1, 2011 through March 31, 2012 and to 1.6% for the period of April 1, 2012 through March 31, 2013. No further action is required by the providers to achieve compliance with this rule.

Regulatory Flexibility Analysis

Effect of Rule:

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. This rule will have no effect on Local Governments.

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

There are no initial capital costs required to comply with the proposed rules, and there are no annual costs for continuing compliance.

Economic and Technological Feasibility:

As the proposed rule affects only the rate applied to the Hospital Quality Contribution paid by General Hospitals, compliance by small businesses and local government is not expected to have any economic or technological implication.

Minimizing Adverse Impact:

The proposed amendment reflects statutory intent and requirements.

Small Business and Local Government Participation:

The proposed rule resulted from the 2011-12 budget and is based on the recommendation of the Medicaid Redesign Team created by Executive Order. The recommendations process allowed for input from Medicaid industry stakeholders, including large and small providers, and the general public, through statewide hearings and website outreach.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

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

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

Costs:

There are no initial capital costs or additional annual costs which are required to comply with this proposal.

Minimizing Adverse Impact:

The proposed amendment reflects statutory intent and requirements.

Rural Area Participation:

The proposed rule resulted from the 2011-12 budget and is based on the recommendations of the Medicaid Redesign Team created by Executive Order. The recommendation process allowed for input from Medicaid stakeholders from all areas of the state, including rural areas, through regional hearings and website outreach.

Job Impact Statement

Nature of Impact:

The proposed emergency regulation will implement statutory action to change the rate of the Hospital Quality Contribution from 1.6% to 2.4% for collections during the period of July 1, 2011 through March 31, 2012. The rate will then be reduced back to 1.6% effective April 1, 2012.

Categories and Numbers Affected:

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.

Regions of Adverse Impact:

The proposed regulations have no implications for job opportunities for any region.

Minimizing Adverse Impact:
No minimizing measures are required.

EMERGENCY RULE MAKING

Reduction to Statewide Base Price

I.D. No. HLT-43-11-00018-E

Filing No. 1428

Filing Date: 2011-12-28

Effective Date: 2011-12-28

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 implement Public Health Law section 2807-c(35)(b), as amended by Chapter 59 of the Laws of 2011, in a timely manner while the State works with the hospital industry to develop and incorporate quality-related measures pertaining to the inappropriate use of cesarean deliveries that will generate future savings. The revised statewide base price is intended to achieve the required savings for this proposal.

Public Health Law section 2807-c(35), as amended by Chapter 59 of the Laws of 2011, Part H, § 36, specifically provides the Commissioner of Health with authority to issue emergency regulations.

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

Subject: Reduction to Statewide Base Price.

Purpose: Imposes a reduction to the statewide base price as an interim measure.

Text of emergency rule: Section 86-1.16 of Subpart 86-1 of title 10 NYCRR is amended by adding a new subdivision (c), to read as follows:

(c) *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.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-43-11-00018-P, Issue of October 26, 2011. The emergency rule will expire February 25, 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 as added by section 2 of part C of Chapter 58 of the laws of 2009. Section 2807-c(35) of the Public Health Law 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 needs to be developed. To generate immediate savings, however, a reduction in the statewide base price is being implemented while an obstetrical workgroup develops a more clinically sound approach to meet Legislative objectives.

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 method needs to be developed. To generate immediate savings, however, this amendment, in concert with enacted statute, implements a statewide base price reduction of \$24.2 million dollars (\$12.1 million State share) to achieve the immediate savings target for the 2011/2012 SFY for unnecessary cesarean deliveries while the state undergoes consultation with affected stakeholders to develop a clinically sound approach to reducing inappropriate cesarean deliveries.

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 is in the process of developing a more clinically sound method to achieve this savings. Several methods were considered to implement this savings measure but it was determined that none of the options were clinically sound. There is no option to not act on this initiative since the Enacted Budget assumes 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 \$24,200,000 for the period effective July 1, 2011 through March 31, 2012.

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)(b) 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

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of ongoing 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 rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the final statewide base price for the period beginning July 1, 2011 through March 31, 2012. The proposed regulations have no implications for job opportunities.

EMERGENCY RULE MAKING

Medicaid Managed Care Programs

I.D. No. HLT-43-11-00019-E

Filing No. 1427

Filing Date: 2011-12-28

Effective Date: 2011-12-28

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

Action taken: Repeal of Subparts 360-10 and 360-11 and sections 300.12 and 360-6.7; and addition of new Subpart 360-10 to Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a, 364-j and 369-ee

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

Specific reasons underlying the finding of necessity: Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to Social Services Law section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the prior exemptions and exclusions from enrollment take effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions regarding expansion of Medicaid managed care enrollment.

Subject: Medicaid Managed Care Programs.

Purpose: To repeal old and outdated regulations and to consolidate all managed care regulations to make them consistent with statute.

Substance of emergency rule: The proposed rule repeals various sections of Title 18 NYCRR that contain managed care regulations and replaces them with a new Subpart 360-10 that consolidates all managed care regulations in one place and makes the regulations consistent with Section 364-j of the Social Services Law (SSL). Section 364-j of the SSL contains the Medicaid managed care program standards. The new Subpart 360-10 will also apply to the Family Health Plus (FHP) program authorized in Section 369-ee of the Social Services Law. FHP-eligible individuals must enroll in a managed care organization (MCO) to receive services and FHP MCOs must comply with most of the programmatic requirements of Section 364-j of the SSL.

The new Subpart 360-10 identifies the Medicaid populations required to enroll and those that are exempt or excluded from enrollment, defines good cause reasons for changing/disenrolling from an MCO, or changing primary care providers (PCPs), adds enrollee fair hearing rights, adds marketing/outreach and enrollment guidelines, and identifies unacceptable practices and the actions to be taken by the State when an MCO commits an unacceptable practice.

The proposed rule repeals the existing Subparts 360-10 and 360-11 and Sections 300.12 and 360-6.7 of Title 18 NYCRR. Section 300.12 applied to the Monroe County Medicap program, a managed care demonstration project that was undertaken in the mid-1980s and that no longer exists. Section 360-6.7 addresses processes and timeframes for disenrollment from the various types of MCOs and these provisions are included in the new Subpart 360-10. Subpart 360-11 implemented provisions relating to special care plans formerly contained in SSL Section 364-j; these provisions were added by Chapter 165 of the Laws of 1991 and later removed by Chapter 649 of the Laws of 1996.

360-10.1 Introduction

This section provides an introduction to the managed care program. Section 364-j of Social Services Law provides the framework for the Statewide Medicaid managed care program. Certain Medicaid recipients are required to receive services from Medicaid managed care organizations. Section 369-ee added the Family Health Plus (FHP) program to Social Services Law. Individuals eligible for FHP are required to receive services from a managed care plan unless they are participating in the Family Health Plus premium assistance program.

360-10.2 Scope

This section identifies the topics addressed by the Subpart.

360-10.3 Definitions

This section includes definitions necessary to understand the regulations.

360-10.4 Individuals required to enroll in a Medicaid managed care organization

This section identifies the individuals who will be required to enroll in an MCO.

360-10.5 Individuals exempt or excluded from enrolling in a Medicaid mandatory managed care organization

This section identifies the good cause reasons for a Medicaid recipient to be exempt or excluded from enrollment in a mandatory managed care program. The section also includes the procedures for requesting an exemption or exclusion and the timeframes for processing the request. This section also describes the notices that must be provided to a Medicaid recipient if his/her request is denied.

360-10.6 Good cause for changing or disenrolling from an MCO

This section describes the good cause reasons for an enrollee to change MCOs and the process for requesting a change or disenrollment. This section also identifies the timeframes for processing the request and the notices that must be provided to the enrollee regarding his/her request.

360-10.7 Good cause for changing primary care providers

This section describes the good cause reasons for a managed care enrollee to change primary care providers, the process through which the enrollee may request such a change and the timeframes for processing the request.

360-10.8 Fair Hearing Rights

This section identifies the circumstances under which a Medicaid or FHP enrollee may request a fair hearing. Enrollees may request a fair hearing for enrollment decisions made by the local social services district and decisions made by an MCO or its utilization review agent about services. The section describes the notices that must be sent to advise the enrollee of his/her of her fair hearing rights. The section also explains when aid continuing is available for managed care issues and how the enrollee requests it when requesting a fair hearing.

360-10.9 Appeal Rights for Recipients Enrolled in Medicaid Advantage

This section identifies the Medicaid and Medicare appeal rights that are available for recipients enrolled in a Medicaid Advantage plan.

360-10.10 Marketing/Outreach

This section defines marketing/outreach and establishes marketing/outreach guidelines for MCOs including requiring MCOs to submit a marketing/outreach plan, requiring MCOs to get approval of materials before distribution, and establishing limits for marketing/outreach representative reimbursement.

360-10.11 MCO unacceptable practices

This section identifies additional unacceptable practices for MCOs. These are generally related to marketing/outreach.

360-10.12 MCO sanctions and due process

This section identifies the actions the Department is authorized to take when an MCO commits an infraction.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-43-11-00019-P, Issue of October 26, 2011. The emergency rule will expire February 25, 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

Regulatory Impact Statement**Statutory Authority:**

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

Legislative Objectives:

Section 364-j of the SSL governs the Medicaid managed care program, under which certain Medicaid recipients are required or allowed to enroll in and receive services through managed care organizations (MCOs). Section 369-ee of Social Services Law authorized the State to implement the Family Health Plus (FHP) program, a managed care program for individuals aged 19 to 64 who have income too high to qualify for Medicaid. The intent of the Legislature in enacting these programs was to assure that low-income citizens of the State receive quality health care and that they obtain necessary medical services in the most effective and efficient manner.

Chapter 59 of the Laws of 2011 amended SSL section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the exemptions and exclusions from enrollment previously contained in the statute.

Needs and Benefits:

The proposed regulations reflect current program practices and requirements, consolidate all managed care regulations in one place, and conform the regulations to the provisions of SSL section 364-j, including the recent amendments made by Chapter 59 of the Laws of 2011. The proposed regulations identify the individuals required to enroll in Medicaid managed care and identify the populations who are exempt or excluded from enrollment.

The proposed regulations also contain provisions, which apply to both the Medicaid managed care and the FHP programs: specifying good cause criteria for an enrollee to change MCOs or to change their primary care provider; explaining enrollees' rights to challenge actions of their MCO or social services district through the fair hearing process; establishing marketing/outreach guidelines for MCOs; and identifying unacceptable practices and sanctions for MCOs that engage in them.

Costs:

The proposed regulations do not impose any additional costs on local social services districts beyond those imposed by law. The current managed care program operates under a federal Medicaid waiver pursuant to section 1115 of the Social Security Act. Through the waiver, the State receives federal dollars for its Safety Net and FHP populations. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005,

administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

Local Government Mandates:

The proposed regulations do not create any additional burden to local social services districts beyond those imposed by law.

Paperwork:

Social Services Law requires that Medicaid recipients be advised in writing regarding enrollment, benefits and fair hearing rights. In compliance with the law, the proposed regulations describe the circumstances under which a Medicaid managed care participant should be provided with such notices, who is responsible for sending the notice and what should be included in the notice. There are reporting requirements associated with the program for social service districts and MCOs. The social services district is required to report on exemptions granted, complaints received and other enrollment issues. MCOs must submit network data, complaint reports, financial reports and quality data. These requirements have been in existence since 1997 when the mandatory Medicaid managed care program began. There are no new requirements for the social services districts or the MCOs in the proposed regulations.

Duplication:

The proposed regulations do not duplicate any State or federal requirements unless necessary for clarity.

Alternative Approaches:

The Department is required by SSL section 364-j to promulgate regulations to implement a statewide managed care program. The proposed regulations implement the provisions of SSL section 364-j in a way which balances the needs of MA recipients, managed care providers and local social services districts. No alternatives were considered.

Federal Standards:

Federal managed care regulations are in 42 CFR 438. The proposed regulations do not exceed any minimum standards of the federal government.

Compliance Schedule:

The mandatory Medicaid managed care program has been in operation since 1997. As a result, all counties in the State have some form of managed care. The requirements in the proposed rules have been implemented through the contract between the State or eligible social services and participating MCOs.

Regulatory Flexibility Analysis**Effect on Small Businesses and Local Governments:**

Section 364-j of Social Services Law (SSL) authorizes a Statewide Medicaid managed care program that includes mandatory enrollment of most Medicaid beneficiaries. In 1997 the State applied for and received approval of a Federal waiver under Section 1115 of the Social Security Act to implement mandatory enrollment. Section 369-ee of SSL authorizes the Family Health Plus (FHP) program and requires eligible persons to receive services through managed care organizations (MCOs). Currently, all counties have implemented some form of managed care. As of April, 2011, forty-nine counties have a mandatory Medicaid managed care program; nine counties have a voluntary Medicaid managed program. All counties have a FHP program.

As a result of the implementation of the Medicaid managed care program and FHP programs, most Medicaid recipients and all FHP eligible persons are required to enroll and receive services from providers who contract with a managed care organization (MCO). MCOs must have a provider network that includes a sufficient array and number of providers to serve enrollees, but they are not required to contract with any willing provider. Consequently, local providers may lose some of their patients. However, this loss may be offset by an increase in business as a result of the implementation of FHP.

The proposed regulations do not impose any additional requirements beyond those in law and the benefits of the program outweigh any adverse impact.

Compliance Requirements:

No new requirements are imposed on local governments beyond those included in law and there are no requirements for small businesses.

Professional Services:

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

Compliance Costs:

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005, administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap. Additionally, the 1115 waiver

reduced local government costs by authorizing Federal participation for the Safety Net and Family Health Plus (FHP) populations.

Economic and Technological Feasibility:

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

Minimizing Adverse Impact:

The mandatory Medicaid managed care program is implemented only when there are adequate resources available in a local district to support the program. No new requirements are imposed beyond those included in law.

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has fourteen years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

Small Business and Local Government Participation:

The regulations do not introduce a new program. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

Rural Area Flexibility Analysis

Effect on Rural Areas:

All rural counties with managed care programs will be affected by this rule. As of April 2011, all rural counties have a Medicaid managed care and Family Health Plus (FHP) program.

Compliance Requirements:

This rule imposes no additional compliance requirements other than those already contained in Section 364-j of the Social Services Law (SSL).

Professional Services:

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

Compliance Costs:

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. The administrative costs incurred by local governments for implementing the Statewide managed care program are included with all other Medicaid administrative costs and beginning in 2005, there was no local share for administrative costs over and above the administrative cost base of the Medicaid administrative cap. Additionally, the Federal Section 1115 waiver which allowed the State to implement mandatory enrollment, reduced local government costs by authorizing Federal participation for the Safety Net and FHP populations.

Minimizing Adverse Impact:

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has many years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

Feasibility Assessment:

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

Rural Area Participation:

The proposed regulations do not reflect new policy. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of the SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

Job Impact Statement

Nature of Impact:

The rule will have no negative impact on jobs and employment opportunities. The mandatory Medicaid managed care program authorized by Section 364-j of the Social Services Law (SSL) will expand job opportunities by encouraging managed care plans to locate and expand in New York State.

Categories and Numbers Affected:

Not applicable.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

Not applicable.

Self-Employment Opportunities:

Not applicable.

**EMERGENCY
RULE MAKING**

Managed Care Organizations (MCOs)

I.D. No. HLT-44-11-00022-E

Filing No. 1438

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Action taken: Amendment of section 98-1.11 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4403(2)

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

Specific reasons underlying the finding of necessity: The SFY 2012 NYS Budget effective April 1, 2011 incorporates a proposal from the Medicaid Redesign Team (MRT Proposal #6) that reduces the allocation of surplus in the premium rates of Medicaid, Family Health Plus (FHP) and HIV SNP managed care plans from 3% to 1%, resulting in savings to the Medicaid program of approximately \$188 million. The actuarial firm employed by DOH, Mercer Consulting, which must certify the actuarial soundness of the premium rates to CMS, has determined the reduction in surplus allocation will require the lowering of the contingent reserve requirement specified in § 98-1.11(e)(1) from the current 10.5% to 7.25% of premium revenue in order to maintain the actuarial soundness of the premium rates. The SFY 2012 Article VII budget bill gives DOH the authority to adopt regulations on an emergency basis to implement provisions of the SFY 2012 budget. The amendments to 98-1.11(e) will allow DOH to reduce the surplus allocation in the mainstream Medicaid, FHP and HIV SNP premium rates consistent with the approved SFY 2012 budget.

In light of the amendments to 98-1.11(e), revisions to 98-1.11(b) are needed to clarify in regulation the criteria used to evaluate transfers of assets or loans proposed by managed care organizations regulated by Part 98 that heretofore have been linked in policy to the contingent reserve requirement specified in § 98-1.11(e).

Subject: Managed Care Organizations (MCOs).

Purpose: To specify approval standards for asset transfers or loans proposed by MCOs.

Text of emergency rule: Subdivision (b) of section 98-1.11 is amended to read as follows:

(b) No funds [the aggregate of which involves five percent or more of the MCO's admitted assets at last year-end] shall be transferred or loaned from the MCO article 44 business to any other business, function or contractor of the MCO, or to any subsidiary or member of the MCO's holding company system or to any member or stockholder [over the course of a single calendar year.] without the prior approval of the commissioner and, except in the case of a PHSP, HIV SNP, [or] PCPCP[,] or MLTC, the superintendent. Repayment of any such approved loans, to the extent required, shall be made in accordance with schedules approved by the superintendent and commissioner. Any such transfers or loans shall require a certification by the MCO that such transfer or loan is in compliance with and does not violate any provision of any applicable law or regulation.

(1) No such transfer or loan shall be approved if the net worth of the MCO after the transfer or loan would fall below 12.5 percent of its annual net premium income, and all such transfers and loans must be accompanied by projections submitted by the MCO showing that its net worth shall continue to meet or exceed 12.5 percent of annual net premium income for two calendar years following the transfer or loan.

(2) Notwithstanding the provisions of paragraph (1) of this subdivision, no such proposed transfer or loan made by any MCO that received seventy-five percent or more of its net premium income from the New York State Medicaid, Family Health Plus, and Child Health Plus programs during the last calendar year shall be approved if the net worth of the MCO after such transfer or loan would fall below 15 percent of its annual net premium revenue, and all such transfers and loans must be accompanied by projections submitted by the MCO showing that its net worth shall continue to meet or exceed 15 percent of annual net premium revenue for two calendar years following the transfer or loan. In order to ensure the availability of quality health services for an enrolled population, the commissioner may waive the provisions of this paragraph should the proposed transfer of funds or loan be used to purchase a controlling interest, or a substantial portion of the assets, of a MCO certified to operate under Article 44 of the Public Health Law.

Subdivision (e) of section 98-1.11 is amended to read as follows:

(e)(1) Except for a PCPCP, a certified operating MCO, or an MCO that is initially commencing operations, shall maintain a reserve, to be designated as the contingent reserve [which must be equal to five percent of its annual net premium income].

(i) The contingent reserve for an HMO, PHSP or HIV SNP shall be equal to and shall not exceed:

[(i)] (a) 5 percent of net premium income for the first calendar year subsequent to the effective date of this Subpart;

[(ii)] (b) 6.5 percent of net premium income for the second calendar year subsequent;

[(iii)] (c) 7.5 percent of net premium income for the third calendar year subsequent;

[(iv)] (d) 8.5 percent of net premium income for the fourth calendar year subsequent;

[(v)] (e) 9.5 percent of net premium income for the fifth calendar year subsequent;

[(vi)] (f) 10.5 percent of net premium income for the sixth calendar year subsequent;

[(vii)] (g) 11.5 percent of net premium income for the seventh calendar year subsequent;

[(viii)] (h) 12.5 percent of net premium income for calendar years thereafter.

(ii) Notwithstanding the provisions of subparagraph (i) above, the contingent reserve applicable to net premium income generated from the Medicaid managed care, Family Health Plus and HIV SNP programs shall be:

(a) 7.25 percent of net premium income for 2011;

(b) 7.25 percent of net premium income for 2012;

(c) 8.25 percent of net premium income for 2013;

(d) 9.25 percent of net premium income for 2014;

(e) 10.25 percent of net premium income for 2015;

(f) 11.25 percent of net premium income for 2016;

(g) 12.25 percent of net premium income for 2017;

(h) 12.5 percent of net premium income for calendar years after

2017.

The provisions of this subparagraph shall not apply to HMOs and PHSPs beginning operations in 2011 or after.

(iii) Upon an HMO, PHSP or HIV SNP reaching its maximum contingent reserve of 12.5 percent of its net premium income for a calendar year, it must continue to maintain its contingent reserve at this level thereafter. Such contingent reserve requirement shall be deemed to have been met if the net worth of the HMO, PHSP or HIV SNP, based upon admitted assets, equals or exceeds the applicable contingent reserve requirement for such calendar year.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-44-11-00022-P, Issue of November 2, 2011. The emergency rule will expire February 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:

Public Health Law section 4403(2) states the Commissioner may adopt and amend rules and regulations pursuant to the state administrative

procedures act to effectuate the purposes and provisions of Article 44, which governs the certification and operational requirements of Managed Care Organizations (MCOs).

Legislative Objectives:

10 NYCRR 98 was extensively amended in 2005 to further implement the provisions of Article 44 of the Public Health Law. The proposed amendments to § 98-1.11(b) and § 98-1.11(e) specify criteria to be used to evaluate requests for approval of asset transfers and loans proposed by MCOs and allows implementation of certain provisions of the SFY 2012 budget and the Medicaid Redesign Team Proposal #6 by temporarily reducing the contingent reserve requirements applied to premium revenues from the Medicaid Managed Care (MMC), Family Health Plus (FHP) and HIV Special Needs Plan (SNP) programs.

Needs and Benefits:

§ 98-1.11(b) - Current regulation requires that the Department of Health (DOH) and State Insurance Department (SID), as applicable, must approve any asset transfers or loans of 5% or more of the MCOs admitted assets but fails to stipulate the criteria for approving such transactions. Both agencies follow a policy of approving a transfer or loan only when the net worth of the plan after the transaction would be equal to or greater than 12.5% of annual premium revenue, or 5% for Managed Long Term Care (MLTC) plans. The 12.5% threshold was selected to coincide with the maximum contingent reserve established under § 98-1.11(e)(1), which begins at 5% of premium revenue and increase by 1% per year until the maximum 12.5% standard is reached. The revision to § 98-1.11(b) establishes this criteria for approval in regulation, applies the same criteria to all plans, including MLTC plans, and requires approval for any asset transfer or loan rather than only those that exceed 5% of admitted assets.

The revised regulation also establishes a higher standard for approval of asset transfers or loans made by MCOs that receive 75% or more of their annual premium revenue from managed care programs sponsored by NYS: Medicaid, Family Health Plus and Child Health Plus. The regulation would allow approval of asset transfers or loans only if the net worth of the MCO after the transaction would be equal to or greater than 15% of annual premium revenue. The Commissioner would have the authority, however, to waive the latter provision when the purpose of the asset transfer or loan is for the purchase of another MCO or a controlling interest thereof, that the Commissioner finds is in the public interest.

MCOs would also be required to submit financial projections showing that their net worth would continue to meet or exceed 12.5% or 15% of premium revenue, as applicable, for two calendar years following the transfer or loan.

§ 98-1.11(e) - The approved SFY 2012 NYS Budget incorporates a proposal from the Medicaid Redesign Team that reduces the allocation of surplus in the premium rates of MMC, FHP and HIV SNP managed care plans from 3% to 1% effective April 1, 2011, resulting in savings to the Medicaid program of approximately \$188 million (federal and state shares combined). The actuarial firm employed by DOH, Mercer Consulting, which must certify the actuarial soundness of the premium rates to CMS, has determined the reduction in surplus allocation will require the lowering of the contingent reserve requirement specified in § 98-1.11(e)(1) from the current 10.5% to 7.25% of premium revenue in order to maintain the actuarial soundness of the premium rates. The revision to 98-1.11(e) will allow DOH to reduce the surplus allocation in the mainstream Medicaid and FHP, and HIV SNP premium rates and allow Mercer to certify the actuarial soundness of the premium rates to CMS.

Costs:

The amended regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Health Department or by the MCOs.

Local Government Mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

Paperwork:

Paperwork associated with filings to DOH or SID should be minimal and would be no more substantial than the current regulation.

Duplication:

These regulations do not duplicate, overlap, or conflict with existing State and federal regulations.

Alternatives:

There were minimal alternative standards considered. Revisions to § 98-1.11(b) in part codifies current policy in evaluating requests for approval for asset transfers or loans. Removal of the 5% threshold before approval is required for asset transfers or loans is consistent with the desire of DOH and SID to ensure MCO financial reserve levels do not fall below regulatory requirements via unregulated financial transactions.

Revisions to § 98-1.11(e) are needed to implement provisions of SFY 2012 budget.

Federal Standards:

The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

Compliance Schedule:

Revisions to § 98-1.11(b) would apply to MCOs immediately upon adoption. Revisions to § 98-1.11(e) would be retroactive to January 1, 2011, once adopted.

Regulatory Flexibility Analysis

Effect of Rule:

Companies affected by the proposed regulation include all MCOs certified under Article 44 of the Public Health Law. Inasmuch as most of these companies are not independently owned and operated and employ more than 100 individuals, they do not fall within the definition of "small business" found in section 102(8) of the State Administrative Procedure Act. No local governments will be affected.

Compliance Requirements:

The amended regulation would not impose additional reporting, recordkeeping or other requirements on small businesses or local governments since the provisions contained therein apply only to MCOs authorized to do business in New York State and regulated by the NYS Health and Insurance Departments.

Professional Services:

There are no professional services that will need to be provided by small businesses or local government as a result of the amended regulation.

Compliance Costs:

The amended regulation would not impose any new reporting, recordkeeping or other requirements on small businesses or local governments.

Economic and Technological Feasibility:

There are no compliance requirements for small businesses or local governments.

Minimizing Adverse Impacts:

The amendment will have no adverse impact on small businesses or local governments since the provisions contained therein apply only to regulated MCOs authorized to do business in New York State.

Small Business and Local Government Participation:

As the amendments have no impact on small businesses or local governments, no input was sought from these entities.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

Companies affected by the proposed regulation include all Managed Care Organizations (MCOs) certified under Article 44 of the Public Health Law. The companies affected by this regulation do business in certain "rural areas" as defined under section 102(1) of the State Administrative Procedure Act, although none do so exclusively or have a significant portion of their business in rural areas. Some of the home offices of these companies may lie within rural areas. Further, companies may establish new office facilities and/or relocate in the future depending on their requirements and needs.

Reporting, Recordkeeping and Other Compliance Requirements:

None of the compliance requirements are significantly different from requirements presently contained in Part 98 and none pertain exclusively to rural areas. The amendments should not impose any significant additional paperwork, recordkeeping or compliance requirements upon any regulated party.

Costs:

The amended regulation imposes no additional compliance costs on MCOs or state and local governments.

Minimizing Adverse Impact:

The proposed regulation applies to all MCOs certified under Article 44 to do business in New York State, including rural areas. It does not impose any adverse impacts unique to rural areas.

Rural Area Participation:

In developing the amended regulation, the Health Department conducted outreach to regulated managed care organizations authorized to do business throughout New York State, including those located or domiciled in rural areas.

Job Impact Statement

Nature of Impact:

The Health Department finds that these amendments will have no adverse impact on jobs and employment opportunities.

Categories and Numbers Affected:

Not Applicable.

Regions of Adverse Impact:

No region in New York should experience an adverse impact on jobs and employment opportunities.

Minimizing Adverse Impact:

The Health Department finds that these amendments will have no adverse impact on jobs and employment opportunities.

**EMERGENCY
RULE MAKING**

Municipal Public Health Services Plan - Radioactive Material and Radiation Equipment

I.D. No. HLT-03-12-00001-E

Filing No. 1430

Filing Date: 2011-12-28

Effective Date: 2011-12-28

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 10 NYCRR.

Statutory authority: Public Health Law, sections 602 and 603

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

Specific reasons underlying the finding of necessity: On July 1, 2011, state funding for municipal programs to conduct inspections of x-ray facilities and regulate and control radioactive material use in New York City ceased to be available because the Legislature repealed the enabling statute. This emergency regulation moves these programs under a new basic State aid environmental health program. See Public Health Law § 602(3)(b)(5). The Commissioner has authority to issue regulations for basic State aid programs under Public Health Law § 602(3)(b).

If the City discontinues its radioactive materials program, the State must take over this work pursuant to its agreement with the federal Nuclear Regulatory Commission. If municipalities discontinue their x-ray inspection programs, the State will be required to take over this work pursuant to the Public Health Law. The fiscal impact to the State of taking over these programs would be significant.

In 2009, the cost to the State to continue to fund the municipalities that that are conducting these programs was approximately \$560,000. It is estimated that the cost to the Department to take over these programs would exceed \$3,000,000. It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents both good public health policy as well as sound fiscal policy.

It is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

Subject: Municipal Public Health Services Plan - Radioactive Material and Radiation Equipment.

Purpose: To establish funding for certified counties to inspect radiation equipment and the NYCDOHMH to conduct licensing and inspections.

Text of emergency rule: Subpart 40-3 is REPEALED, in its entirety. Subpart 40-2 is amended and new subdivisions 40-2.240, 40-2.241, 40-2.250, and 40-2.251 are added to read as follows:

40-2.240. *Radioactive materials licensing and inspection program; performance standard.*

The municipal public health services plan shall include a radioactive materials licensing and inspection program containing those provisions set forth in section 40-2.241 of this Subpart, if the Department has authorized the municipality to conduct such a program.

40-2.241. *Radioactive materials licensing and inspection program; authorization.*

The department shall authorize a municipality's radioactive materials licensing and inspection program if such program includes, at a minimum, provisions for:

- (a) regulating all facilities in the municipality's jurisdiction;*
- (b) ensuring the technical quality of licensing actions by the municipality;*
- (c) assessing licensee compliance with Part 16 of the State Sanitary Code and conditions of the license, and ensuring correction of violations; and*
- (d) inspecting regulated facilities at a frequency established by the department.*

40-2.250. *Radiation-producing equipment program; performance standard.*

The municipal public health services plan shall include a radiation-producing equipment inspection program containing those provisions set forth in section 40-2.251 of this Subpart, if the department has certified such a program for the municipality.

40-2.251 Radiation-producing equipment program; authorization.

The department shall certify a municipality's radiation producing equipment inspection program if such program includes, at a minimum, provisions for:

- (a) inspecting all facilities and equipment in the municipality's jurisdiction; and
- (b) performing inspections and issuing reports in accordance with Part 16 of the State Sanitary Code and, in particular, reporting as described in section 16.10.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 26, 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:

Article 6 of the Public Health Law (PHL) provides statutory authority to provide State aid to municipalities for general public health work (GPHW). PHL § 614(3) defines municipality to be a county or city. PHL § 602(3)(b)(5) provides that GPHW must include certain health services, including environmental health services. PHL § 602(3)(a) authorizes the Commissioner to adopt rules and regulations after consulting with the Public Health and Health Planning Council and county commissioners, boards, and the public health directors, to establish standards of performance for environmental health services delivered under the GPHW program.

Legislative Objectives:

The State Legislature recently amended PHL § 605 to eliminate "optional services" as a category of services eligible for State aid reimbursement. These optional services are still described in regulations of the Department of Health (Department) at 10 NYCRR subpart 40-3. Repealing subpart 40-3 will eliminate this superfluous language.

However, two of the optional services that are no longer eligible for State aid are regulation of radioactive materials and regulation of radiation producing equipment. The Department recognizes that radioactive materials and radiation producing equipment present significant environmental health hazards to the public. The Department should encourage counties to protect their citizens from the potentially harmful effects of radioactive materials and radiation producing equipment by providing State aid to offset the cost of these services.

The Department further recognizes that not every county has the technical capability to regulate radioactive materials and radiation producing equipment. Counties without such technical capability should not be precluded from receiving State aid for public health work. Accordingly, the proposed regulation provides that a county that wishes to receive State aid must regulate radioactive materials and equipment only if its programs have the technical capability to do so, as authorized or certified by the Department.

Needs and Benefits:

Pursuant to a New York State agreement with the federal Nuclear Regulatory Commission (NRC), radioactive materials must be regulated throughout the State. Currently, the New York City Department of Health and Mental Hygiene (DOHMH) is the only municipality certified by the Department to regulate radioactive materials; the State provides this service in all other counties. DOHMH licenses and inspects approximately 350 radioactive material facilities in New York City. By protecting the public from the environmental health hazards from these radioactive materials, DOHMH provides a substantial benefit to the public health.

Additionally, pursuant to Part 16 of the State Sanitary Code, the Department has certified DOHMH and four additional counties (Suffolk, Westchester, Dutchess and Niagara) to inspect radiation producing equipment. DOHMH and these additional counties license and inspect nearly 10,000 radiation equipment facilities. Like the radioactive materials program, these municipalities offer a substantial public health benefit by protecting their citizens from the environmental health hazards potentially created by radiation producing equipment.

Failure to conduct timely inspections of any of these facilities could result in equipment failure or technician errors going unnoticed and uncorrected for longer periods of time, resulting in radiation overexposure during diagnostic or therapeutic procedures or misadministration of nuclear medicine for patients who require these life-saving health services. Inspection of facilities that use radioactive materials ensures appropriate handling and minimizes exposure to workers, the public and the environment. A security check of high-risk radiation sources is also conducted during these inspections.

A recent series of New York Times articles indicate the public's concern

over radiation medical events and malpractice has significantly and justifiably increased. Recent events in Japan further indicate that the public is highly concerned about radiation exposure. During the week of March 14, 2011, the Department's Bureau of Environmental Radiation Protection received approximately 40 calls every day from concerned citizens with concerns about exposure. The public rightfully expects a robust regulatory program, which DOHMH and other counties currently provide, through their partnership with the Department.

Due to the public health threat presented by radiation, it is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

Costs to Regulated Parties for the Implementation of, and Continuing Compliance with, the Rule:

Because the regulated municipalities are currently performing these programs, there will be no increase in their costs. Rather, regulated municipalities that wish to continue these programs will save money by continuing to receive State aid. However, without this regulatory change, the costs to municipalities that wish to continue these programs will increase substantially.

Costs to the Agency, the State and Local Governments for the Implementation of the Rule:

The municipalities that operate these programs and receive funding have indicated they would discontinue the programs if State aid is not provided. By encouraging counties to continue these programs, the Department will save money. As noted, pursuant to the State's agreement with the federal Nuclear Regulatory Commission, if DOHMH ceases to regulate radioactive materials, the State must do so. This will cost substantially more than the \$370,000 in State aid that was paid to New York City in State aid in 2009, which represented only 26% of DOHMH's total costs for regulating radioactive materials. Although the NRC could theoretically take over regulation of radioactive materials, the burden on local businesses to pay federal fees would be more than five (5) times higher than the costs imposed by programs operated by State or local government. Similarly, and as a matter of sound public policy, if municipalities cease to regulate radiation producing equipment the Department would take over these programs.

In 2009, the cost to the State to fund the municipalities that conduct these programs was approximately \$560,000. Specifically, New York City was reimbursed \$370,000 for its radioactive materials inspection and licensing program and \$119,000 for the radiation producing equipment program, for a total of \$489,000. Two other counties were reimbursed approximately \$71,000 for their radiation producing equipment programs. The remaining two counties recovered enough in fees that year that they exceeded their expenses for their radiation producing equipment programs and did not receive State aid. These costs are not expected to change if the proposed regulations are adopted.

It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents both good public health policy as well as sound fiscal policy.

The Information, Including the Source(s) of Such Information and the Methodology, upon Which the Cost Analysis is Based:

The cost analysis is based on calendar year 2009 State Aid claims provided by municipalities, as currently required by PHL § 618 and 10 NYCRR § 40-1.20(b). An annual summary of State aid is routinely prepared by the Department.

Local Government Mandates:

This proposed rule does not impose any program, service, duty or responsibility upon the municipalities that has not already been agreed to and certified by the Department.

Paperwork:

The requirements for reporting will remain unchanged.

Duplication:

There are no relevant rules and other legal requirements of the state and federal governments, that duplicate, overlap or conflict with the proposed rule.

Alternatives:

The alternative is for the Department to take over regulation of radioactive materials as well as regulation of radiation producing equipment in those municipalities that discontinue these programs because they are ineligible for State aid. It is estimated that this alternative would cost the State over \$3,000,000, based on the cost of funding the 22 FTEs currently employed by the municipalities to operate these programs. This number does not include clerical, administrative, and management positions that support the municipal programs.

Federal Standards:

There is no federal minimum standard that determines whether the State

must supply State aid to municipalities that choose to provide these services. However, the federal government does require that these programs be provided throughout the State.

Compliance Schedule:

The regulations will take effect upon filing with the Department of State.

Regulatory Flexibility Analysis

Effect on Small Business:

This rule will apply to county radiation programs that are certified or become certified in the future. Currently only Dutchess, Niagara, Westchester, Suffolk counties and New York City have such programs. The proposed regulatory change will result in no additional cost to these local governments.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41(c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the cost to small business would be at least five (5) times higher than it is now.

Compliance Requirements:

The certified county programs already meet the requirements and comply with the regulations. Facilities inspected will still be required to meet the requirements of Part 16, regardless of whether they are inspected by county inspectors or State inspectors.

Professional Services:

Certified counties do not need professional services to establish or maintain certification.

Capital Costs and Annual Costs of Compliance:

There are no capital costs associated with this regulation.

Economic and Technological Feasibility:

The proposed regulatory change will result in no additional cost to local governments or impose any new technology requirements or costs.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41(c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the economic cost to small business would be at least five (5) times higher than it is now.

Minimizing Adverse Impact:

No adverse impact of implementation has been identified. Failure to implement may result in some county programs dropping certification, which will then require the State DOH to implement these programs.

Small Business Input:

No small businesses were surveyed. The proposed changes do not have any direct effect on small business. Failure to implement these changes may result in fee increases for small business.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

No affected county programs are classified as rural areas (18 counties with less than 200,000 population and 9 counties with certain townships with a population density less than 150 persons/square mile).

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

There are no new reporting requirements contained in the proposed regulations. No additional professional service costs are anticipated.

Costs:

No rural counties affected.

Minimizing Adverse Impact:

No rural counties are affected by this regulation.

Rural Area Participation:

No communications were made with rural counties.

Job Impact Statement

Nature of Impact:

No jobs will be adversely affected by adoption of these regulations. The proposal does not change the regulatory requirements on regulated entities.

Categories and Numbers Affected:

The certified counties include Dutchess, Niagara, Westchester, Suffolk and New York City.

Regions of Adverse Impact:

No regions will be adversely impacted by the adoption of these regulations.

Minimizing Adverse Impact:

As stated, no jobs will be adversely affected by the adoption of the proposed changes in the regulations.

EMERGENCY RULE MAKING

Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP)

I.D. No. HLT-03-12-00004-E

Filing No. 1437

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Action taken: Amendment of sections 505.14 and 505.28 of Title 18 NYCRR.

Statutory authority: Public Health Law, section 201(1)(v); and Social Services Law, sections 363-a(2), 365-a(2)(e) and 365-f

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

Specific reasons underlying the finding of necessity: Pursuant to the authority vested in the Commissioner of Health by Social Services Law § 365-a(2)(e), the Commissioner is authorized to adopt standards, pursuant to emergency regulation, for the provision and management of services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

Subject: Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP).

Purpose: To establish definitions, criteria and requirements associated with the provision of continuous PC and continuous CDPAP services.

Text of emergency rule: Paragraph (3) of subdivision (a) of section 505.14 is repealed and a new paragraph (3) is added to read as follows:

(3) *Continuous personal care services means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted.*

Paragraph (4) of subdivision (a) of section 505.14 is amended by adding new subparagraph (iii) to read as follows:

(iii) *Personal care services shall not be authorized if the patient's need for assistance can be met by either or both of the following:*

(a) *voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends or other responsible adult; or formal services provided by an entity or agency; or*

(b) *adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.*

Paragraph (5) of subdivision (a) of section 505.14 is repealed and a new paragraph (5) is added to read as follows:

(5) *Live-in 24-hour personal care services means the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted.*

Clause (b) of subparagraph (i) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) The [initial] authorization for Level I services shall not exceed eight hours per week. [An exception to this requirement may be made under the following conditions:

(1) The patient requires some or total assistance with meal preparation, including simple modified diets, as a result of the following conditions:

(i) informal caregivers such as family and friends are unavailable, unable or unwilling to provide such assistance or are unacceptable to the patient; and

(ii) community resources to provide meals are unavailable or inaccessible, or inappropriate because of the patient's dietary needs.

(2) In such a situation, the local social services department may authorize up to four additional hours of service per week.]

Clause (b) of subparagraph (ii) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) When continuous [24-hour care] *personal care services* is indicated, additional requirements for the provision of services, as specified in clause (b)(4)(i)(c) of this section, must be met.

Clause (c) of subparagraph (ii) of paragraph (3) of subdivision (b) of section 505.14 is relettered as clause (d) and a new clause (c) is added to read as follows:

(c) *When live-in 24-hour personal care services is indicated, the*

social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.

Subclauses (5) and (6) of clause (b) of subparagraph (iii) of paragraph (3) of subdivision (b) of section 505.14 are renumbered as subclauses (6) and (7), and new subclause (5) is added to read as follows:

(5) an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively;

Subclause (7) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(7) whether the patient can be served appropriately and more cost-effectively by using adaptive or specialized medical equipment or supplies covered by the MA program including, but not limited to, bedside commodes, urinals, walkers, wheelchairs and insulin pens; and

Clause (c) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(c) A social services district may determine that the assessments required by subclauses (a)(1) through (6) and (8) of this subparagraph may be included in the social assessment or the nursing assessment.

Clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(c) the case involves the provision of continuous [24-hour] personal care services as defined in paragraph (a)(3) of this section. Documentation for such cases shall be subject to the following requirements:

Subclause (2) of clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(2) The nursing assessment shall document that: the functions required by the patient[.]; the degree of assistance required for each function, including that the patient requires total assistance with toileting, walking, transferring or feeding; and the time of this assistance require the provision of continuous [24-hour care] personal care services.

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(ii) The local professional director, or designee, must review the physician's order and the social, nursing and other required assessments in accordance with the standards for levels of services set forth in subdivision (a) of this section, and is responsible for the final determination of the level and amount of care to be provided. *The local professional director or designee shall consult with the patient's treating physician and may conduct an additional assessment of the patient in the home. The final determination must be made [within five working days of the request] with reasonable promptness, generally not to exceed seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.*

Paragraph (4) of subdivision (b) of section 505.28 is amended to read as follows:

(4) "continuous [24-hour] consumer directed personal assistance" means the provision of uninterrupted care, by more than one consumer directed personal assistant, for more than 16 hours per day for a consumer who, because of the consumer's medical condition [or] and disabilities, requires total assistance with toileting, walking, transferring or feeding at [unscheduled times during the day and night] at times that cannot be predicted.

Paragraphs (8) through (13) of subdivision (b) of section 505.28 are renumbered as paragraphs (9) through (14) and the renumbered paragraph (9) is amended to read as follows:

(9) "personal care services" means the nutritional and environmental support functions, personal care functions, or both such functions, that are specified in Section 505.14(a)(6) of this Part except that, for individuals whose needs are limited to nutritional and environmental support functions, personal care services shall not exceed eight hours per week.

A new paragraph (8) of subdivision (b) of section 505.28 is added to read as follows:

(8) "live-in 24-hour consumer directed personal assistance" means the provision of care by one consumer directed personal assistant for a consumer who, because of the consumer's medical condition and disabilities, requires some or total assistance with personal care functions, home health aide services or skilled nursing tasks during the day and night and whose need for assistance during the night is infrequent or can be predicted.

Subparagraph (iii) of paragraph (2) of subdivision (d) of section 505.28 is amended, and new subparagraphs (iv) and (v) of such paragraph are added, to read as follows:

(iii) an evaluation of the potential contribution of informal supports, such as family members or friends, to the individual's care, which

must consider the number and kind of informal supports available to the individual; the ability and motivation of informal supports to assist in care; the extent of informal supports' potential involvement; the availability of informal supports for future assistance; and the acceptability to the individual of the informal supports' involvement in his or her care [.] and;

(iv) for cases involving continuous consumer directed personal assistance, documentation that: all alternative arrangements for meeting the individual's medical needs have been explored or are infeasible including, but not limited to, the provision of consumer directed personal assistance in combination with other former services or in combination with contributions of informal caregivers; and

(v) for cases involving live-in 24-hour consumer directed personal assistance, an evaluation whether the individual's home has adequate sleeping accommodations for a consumer directed personal assistant.

Subparagraph (i) of paragraph (3) of subdivision (d) of section 505.28 is repealed and a new subparagraph (i) is added to read as follows:

(i) The nursing assessment must be completed by a registered professional nurse who is employed by the social services district or by a licensed or certified home care services agency or voluntary or proprietary agency under contract with the district.

Clauses (g) and (h) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 are relettered as clauses (h) and (i) and a new clause (g) is added to read as follows:

(g) for continuous consumer directed personal assistance cases, documentation that: the functions the consumer requires; the degree of assistance required for each function, including that the consumer requires total assistance with toileting, walking, transferring or feeding; and the time of this assistance require the provision of continuous consumer directed personal assistance;

Paragraph (5) of subdivision (d) of section 505.28 is amended to read as follows:

(5) Local professional director review. If there is a disagreement among the physician's order, nursing and social assessments, or a question regarding the level, amount or duration of services to be authorized, or if the case involves continuous [24-hour] consumer directed personal assistance, an independent medical review of the case must be completed by the local professional director, a physician designated by the local professional director or a physician under contract with the social services district. The local professional director or designee must review the physician's order and the nursing and social assessments and is responsible for the final determination regarding the level and amount of services to be authorized. *The local professional director or designee shall consult with the consumer's treating physician and may conduct an additional assessment of the consumer in the home. The final determination must be made with reasonable promptness, generally not to exceed [five] seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.*

Paragraph (1) of subdivision (e) of section 505.28 is amended to read as follows:

(1) When the social services district determines pursuant to the assessment process that the individual is eligible to participate in the consumer directed personal assistance program, the district must authorize consumer directed personal assistance according to the consumer's plan of care. The district must not authorize consumer directed personal assistance unless it reasonably expects that such assistance can maintain the individual's health and safety in the home or other setting in which consumer directed personal assistance may be provided. *Consumer directed personal assistance shall not be authorized if the consumer's need for assistance can be met by either or both of the following:*

(i) voluntary assistance available from informal caregivers including, but not limited to, the consumer's family, friends or other responsible adult; or formal services provided by an entity or agency; or

(ii) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 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

Regulatory Impact Statement

Statutory Authority:

Social Services Law ("SSL") § 363-a(2) and Public Health Law

§ 201(1)(v) provide that the Department has general rulemaking authority to adopt regulations to implement the Medicaid program.

The Commissioner has specific rulemaking authority under SSL § 365-a(2)(e)(ii) to adopt standards, pursuant to emergency regulation, for the provision and management of personal care services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

Under SSL § 365-a(2)(e)(iv), personal care services shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

Legislative Objectives:

The Legislature sought to reform the Medicaid personal care services program by controlling expenditure growth and promoting self-sufficiency.

The Legislature authorized the Commissioner of Health to adopt standards for the provision and management of personal care services for Medicaid recipients whose need for such services exceeds a specified level. The regulations adopt such standards for Medicaid recipients who seek continuous personal care services or continuous consumer directed personal assistance for more than 16 hours per day.

The Legislature additionally sought to promote the goal of self-sufficiency among Medicaid recipients who do not need hands-on assistance with personal care functions such as bathing, toileting or transferring. It determined that recipients whose need for personal care services is limited to nutritional and environmental support functions, such as shopping, laundry and light housekeeping, could receive no more than eight hours per week of such assistance.

Needs and Benefits:

The regulations have two general purposes: to conform the Department's personal care services and consumer directed personal assistance program (CDPAP) regulations to State law limiting the amount of services that can be authorized for individuals who require assistance only with nutritional and environmental support functions; and, to implement State law authorizing the Department to adopt standards for the provision and management of personal care services for individuals whose need for such services exceeds a specified level that the Commissioner may determine.

The term "nutritional and environmental support functions" refers to housekeeping tasks including, but not limited to, laundry, shopping and meal preparation. Department regulations refer to these support functions as "Level I" personal care services. Department regulations have long provided that social services districts cannot initially authorize Level I services for more than eight hours per week; however, an exception permitted authorizations for Level I services to exceed eight hours per week under certain circumstances.

The Legislature has nullified this regulatory exception. The regulations conform the Department's personal care services regulations to the new State law. They repeal the regulatory exception that permitted social services districts to authorize up to 12 hours of Level I services per week, capping such authorizations at no more than eight hours per week.

The regulations similarly amend the Department's CDPAP regulations. Some CDPAP participants are authorized to receive only assistance with nutritional and environmental support functions. Since personal care services are included within the CDPAP, it is consistent with the Legislature's intent to extend the eight hour weekly cap on nutritional and environmental services to that program.

The regulations also implement the Department's specific statutory authority to adopt standards pursuant to emergency regulation for the provision and management of personal care services for individuals whose need for such services exceeds a specified level. The Commissioner has determined to adopt such standards for individuals whose need for continuous personal care services or continuous consumer directed personal assistance exceeds 16 hours per day.

The regulations repeal the definition of "continuous 24-hour personal care services," replacing it with a definition of "continuous personal care services." The prior definition applied to individuals who required total assistance with certain personal care functions for 24 hours at unscheduled times during the day and night. The new definition applies to individuals who require such assistance for more than 16 hours per day at times that cannot be predicted.

Cases in which continuous personal care services are indicated must be referred to the local professional director or designee. Such referrals would now be required in additional cases: those involving provision of continuous care for more than 16 hours per day.

The regulations add a requirement that the local professional director or designee consult with the recipient's treating physician and permit such director or designee to conduct an additional assessment of the recipient in the home.

The regulations amend the documentation requirements for nursing assessments in continuous personal care services cases.

The regulations add a definition of live-in 24 hour personal care

services. This level of service has long existed, primarily in New York City, but has never been explicitly set forth in the Department's regulations. The regulations also require that, for recipients who may be eligible for such services, the social assessment evaluate whether the recipient's home has adequate sleeping accommodations for the live-in aide.

The regulations provide that personal care services shall not be authorized when the recipient's need for assistance can be met by the voluntary assistance of informal caregivers or by formal services or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively. The regulations require that the nursing assessments that districts currently complete or obtain include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be provided safely and cost-effectively.

The regulations adopt conforming amendments to the Department's CDPAP regulations.

Costs to Regulated Parties:

Regulated parties include entities that voluntarily contract with social services districts to provide personal care services to, or to perform certain CDPAP functions for, Medicaid recipients. These entities include licensed home care services agencies, agencies that are exempt from licensure, and CDPAP fiscal intermediaries.

Social services districts may no longer authorize certain Medicaid recipients to receive more than eight hours per week of assistance with nutritional and environmental support functions. To the extent that regulated parties were formerly reimbursed for more than eight hours per week for these services, their Medicaid revenue will decrease. This is a consequence of State law, not the regulations. The regulations do not impose any additional costs on these regulated parties.

Costs to State Government:

The regulations impose no additional costs on State government.

The statutory cap on nutritional and environmental support functions will result in cost-savings to the State share of Medicaid expenditures. The estimated annual personal care services and CDPAP cost-savings for subsequent State fiscal years are approximately \$3.4 million.

This estimate is based on 2010 recipient and expenditure data for the personal care services program. According to such data, 2,377 New York City recipients received more than eight hours per week of Level I services, the average being 11 weekly hours of such service. The number of Level I hours that exceeded eight hours per week was thus approximately 370,800 hours (2,377 recipients x 3 hours per week x 52 weeks). Multiplying this hourly total by the 2010 average hourly New York City personal care aide cost (\$17.30) results in total annual savings of \$6.4, or \$3.2 million in State share savings. Application of this calculation to the Rest of State recipient and expenditure data yields an additional \$200,000 in State share savings, or \$3.4 million.

State Medicaid cost-savings are also projected to occur as a result of changes to continuous personal care services authorizations. It is not possible to accurately estimate such savings. However, the Department anticipates that most recipients currently authorized for continuous 24-hour personal care services will continue to receive that level of care. Others may be authorized for continuous services for 16 hours per day or live-in 24 hour personal care services. Still others may be authorized for services for more than 16 hours per day but fewer than 24 hours per day.

The estimated State share savings for this portion of the regulations are \$33.1 million. This comprises approximately \$17.1 million in personal care savings and \$15.9 million in CDPAP savings. This estimate is based on 2010 personal care services and CDPAP recipient and expenditure data. In 2010, 1,809 Medicaid recipients were authorized to receive more than 16 hours of services per day. The assumption is that these recipients were authorized for continuous 24-hour services, which has an average annual per person cost of approximately \$166,000. Assuming that 20 percent were authorized for live-in 24-hour services at an average annual per person cost of approximately \$83,000, and 15 percent were authorized for 16 hours per day at an average hourly cost of between approximately \$17.00 and \$22.00, depending on service and location, the annual State share savings per recipient would range from approximately \$28,000 to \$35,000.

Costs to Local Government:

The regulation will not require social services districts to incur new costs. State law limits the amount that districts must pay for Medicaid services provided to district recipients. Districts may claim State reimbursement for any costs they may incur when administering the Medicaid program.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The regulations require social services districts to refer additional cases to their local professional directors or designees. Currently, the regula-

tions require that such referrals be made for continuous 24 hour care and certain other cases. Under the proposed regulations, such referrals must also be made for recipients who may require continuous services for more than 16 hours.

Paperwork:

The regulations specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients. For persons who may be eligible for live-in 24 hour services, the social assessment must evaluate whether the recipient’s home has adequate sleeping accommodations for the live-in aide. The nursing assessments for all personal care services and CDPAP cases, including those not involving continuous services, must include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient’s need for assistance and whether such equipment or supplies can be used safely and cost-effectively. The amendments to the CDPAP regulations also specify additional documentation requirements for the social and nursing assessments for cases involving continuous consumer directed personal assistance. These requirements mirror long-standing documentation requirements in the personal care services regulations.

Duplication:

The regulations do not duplicate any existing federal, state or local regulations.

Alternatives:

With respect to the regulation that caps authorizations for nutritional and environmental support functions to eight hours per week, no alternatives exist. The regulation must conform to State law that imposes this weekly cap. With respect to the regulation that establishes new requirements for continuous services, alternatives existed but were not now pursued. One such alternative may be the repeal of the regulatory authorization for continuous 24-hour services. The Department determined to promulgate further regulatory controls regarding the provision and management of continuous services, rather than repeal such services in their entirety.

Federal Standards:

This rule does not exceed any minimum federal standards.

Compliance Schedule:

The Department has issued instructions to social services districts advising them of the new State law that limits nutritional and environmental support functions to no more than eight hours per week for certain recipients. Districts should not now be authorizing more than eight hours per week of such assistance and should thus be able to comply with the regulations when they become effective. With regard to the remaining regulations, social services districts should be able to comply with the regulations when they become effective. For applicants, social services districts would apply the regulations when assessing applicants’ eligibility for personal care services and the CDPAP. For current recipients, districts would apply the regulations upon reassessing these recipients’ continued eligibility for services.

Regulatory Flexibility Analysis

Effect of Rule:

The regulation limiting authorizations of nutritional and environmental support functions to no more than eight hours per week primarily affects licensed home care services agencies and exempt agencies that provide only such Level I services. These entities are the primary employers of individuals providing Level I services. Most recipients of Level I personal care services are located in New York City. There are currently eight Level I only personal care service providers in New York City, none of which employ fewer than 100 persons.

Fiscal intermediaries that are enrolled as Medicaid providers and that facilitate payments for the nutritional and environmental support functions provided to consumer directed personal assistance program (CDPAP) participants may also experience slight reductions in service hours reimbursed. There are approximately 46 fiscal intermediaries that contract with social services districts. Fiscal intermediaries are typically non-profit entities such as independent living centers but may also include home care services agencies.

With respect to continuous care, a significant majority of existing 24-hour a day continuous care cases are located in New York City. There are currently 60 Level II personal care service providers in New York City, none of which employ fewer than 100 persons.

The regulations also affect social services districts. There are 62 counties in New York State, but only 58 social services districts. The City of New York comprises five counties but is one social services district.

Compliance Requirements:

Social services districts currently assess whether Medicaid recipients are eligible for personal care services and the CDPAP. When 24 hour continuous care is indicated, districts are currently required to refer such cases to the local professional director or designee for final determination. The regulations would require districts to refer additional continuous care

cases to the local professional director or designee; namely, those cases in which continuous care for more than 16 hours a day is indicated would also be referred to the local professional director or designee. The local professional director or designee would be required to consult with the recipient’s treating physician before approving continuous care for more than 16 hours per day.

In addition, the nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients would be required to include an evaluation of whether adaptive or specialized equipment or supplies would be appropriate and could be safely and cost-effectively provided. In cases involving the authorization of live-in 24 hour services, the social assessments that districts currently are required to complete would have to include an evaluation whether the recipient’s home had sufficient sleeping accommodations for a live-in aide.

Professional Services:

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

Compliance Costs:

No capital costs will be imposed as a result of this rule, nor are there any annual costs of compliance.

Economic and Technological Feasibility:

There are no additional economic costs or technology requirements associated with this rule.

Minimizing Adverse Impact:

The regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients to determine whether they are eligible for personal care services or the CDPAP. The regulations modify these assessment procedures. Should districts incur administrative costs to comply with the regulation, they may seek State reimbursement for such costs.

Small businesses providing Level I personal care services and consumer directed environmental and nutritional support functions may experience slight reductions in service hours provided. This is a consequence of State law limiting these services to no more than eight hours per week.

Small businesses currently providing continuous 24-hour services may experience some reductions in service hours provided.

Small Business and Local Government Participation:

The Department solicited comments on the regulations from the New York City Human Resources Administration, which administers the personal care services program and CDPAP for New York City Medicaid recipients who are not enrolled in managed care. Most of the State’s personal care services and CDPAP recipients reside in New York City. Personal care services provided to New York City recipients comprises approximately 84 percent of Medicaid personal care services expenditures.

Small business and local governments also have the opportunity to provide input into the redesign of New York State’s Medicaid program. The Medicaid Redesign Team (MRT) was tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

Rural Area Flexibility Analysis

Types and Estimated Numbers of 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. In 2010, only 6% of all continuous care cases resided in the counties listed below. Currently there are 34 organizations which maintain contracts with local districts to provide consumer directed environmental and nutritional support functions, and 50 individual licensed home care services agencies which maintain contracts with local districts to provide Level I personal care services, within the following 43 counties having 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		

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

Social services districts would be required to refer additional cases to their local professional directors or designees. Currently, the personal care services and CDPAP regulations require that such referrals be made for recipients seeking continuous 24-hour services and in certain other cases. Under the regulations, such referrals must also be made for recipients who require continuous care for more than 16 hours. The regulations also specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients.

Costs:

There are no new capital or additional operating costs associated with the rule.

Minimizing Adverse Impact:

It is anticipated the rule will have minimal impact on rural areas as the Department has determined that the preponderance of Level I services in excess of eight hours per week occur in downstate urban areas. Additionally, in 2010, only 6% of all individuals receiving continuous care services resided in those counties listed above. To the extent that social services districts incur administrative costs to comply with the regulations' requirements for referral of continuous care cases and social and nursing assessment documentation requirements, they may seek State reimbursement of such expenses.

Rural Area Participation:

Individuals and organizations from rural areas have the opportunity to provide input into the redesign of New York State's Medicaid program. The Medicaid Redesign Team (MRT) is tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

EMERGENCY RULE MAKING

Audits of Institutional Cost Reports (ICR)

I.D. No. HLT-03-12-00005-E

Filing No. 1439

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Action taken: Amendment of Subpart 86-1 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 implement Public Health Law section 2807-c(35)(b)(xiii), as amended by Chapter 59 of the Laws of 2011, in a timely manner related to imposing a fee schedule associated with filing institutional cost reports, which is intended to fund

the costs of auditing institutional cost reports. In addition, this regulation eliminates the need for hospitals to submit a CPA certification of their cost reports for years ended on and after December 31, 2010. To avoid these costs, hospitals need to be advised of the elimination of this requirement.

Public Health Law section 2807-c(35), as amended by Chapter 59 of the Laws of 2011, Part H, § 36, specifically provides the Commissioner of Health with authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these new policies related to fee obligations for filing institutional cost reports.

Subject: Audits of Institutional Cost Reports (ICR).

Purpose: To impose a fee schedule on general hospitals related to the filing of ICRs sufficient to cover the costs of auditing the ICRs.

Text of emergency rule: Subdivision (k) of section 86-1.2 of title 10 of NYCRR is amended to read as follows:

(k) Accountant's certification. *With regard to institutional cost reports filed for report years prior to 2010, [T]he institutional cost report shall be certified by an independent licensed public accountant or an independent certified public accountant. The minimum standard for the term independent shall be the standard used by the State Board of Public Accountancy.*

Subdivision (b) of section 86-1.4 of title 10 of NYCRR is amended and a new subdivision (i) is added to read as follows:

(b) Subsequent to the filing of fiscal and statistical reports, field audits [shall] *may* be conducted of the records of medical facilities in a time, manner and place to be determined by the State Department of Health. [Where feasible, the department shall enter into an agreement to use a combined audit (Medicare-Medicaid and other organizations and agencies having audit responsibilities) to satisfy the department's auditing needs. In this respect, the State Department of Health reserves the right, after entering into an agreement to use a combined audit, to reject the audit findings of other organizations and agencies having audit responsibilities and to perform a limited scope or comprehensive audit of their own for the same fiscal period audited by the organization and/or agency.] *Alternatively or in addition the Department may, in its sole discretion, conduct desk audits of such fiscal and statistical reports.*

(i)(1) *Effective for institutional cost reports filed for report periods ending on and after December 31, 2010, the Department shall establish a fee schedule for the purpose of funding audit activities authorized pursuant to this section. Such fee schedule shall be published on the Department's Health website at <http://www.health.state.ny.us>. The amount of such fees shall be based upon the relative amount of the total costs reported by each facility, provided, however, that minimum and maximum fee levels may be established.*

(2) *Additional fees shall be established for facilities filing more than two institutional costs reports for a cost period. The Department may, upon written application submitted prior to the submission of such additional institutional cost reports, waive all or part of such additional fees based on a showing of financial hardship or for other good cause shown. Such a waiver must be in writing.*

(3) *Fees shall be submitted at the time of the submission of the institutional cost reports. A failure to pay such fees may be deemed by the Department as constituting the non-filing of the institutional cost report and subject the facility to the rate reduction authorized pursuant to section 86-1.2(c) of this Subpart. Failure to pay the additional fee associated with the filing of additional institutional cost reports as described in paragraph (2) of this subdivision shall result in the non-utilization of such revised cost reports by the Department. Delinquent fees may be collected by the Department in accordance with the provisions of Public Health Law section 2807-c(18)(h).*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 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:

Public Health Law section 2807-c(35)(b)(xiii) authorizes the Commissioner to impose a fee, by regulation, on general hospitals that is sufficient to cover the costs of auditing the institutional cost reports submitted by such hospitals.

Legislative Objectives:

The Legislature authorized the Commissioner to impose fees sufficient to cover the costs of auditing institutional cost reports for fiscal purposes and to improve the data integrity of information reported by hospitals.

Such information is used to make both policy and financial decisions related to the Medicaid program.

Needs and Benefits:

The proposed rule implementing the provisions of Public Health Law section 2807-c(35)(b)(xiii) provides for the establishment and implementation of a new fee schedule to support the costs of auditing institutional cost reports. The rule also details how the audit process will be implemented. At the same time the Department is exercising its discretion under its pre-existing hospital rate-setting regulation authority pursuant to PHL section 2807-c(35)(b) to eliminate the requirement that hospitals secure certification of their cost reports by an independent licensed CPA.

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. The Department is authorized by the Public Health Law section 2807-c(35)(b) to address certain aspects of the hospital reimbursement methodology through regulations.

Federal Standards:

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

Compliance Schedule:

The proposed amendments to Section 86-1.2 limits the requirement that institutional cost reports be certified by an independent licensed or certified public accountant to cost periods prior to 2010. Regulated parties must continue to comply with this provision when filing institutional cost reports for cost periods prior to 2010.

The proposed amendments to Section 86-1.4 allows the Department to impose fees on general hospitals sufficient to cover the costs of auditing the institutional cost reports submitted by general hospitals for cost periods on and after December 31, 2010. Regulated parties must comply with this provision at the time of submission of the institutional cost report. Failure to comply may subject the facility to a rate reduction. In addition, general hospitals that fail to pay the additional fee associated with filing more than two institutional cost reports for a reporting period will be subject to an additional fee.

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.

All health care providers who file Institutional Cost Reports with the Department, including the seven hospitals identified as small businesses, are subject to the provisions of this regulation under section 2807-c(35)(b) of the Public Health Law. However, this rule also eliminates the requirement for all hospitals that annual cost reports be certified by an independent CPA, thus reducing the costs and administrative burdens resulting from that current requirement. In addition, provisions are made to waive or reduce some of the new fees for institutions who demonstrate financial hardship and good cause and who apply for such in writing.

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 this rule. 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:

While fee obligations related to the filing of institutional cost reports

represent a cost for general hospitals, this is offset by the reduction in costs resulting from the elimination of the requirement that reports be certified by an independent certified public accountant. No capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance.

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

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of ongoing 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 rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations allow for the Department to perform field or desk audits of the fiscal and statistical records of medical facilities, establish a fee schedule for filing institutional cost reports for report periods on and after December 31,

2010, and require accountant's certification only for institutional cost reports filed for cost years prior to 2010. The proposed regulations have no implications for job opportunities.

NOTICE OF ADOPTION

Distributions from the Health Care Initiatives Pool for Poison Control Center Operations

I.D. No. HLT-42-11-00001-A

Filing No. 1435

Filing Date: 2011-12-29

Effective Date: 2012-01-18

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

Action taken: Amendment of section 68.6 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2500-d, 2807-j and 2807-l

Subject: Distributions from the Health Care Initiatives Pool for Poison Control Center Operations.

Purpose: Revises the methodology for distributing HCRA grant funding to Regional Poison Control Centers (RPCCs).

Text or summary was published in the October 19, 2011 issue of the Register, I.D. No. HLT-42-11-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Behavioral Health Organization Implementation

I.D. No. OMH-03-12-00006-EP

Filing No. 1440

Filing Date: 2011-12-30

Effective Date: 2011-12-30

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

Proposed Action: Amendment of Parts 580, 582 and 587 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, section 365-m

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

Specific reasons underlying the finding of necessity: The amendments to 14 NYCRR Parts 580, 582 and 587 are necessary to inform providers of services of their responsibilities with respect to Behavioral Health Organization (BHO) implementation. As the BHO implementation date commenced November 1, 2011, with full implementation effective January 1, 2012, the emergency filing is needed to inform providers of their responsibilities. Further, the delivery and coordination of care for persons in need of services could be negatively impacted if the emergency rule is not in effect at the time of the BHO implementation. Therefore, for the health, safety and general welfare of persons in need of services, an emergency filing is necessary.

Subject: Behavioral Health Organization Implementation.

Purpose: To inform providers of their responsibilities and the requirements associated with Behavioral Health Organization implementation.

Text of emergency/proposed rule: 1. Part 580 of Title 14 NYCRR is amended to read as follows:

Part 580

OPERATION OF PSYCHIATRIC INPATIENT UNITS OF GENERAL HOSPITALS

(Statutory Authority: Mental Hygiene Law, §§ 7.09, 9.39, 7.21, 29.15, 29.29, 31.02, 31.04, 45.19; Social Services Law § 365-m)

2. A new subdivision (d) of Section 580.2 of Title 14 NYCRR is added to read as follows:

(d) Section 365-m of the Social Services Law authorizes the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

3. New subdivisions (b) and (e) are added to Section 580.3 of Title 14 NYCRR to read as follows. The remaining subdivisions are re-lettered accordingly.

(b) Behavioral Health Organization or BHO shall mean an entity selected by the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services pursuant to Section 365-m of the New York State Social Services Law to provide administrative and management services for the purposes of conducting concurrent review of Behavioral Health admissions to inpatient treatment settings, assisting in the coordination of Behavioral Health Services, and facilitating the integration of such services with physical health care.

(e) Concurrent Review shall mean the review of the clinical necessity for continued inpatient Behavioral Health Services, resulting in a non-binding recommendation regarding the need for such continued inpatient services.

4. A new Section 580.11 is added to Title 14 NYCRR Part 580 to read as follows:

580.11 Behavioral health organizations.

The facility shall cooperate with designated regional behavioral health organizations. Such cooperation shall include, but not be limited to:

(a) notifying the appropriate behavioral health organization of an admission for a behavioral health condition for which coverage is provided by Medicaid on a fee-for-service basis to an individual who is not also enrolled in the Medicare program. Such notification shall be provided within 24 hours of such admission or, for an admission occurring on a Friday, Saturday, Sunday or public holiday, by 5:00 p.m. on the next business day following such admission. When Medicaid coverage cannot be determined at the time of admission, notification shall be provided as soon as practicably possible after confirmation of Medicaid eligibility, but in no event more than 24 hours after such confirmation or, for a confirmation made on a Friday, Saturday, Sunday or public holiday, later than 5:00 p.m. of the next business day following such confirmation;

(b) cooperating with concurrent review activities;

(c) ensuring that the discharge plan for such an individual includes consideration of physical health needs and services;

(d) notifying such behavioral health organization within 24 hours of the discharge of such an individual or, for a discharge occurring on a Friday, Saturday, Sunday or public holiday, by 5:00 p.m. on the next business day following such discharge;

(e) receiving and providing physical and mental health information, pursuant to Section 33.13(d) of the Mental Hygiene Law; and

(f) seeking to obtain, as needed, such individual's consent to receive and provide information regarding such individual's substance use problems.

5. Part 582 of Title 14 NYCRR is amended to read as follows:

Part 582

OPERATION OF HOSPITALS FOR PERSONS WITH MENTAL ILLNESS

(Statutory Authority: Mental Hygiene Law, §§ 7.09, 7.21, 29.15, 29.29, 31.04(a), 31.35, 45.19; Social Services Law § 365-m)

6. A new subdivision (e) of Section 582.2 of Title 14 NYCRR is added to read as follows:

(e) Section 365-m of the Social Services Law authorizes the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

7. New subdivisions (b) and (e) are added to Section 582.3 of Title 14 NYCRR to read as follows. The remaining subdivisions are re-lettered accordingly.

(b) Behavioral Health Organization or BHO shall mean an entity selected by the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services pursuant to Section 365-m of the New York State Social Services Law to provide administrative and management services for the purposes of conducting concurrent review of Behavioral Health admissions to inpatient treatment settings, assisting in the coordination of Behavioral Health Services, and facilitating the integration of such services with physical health care.

(e) Concurrent Review shall mean the review of the clinical necessity for continued inpatient Behavioral Health Services, resulting in a non-binding recommendation regarding the need for such continued inpatient services.

8. A new Section 582.11 is added to Title 14 NYCRR Part 582 to read as follows:

582.11 Behavioral health organizations.

The facility shall cooperate with designated regional behavioral health organizations. Such cooperation shall include, but not be limited to:

(a) notifying the appropriate behavioral health organization of an admission for a behavioral health condition for which coverage is provided by Medicaid on a fee-for-service basis to an individual who is not also enrolled in the Medicare program. Such notification shall be provided within 24 hours of such admission or, for an admission occurring on a Friday, Saturday, Sunday, or public holiday, by 5:00 p.m. on the next business day following such admission. When Medicaid coverage cannot be determined at the time of admission, notification shall be provided as soon as practicably possible after confirmation of Medicaid eligibility, but in no event more than 24 hours after such confirmation or, for a confirmation made on a Friday, Saturday, Sunday or public holiday, later than 5 p.m. of the next business day following such confirmation;

(b) cooperating with concurrent review activities;

(c) ensuring that the discharge plan for such an individual includes consideration of physical health needs and services;

(d) notifying such behavioral health organization no later than 24 hours subsequent to the discharge of such an individual or by 5:00 p.m. the next business day following Friday, Saturday, Sunday and public holiday discharges;

(e) receiving and providing physical and mental health information, pursuant to Section 33.13(d) of the Mental Hygiene Law; and

(f) seeking to obtain, as needed, such individual's consent to receive and provide information regarding such individual's substance use problems.

9. Part 587 of Title 14 NYCRR is amended to read as follows:

PART 587

OPERATION OF OUTPATIENT PROGRAMS

(Statutory Authority: Mental Hygiene Law, §§ 7.07, 7.09, 7.15, 7.31, 31.02, 31.04, 31.92, 31.94, 43.02; Social Services Law §§ 364(3), 364-a(1), 365-m)

10. A new subdivision (j) of Section 587.2 of Title 14 NYCRR is added to read as follows:

(j) Section 365-m of the Social Services Law authorizes the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

11. Subdivision (b) of Section 587.4 of Title 14 NYCRR is amended to read as follows:

(b) Program definitions.

(1) Behavioral Health Organization or BHO means an entity selected by the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services pursuant to Section 365-m of the New York State Social Services Law to provide administrative and management services for the purposes of conducting concurrent review of Behavioral Health admissions to inpatient treatment settings, assisting in the coordination of Behavioral Health Services, and facilitating the integration of such services with physical health care.

(2) Child and family clinic plus provider means a licensed clinic that has been approved by the Office of Mental Health to provide child and family clinic plus services.

(3) Concurrent Review means the review of the clinical necessity for continued inpatient Behavioral Health Services, resulting in a non-binding recommendation regarding the need for such continued inpatient services.

[(2)](4) Off-site locations for purposes of providing outpatient services and reimbursement[,] means any sites in the community where a recipient may require services.

[(3)](5) Program capacity [shall mean]means the number of recipients who can be on-site at a given time.

[(4)](6) Program space means discrete space dedicated to the purpose of the outpatient program and includes all space used by recipients enrolled in the program.

[(5)](7) Provider of service means the entity which is responsible for the operation of a program. Such entity may be an individual, partnership, association or corporation. For purposes of this Part, unless otherwise noted, the term also applies to a psychiatric center or institute operated by the Office of Mental Health.

[(6)](8) Satellite location of a primary program means a physically separate adjunct site to a certified clinic treatment program, continuing day treatment program, day treatment program serving children or intensive psychiatric rehabilitation treatment program which provides either a full or partial array of outpatient services on a regularly and routinely scheduled basis (full or part time).

12. A new Section 587.14 is added to Title 14 NYCRR Part 587 to read as follows:

587.14 Behavioral health organizations.

Providers shall cooperate with the designated regional behavioral health organizations and shall be authorized pursuant to Section 33.13(d) of the Mental Hygiene Law to exchange clinical information concerning clients with such organizations. Information so exchanged shall be limited to the minimum necessary in light of the reason for the disclosure. Such information shall be kept confidential and any limitations on the release of such information imposed on the party giving such information shall apply to the party receiving such information.

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 March 28, 2012.

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

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

Section 43.02 of the Mental Hygiene Law gives the Commissioner the authority to request from operators of facilities licensed by the Office of Mental Health such financial, statistical and program information as the Commissioner may determine to be necessary.

Section 365-m of the Social Services Law authorizes the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

2. Legislative objectives: Chapter 59 of the Laws of 2011 authorizes the Office of Mental Health and the Office of Alcoholism and Substance Abuse Services to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services. The intent of this legislation is to facilitate the coordination of mental health and substance use services and physical health care services for individuals with significant behavioral health needs.

3. Needs and benefits: A key element of the New York State Medicaid agenda is to increase the quality and efficiency of the Medicaid program and reduce Medicaid costs. To accomplish these objectives, Governor Cuomo issued Executive Order No. 5 to convene a Medicaid Redesign Team (MRT), consisting of representatives from the legislature, health care industry, patient advocacy groups, and State executive staff including the Commissioners of the Office of Mental Health and the Office of Alcoholism and Substance Abuse Services and the New York State Medicaid Director. One of the MRT recommendations that was adopted into New York State Law authorizes the Commissioners of the Office of Mental Health and the Office of Alcoholism and Substance Abuse Services to jointly select and contract for the services of one or more regional Behavioral Health Organizations (BHO). The BHOs shall provide administrative and management services for the purposes of conducting

concurrent review of inpatient behavioral health services and coordinating the provision of behavioral health services and other services available under the Medicaid Program. After a successful procurement, five regional BHOs were selected. The amendments to 14 NYCRR Parts 580, 582 and 587 are necessary to inform providers of services of the requirements and expectations of the Office of Mental Health with respect to the BHO implementation.

4. Costs:

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

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

c) Costs to regulated parties: There will be no fiscal impact, nor will there be any change in reimbursement or rates of payments to regulated parties as a result of these regulatory amendments.

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

6. Paperwork: This rule should not have a significant increase in the paperwork requirements of providers.

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

8. Alternatives: The only alternative to the regulatory amendment would be inaction. BHO implementation is consistent with statute. Providers of service must be aware of their responsibilities and the requirements associated with the BHO implementation; this rule making clarifies those responsibilities and makes clear the Office's expectations with respect to BHO implementation. Therefore, that alternative was not considered.

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

10. Compliance schedule: These regulatory amendments are effective immediately 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 rule making merely serves to clarify the expectations of the Office of Mental Health regarding Behavioral Health Organization (BHO) implementation and notify providers of services of their responsibilities as a result of the BHO implementation.

Rural Area Flexibility Analysis

The amendments to Parts 580, 582 and 587 of Title 14 NYCRR serve to clarify the expectations of the Office of Mental Health regarding Behavioral Health Organization (BHO) implementation and notify providers of services of their responsibilities as a result of the BHO implementation. 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 this rule making is merely to clarify the expectations of the Office of Mental Health regarding Behavioral Health Organization (BHO) implementation and notify providers of services of their responsibilities as a result of the BHO implementation. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

NOTICE OF ADOPTION

Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health

I.D. No. OMH-46-11-00003-A

Filing No. 2

Filing Date: 2012-01-03

Effective Date: 2012-01-18

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

Action taken: Amendment of Part 577 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 43.02

Subject: Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health.

Purpose: To freeze rates of payments to freestanding psychiatric centers licensed under Mental Hygiene Law article 31 effective 1/1/12.

Text or summary was published in the November 16, 2011 issue of the Register, I.D. No. OMH-46-11-00003-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Requirements Pertaining to the Investigation and Review of Serious Reportable Incidents and Abuse Allegations

I.D. No. PDD-45-11-00015

Filing No. 1

Filing Date: 2012-01-03

Effective Date: 2012-01-18

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

Action taken: Amendment of section 624.5(c)(1)(iii) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Requirements pertaining to the investigation and review of serious reportable incidents and abuse allegations.

Purpose: To clarify the effective date of recently promulgated regulations.

Text or summary was published in the November 9, 2011 issue of the Register, I.D. No. PDD-45-11-00015-P.

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

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

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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

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

Net Metering

I.D. No. PSC-03-12-00012-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 proposed tariff filing by Consolidated Edison Company of New York, Inc. to make revisions to electric tariff schedule, P.S.C. No. 9—Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0319. The proposed filing has an effective date of April 1, 2012. The Commission

may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

(11-E-0319SP2)

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

Net Metering

I.D. No. PSC-03-12-00013-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Rochester Gas and Electric Corporation to make revisions to electric tariff schedule, P.S.C. No. 19—Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Rochester Gas and Electric Corporation to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0322. The proposed filing has an effective date of April 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

(11-E-0322SP2)

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

Approval of the Transfer, to Williams, of Indirect Ownership Interests in DMP and a Natural Gas Gathering Pipeline

I.D. No. PSC-03-12-00014-P

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

Proposed Action: The Commission is considering a petition requesting the approval of the transfer, to Williams Partners, L.P. (Williams), of indirect interests in DMP New York, Inc. (DMP) and others and their natural gas gathering pipeline located in Broome County, NY.

Statutory authority: Public Service Law, sections 2(11), 5(1)(b) and 70

Subject: Approval of the transfer, to Williams, of indirect ownership interests in DMP and a natural gas gathering pipeline.

Purpose: Consideration of approval of the transfer, to Williams, of indirect ownership interests in DMP and a gas gathering pipeline.

Substance of proposed rule: The Public Service Commission is considering a petition filed on November 30, 2011 requesting approval of the transfer, to Williams Partners L.P., of all the indirect ownership interests in DMP New York, Inc. and Laser Northeast Gathering Company LLC, which own a 9.82 mile, sixteen inch, natural gas gathering pipeline located in the Town of Windsor, Broome County, N.Y. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

(11-G-0656SP1)

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

Net Metering

I.D. No. PSC-03-12-00015-P

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

Proposed Action: The Commission is considering a proposed tariff filing by New York State Electric & Gas Corporation to make revisions to electric tariff schedule, P.S.C. No. 120 — Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by New York State Electric & Gas Corporation to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0320. The proposed filing has an effective date of April 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

(11-E-0320SP2)

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

Approval of the Transfer of Ownership of 41.9 MW and 46.5 MW Electric Generation Facilities from AER to NYGT

I.D. No. PSC-03-12-00016-P

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

Proposed Action: The Commission is considering a petition requesting the approval of the transfer of ownership of 41.9 MW and 46.5 MW electric generation facilities from AER NY—Gen LLC (AER) to Alliance NYGT LLC (NYGT).

Statutory authority: Public Service Law, sections 2(11), 5(1)(b) and 70

Subject: Approval of the transfer of ownership of 41.9 MW and 46.5 MW electric generation facilities from AER to NYGT.

Purpose: Consideration of approval of the transfer of ownership of 41.9 MW and 46.5 MW electric generation facilities from AER to NYGT.

Substance of proposed rule: The Public Service Commission is considering a petition filed on December 22, 2011 requesting approval of the transfer, from AER NY-Gen LLC (AER) to Alliance NYGT LLC (NYGT), of all ownership interests in the 41.9 MW Shoemaker Gas Turbine and the 46.5 MW Hillburn Gas Turbine electric generation facilities located in, respectively, Middletown and Hillburn, New York. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

(11-E-0701SP1)

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

Pole Attachment Rates

I.D. No. PSC-03-12-00017-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make revisions to electric tariff schedule, P.S.C. No. 220—Electricity.

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

Subject: Pole Attachment Rates.

Purpose: To update pole attachment rates.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to revise Rule No. 35—Cable System Operator and Telecommunications Service Provide Wire Line Attachment Rates to Electric Distribution Poles including Wireless Attachment Rates to update its pole attachment rates. The proposed filing has an effective date of March 19, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

(11-E-0708SP1)

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

Net Metering

I.D. No. PSC-03-12-00018-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make revisions to electric tariff schedule, P.S.C. No. 220—Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0321. The proposed filing has an effective date of April 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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

(11-E-0321SP2)

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

General Powers of Commission in Respect to Gas and Electricity

I.D. No. PSC-03-12-00019-P

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

Proposed Action: The PSC is considering whether to approve or reject a request by The Brooklyn Union Gas Company and KeySpan Gas East Corporation proposing to modify, on a permanent basis, the filing date, of the quarterly financial report for quarter ended March.

Statutory authority: Public Service Law, section 66

Subject: General powers of Commission in respect to gas and electricity.

Purpose: General powers of Commission in respect to gas and electricity.

Substance of proposed rule: The Public Service Commission is considering a petition by The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid (Companies or National Grid) to modify, on a permanent basis, the filing date, of the Companies' quarterly financial report for the quarter ended March. The Commission may approve, reject or modify, in whole or in part, the relief requested by KeySpan.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.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.
(11-G-0180SP1)

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

Net Metering

I.D. No. PSC-03-12-00020-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Orange and Rockland Utilities, Inc. to make revisions to electric tariff schedule, P.S.C. No. 2 — Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Orange and Rockland Utilities, Inc. to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0323. The proposed filing has an effective date of April 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.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.
(11-E-0323SP2)

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

Net Metering

I.D. No. PSC-03-12-00021-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Central Hudson Gas and Electric Corporation to make revisions to electric tariff schedule, P.S.C. No. 15 — Electricity.

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

Subject: Net Metering.

Purpose: To provide for net metering of micro-hydroelectric and fuel cell generating facilities.

Substance of proposed rule: The Commission is considering whether to

approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas and Electric Corporation to provide for the net metering of micro-hydroelectric and fuel cell generating facilities pursuant to Commission Order issued November 21, 2011 in Case 11-E-0318. The proposed filing has an effective date of April 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.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.
(11-E-0318SP2)