

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. AAM-11-12-00001-EP

Filing No. 165

Filing Date: 2012-02-24

Effective Date: 2012-02-24

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

Proposed Action: Amendment of section 141.2 of Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The amendment of section 141.2 of 1 NYCRR to extend the Emerald Ash Borer (EAB) quarantine to Albany and Orange Counties is being adopted as an emergency measure because of the threat that EAB will spread outside the areas it now infests in New York State.

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. EAB can cause serious damage to healthy trees by boring

through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years. The average adult EAB is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the EAB includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree. Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the EAB include the following species of North American ash trees: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*). Since the EAB is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

EAB was first discovered in Michigan in June 2002, and has since spread to at least 15 other states as well as to two provinces in Canada. The initial detection of this pest in New York occurred on June 16, 2009 in the Town of Randolph, which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County. Further detections were confirmed in six other counties (Monroe, Genesee, Livingston, Steuben, Greene and Ulster) during July and August, 2010, prompting the establishment of an EAB quarantine in those counties. In 2011, the EAB quarantine was extended to the following 12 counties: Cattaraugus, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung. Of these counties, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung have had no detections of EAB, but serve as buffers between counties with known or suspected infestations and those which have no known infestations.

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

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this amendment is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The amendments establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation

does not spread beyond those areas via the artificial movement of infested trees and materials.

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

Purpose: To extend the emerald ash borer quarantine to Albany and Orange Counties to prevent the spread of this beetle to other areas.

Text of emergency/proposed rule: Section 141.2 of 1 NYCRR is amended to read as follows:

Section 141.2. Quarantined area.

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

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 May 23, 2012.

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

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

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

The proposal would amend section 141.2 of 1 NYCRR to establish an EAB quarantine in Albany and Orange Counties based upon detection of the pest in those counties.

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. EAB can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years. The average adult EAB is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female

can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the EAB includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the EAB include the following species of North American ash trees: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*). Since the EAB is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

EAB was first discovered in Michigan in June 2002, and has since spread to at least 15 other states as well as to two provinces in Canada. The initial detection of this pest in New York occurred on June 16, 2009 in the Town of Randolph, which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County. Further detections were confirmed in six other counties (Monroe, Genesee, Livingston, Steuben, Greene and Ulster) during July and August, 2010, prompting the establishment of an EAB quarantine in those counties. In 2011, the EAB quarantine was extended to the following 12 counties: Cattaraugus, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung. Of these counties, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung have had no detections of EAB, but serve as buffers between counties with known or suspected infestations and those which have no known infestations.

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

4. Costs:

(a) Costs to the State government: None.

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

(c) Costs to private regulated parties: There are 59 licensed nursery growers and 110 nursery dealers in Albany County. In Orange County, there are 77 licensed growers and 90 licensed dealers. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol for ash nursery stock. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

Regulated parties exporting regulated articles (exclusive of nursery stock) from Albany and Orange Counties, other than pursuant to

compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 211 such inspections each year (117 in Orange County; 94 in Albany County), with a total annual cost of \$5,275.

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

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

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

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

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business.

The small businesses affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Albany and Orange Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 59 licensed nursery growers and 110 nursery dealers in Albany County. In Orange County, there are 77 licensed growers and 90 licensed dealers. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

2. Compliance requirements.

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

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

3. Professional services.

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

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

4. Compliance costs:

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

(b) Annual cost for continuing compliance with the rule: There are 336 licensed nursery growers and dealers in Albany and Orange Counties which would be affected by the quarantine set forth in the regulations. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants.

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

Regulated parties exporting regulated articles (exclusive of nursery stock) from Albany and Orange Counties, other than pursuant to compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 211 such inspections each year (117 in Orange County; 94 in Albany County), with a total annual cost of \$5,275.

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

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

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

5. Minimizing adverse impact.

The Department has designed the rule to minimize adverse economic impact on small businesses. This is done by limiting the quarantine area to only those parts of New York State near or where EAB has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of EAB; and to prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the regulations provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact.

The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the regulations minimize adverse economic impact as much as is currently possible.

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

6. Small business and local government participation.

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

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

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

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

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

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

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

The group heard presentations about current survey, detections and infestation levels discovered during July and early August 2010. A national perspective was provided by USDA- APHIS regarding survey, regulatory, and other control measures being implemented nationally and by other states. The attendees were asked to provide their views regarding what State government should be doing and specifically asked to identify issues related to where to draw lines for quarantine purposes.

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

Ultimately, by 2011, the discussions resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

On January 16, 2012, the Department made a presentation at the Penn-York Lumbermen's Association about the Asian Longhorned Beetle and the EAB. Over 80 lumber industry members were in attendance from throughout New York and Pennsylvania. The finds of EAB in Albany and Orange Counties and the planned expansion of the quarantine in those counties were specifically discussed.

A stakeholders meeting is planned for late February or early March to discuss further changes to the EAB quarantine.

Outreach efforts will continue.

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The regulated parties affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Albany and Orange Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 336 licensed nursery growers and dealers within these counties. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

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

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

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

3. Costs:

There are 336 licensed nursery growers and dealers in Albany and Orange Counties which would be affected by the quarantine. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceed \$13-million annually.

Regulated parties exporting regulated articles (exclusive of nursery stock) from Albany and Orange Counties, other than pursuant to compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 211 such inspections each year (117 in Orange County; 94 in Albany County), with a total annual cost of \$5,275.

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

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

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

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

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

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

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

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

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

Ultimately, by 2011, the discussions resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene,

Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

On January 16, 2012, the Department made a presentation at the Penn-York Lumbermen's Association about the Asian Longhorned Beetle and the EAB. Over 80 lumber industry members were in attendance from throughout New York and Pennsylvania. The finds of EAB in Albany and Orange Counties and the planned expansion of the quarantine in those counties was specifically discussed.

A stakeholders meeting is planned for late February or early March to discuss further changes to the EAB quarantine.

Outreach efforts will continue.

Job Impact Statement

The amendment to section 141.2, establishing an Emerald Ash Borer (EAB) quarantine in Albany and Orange Counties, will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

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

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

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-11-12-00012-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: Delete and classify headings in exempt and non-competitive class, delete and classify positions in exempt and non-competitive class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, by deleting therefrom the heading "Banking Department," and the positions of Assistant Counsel (12), Assistant Director of Internal Audit, Assistant Public Information Officer, Chief Investigations, Confidential Aide, Deputy Counsel, Deputy Superintendent of Banks (3), Deputy Superintendent and Counsel, Director of Internal Audit, Director Public Information, Director of Research, Executive Assistant (2), First Deputy Superintendent (2), Investigator (11), Legislative Coordinator, Secretary and Special Assistant (4); and, by deleting therefrom the heading "Insurance Department," and the positions of Assistant Counsel (4), Assistant Director of Insurance Frauds Bureau, Assistant to Superintendent (2), Associate Counsel (2), Confidential Aide, Deputy Counsel, Deputy Superintendent (5), Deputy Superintendent and

Counsel, Deputy Superintendent for Public Information, Director of Insurance Frauds Bureau, Director of Internal Audit, Executive Assistant (8), First Deputy Superintendent, Secretary (2), Special Assistant (11) and Special Counsel; and, by adding thereto the heading "Department of Financial Services," and the positions of Assistant Counsel (16), Assistant Director Insurance Frauds Bureau, Assistant Director Internal Audit, Assistant Public Information Officer, Assistant to Superintendent (2), Associate Counsel (2), Chief Investigations, Confidential Aide (2), Deputy Counsel (2), Deputy Superintendent (5), Deputy Superintendent and Counsel (2), Deputy Superintendent Banks, Deputy Superintendent Public Information, Director Insurance Frauds Bureau, Director Internal Audit (2), Director Public Information, Director Research, Executive Assistant (10), First Deputy Superintendent (2), Investigator (11), Legislative Coordinator, Secretary (3), Special Assistant (15) and Special Counsel; and,

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, by deleting therefrom the heading "Banking Department," and the positions of Administrative Assistant (1), Affirmative Action Administrator 2 (1), Associate Director of Banking Research and Statistics (1), Associate Attorney (Banking) (5), Chief Banking Regulatory Accounting (1), Chief Real Estate Appraiser (1), Chief Risk Management Specialist (2), Director of Banking Surveillance Systems (1), Director, Community Reinvestment Monitoring Division (1), Director, Consumer Lending Regulation and Compliance (1), Director Information Technology Services 1 (1), Fair Lending Specialist 1 (3), Fair Lending Specialist 2 (1), Holocaust Claims Assistant (2), Holocaust Claims Program Assistant Manager (1), Holocaust Claims Program Manager (1), Holocaust Claims Specialist 1 (3), Holocaust Claims Specialist 2 (3), Holocaust Claims Specialist 3 (2), Inspector, Manager Information Technology Services 2 (1), Principal Real Estate Appraiser (2), Principal Risk Management Specialist (9), Secretary 2 (2), Senior Risk Management Specialist (17), Supervising Credit Risk Management Specialist (1), Supervising Risk Management Specialist (7), Supervising Risk Management Specialist (Model Validation) (2), Urban Analyst 3 (3) and Urban Analyst 4 (1); and, by deleting therefrom the heading "Insurance Department," and the positions of Affirmative Action Administrator 2 (1), Assistant Counsel (1), Associate Attorney (Insurance Industry Investigations) (5), Chief of Insurance Policy and Planning (1), Chief Risk Management Specialist (1), Director Insurance Department Public Affairs (1), Director of Insurance Policy Analysis (1), Director of Insurance Program Analysis (1), Insurance Frauds Investigator 1 (22), Insurance Frauds Investigator 2 (20), Insurance Frauds Investigator 3 (10), Insurance Frauds Investigator 4 (2), Insurance Frauds Investigator 5 (1), Supervising Attorney (Insurance) (1) and Supervising Risk Management Specialist (7); and by adding thereto the heading "Department of Financial Services," and the positions of Administrative Assistant (1), Affirmative Action Administrator 2 (1), Assistant Counsel (1), Assistant Director Banking Research and Statistics (1), Associate Attorney (Banking) (5), Associate Attorney (Insurance Industry Investigations) (5), Chief Banking Regulatory Accounting (1), Chief Insurance Policy and Planning (1), Chief Risk Management Specialist (3), Director Banking Surveillance Systems (1), Director Community Reinvestment Monitoring (1), Director Consumer Lending Regulation and Compliance (1), Director Information Technology Services 1 (1), Director Insurance Department Public Affairs (1), Director Insurance Policy Analysis (1), Director Insurance Programs Analysis (1), Fair Lending Specialist 1 (3), Fair Lending Specialist 2 (1), Holocaust Claims Assistant (1), Holocaust Claims Program Assistant Manager (1), Holocaust Claims Program Manager (1), Holocaust Claims Specialist 1 (3), Holocaust Claims Specialist 2 (3), Holocaust Claims Specialist 3 (2), Inspector, Insurance Frauds Investigator 1 (22), Insurance Frauds Investigator 2 (20), Insurance Frauds Investigator 3 (10), Insurance Frauds Investigator 4 (2), Insurance Frauds Investigator 5 (1), Manager Information Technology Services 2 (1), Principal Risk Management Specialist (9), Secretary 2 (2), Senior Risk Management Specialist (14), Supervising Attorney (Insurance) (1), Supervising Credit Risk Management Specialist (1), Supervising Risk Management Specialist (14), Supervising Risk Management Specialist (Model Validation) (2), Urban Analyst 3 (3) and Urban Analyst 4 (1).

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

Data, views or arguments may be submitted to: Mark Worden, Associate Attorney, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: mark.worden@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-06-12-00001-P, Issue of February 8, 2012.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-06-12-00001-P, Issue of February 8, 2012.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-06-12-00001-P, Issue of February 8, 2012.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-06-12-00001-P, Issue of February 8, 2012.

Department of Corrections and Community Supervision

NOTICE OF ADOPTION

Butler Correctional Facility

I.D. No. CCS-47-11-00002-A

Filing No. 161

Filing Date: 2012-02-22

Effective Date: 2012-03-14

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

Action taken: Amendment of section 100.69(c) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Butler Correctional facility.

Purpose: Amend the text to remove reference to functions that are no longer operational at this correctional facility.

Text or summary was published in the November 23, 2011 issue of the Register, I.D. No. CCS-47-11-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Rules@Doccs.ny.gov

Assessment of Public Comment

The agency received no public comment.

Department of Economic Development

EMERGENCY RULE MAKING

Excelsior Jobs Program

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

Filing No. 163

Filing Date: 2012-02-24

Effective Date: 2012-02-24

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. 2010, ch. 59; L. 2011, ch. 61

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 April 23, 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 legislative 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 record-keeping 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 record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

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

7. Small business and local government participation

DED is in 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, record keeping 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**

Occupational Therapy

I.D. No. EDU-11-12-00010-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 76.4; repeal of sections 76.5 and 76.6; renumbering of section 76.7 to section 76.5; and addition of new sections 76.6, 76.7, 76.8 and 76.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a) and 7906(4), (7); and L. 2011, ch. 460

Subject: Occupational Therapy.

Purpose: To implement chapter 460 of the Laws of 2011, relating to the profession of occupational therapy.

Text of proposed rule: 1. Section 76.4 of the Regulations of the Commissioner of Education is amended, effective June 13, 2012, as follows:

(a) ...
 (b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

(c) *Supervision.*

(1) *The occupational therapist providing direct supervision required by section 7905(2) of the Education Law shall develop a written supervision plan for each permittee. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts; the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with permittee) of supervision; the content areas to be addressed; how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor; and how professional development will be fostered.*

(2) *Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes and reports.*

(3) *The determination of the level and type of supervision shall be based on the ability level and experience of the permittee providing the delegated occupational therapy services, the complexity of client needs, and the setting in which the permittee is providing the services. The supervision plan shall require that the supervisor be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.*

(4) *Direct supervision shall mean that the supervisor:*

(i) *initiates, directs and participates in the initial evaluation, interprets the evaluation data, and develops the occupational therapy services plan with input from the permittee;*

(ii) *participates, on a regular basis, in the delivery of occupational therapy services;*

(iii) *is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services;*

(iv) *takes into consideration information provided by the permittee about the client's responses to and communications during occupational therapy services; and*

(v) *is available for consultation with the permittee in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.*

(5) *In no event shall the occupational therapist or licensed physician supervise more than five permittees, or its full time equivalent, provided that the total number of permittees being supervised by a single occupational therapist or licensed physician shall not exceed ten.*

2. Sections 76.5 and 76.6 of the Regulations of the Commissioner of Education are repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective June 13, 2012.

3. The Regulations of the Commissioner of Education are amended by the addition of new sections 76.6, 76.7, 76.8, and 76.9, effective June 13, 2012, to read as follows:

76.6 *Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.*

(a) *An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."*

(b) *As used in this section, client related activities shall mean:*

(1) *contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;*

(2) *consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;*

(3) *the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;*

(4) *the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or*

(5) *the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.*

76.7 *Requirements for authorization as an occupational therapy assistant.*

To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) *file an application with the Department;*

(b) *have received an education as follows:*

(1) *completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or*

(2) *completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;*

(c) *have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;*

(d) *be at least eighteen years of age;*

(e) *be of good moral character as determined by the Department;*

(f) *register triennially with the Department in accordance with the provisions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;*

(g) *pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and*

(h) *except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.*

76.8 *Supervision of occupational therapy assistant.*

(a) *A written supervision plan, acceptable to the occupational therapist or licensed physician providing direction and supervision, shall be required for each occupational therapy assistant providing services pursuant to section 7906(7) of the Education Law. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts, the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with occupational therapy assistant) of supervision, the content areas to be addressed, how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor, and how professional development will be fostered.*

(b) *Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes, reports and assessments.*

(c) *Consistent with the requirements of this section, the determination of the level and type of supervision shall be based on the ability level and experience of the occupational therapy assistant providing the delegated occupational therapy services, the complexity of client needs, the setting in which the occupational therapy assistant is providing the services, and consultation with the occupational therapy assistant.*

(d) *The supervision plan shall require that the occupational therapist or licensed physician be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.*

(e) *Direction and supervision means that the occupational therapist or licensed physician:*

(i) *initiates, directs and participates in the initial evaluation occupational therapy assistant under the authority of, interprets the evaluation data, and develops the occupational therapy services plan with input from the occupational therapy assistant;*

(ii) *participates, on a regular basis, in the delivery of occupational therapy services;*

(iii) *is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services, after considering any reports by the occupational therapy assistant of any changes in the condition of the client that would require a change in the treatment plan;*

(iv) *takes into consideration information provided about the client's responses to and communications during occupational therapy services; and*

(v) *is available for consultation with the occupational therapy assis-*

tant in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.

(f) In no event shall the occupational therapist or licensed physician supervise more than five occupational therapy assistants, or its full time equivalent, provided that the total number of occupational therapy assistants being supervised by a single occupational therapist or licensed physician shall not exceed ten.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Direct supervision, as required by section 7906(4) of the Education Law, may be provided in conjunction with an occupational therapy assistant who is designated as a fieldwork educator by a program that meets the requirements of section 76.7(b)(1) of this Part. Any such work performed by an occupational therapy assistant as a fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

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: Office of the Professions, Office of the Deputy Commissioner, State Education Department, 89 Washington Avenue, 2M, Albany, NY 12234, (518) 474-1941, email: opdepcom@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (2) of section 7905 of the Education Law authorizes the Commissioner of Education to define in regulation direct supervision of limited permittees in occupational therapy.

Subdivision (4) of section 7906 of the Education Law authorizes the Commissioner of Education to define in regulation the direct supervision of an occupational therapy assistant student engaged in occupational therapy as an exempt person.

Subdivision (7) of section 7906 of the Education Law authorizes the Commissioner of Education to define occupational therapy assistants and to promulgate regulations governing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination and character, and authorizes the Board of Regents to establish an application fee for such authorization to practice.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment to section 76.4(b) of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by removing the provision that prohibits a holder of a limited permit in occupational therapy from receiving a renewal of the permit in the event the holder has failed the licensing examination.

The proposed adoption of a new section 76.4(c) of the Commissioner's regulations carries out the intent of the aforementioned statutes by defining supervision of a holder of a limited permit in occupational therapy, including a requirement for a written supervision plan and requirements for documentation of supervision.

The proposed adoption of a new section 76.6 of the Commissioner's regulations carries out the intent of the aforementioned statutes by defining occupational therapy practice and providing that only a person authorized by the Department shall participate in the practice of occupational therapy assistant and use the title occupational therapy assistant.

The proposed adoption of a new section 76.7 of the Commissioner's regulations carries out the intent of the aforementioned statutes by establishing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination, and character, and by establishing fees for initial licensure and for triennial registration.

The proposed adoption of a new section 76.8 of the Commissioner's regulations carries out the intent of the aforementioned statutes by defin-

ing supervision of an occupational therapy assistant, including a requirement for a written supervision plan, requirements for documentation of supervision, and a limitation on the number of occupational therapists who may be supervised.

The proposed adoption of a new section 76.9 of the Commissioner's regulations carries out the intent of the aforementioned statutes by setting requirements for an occupational therapy student to qualify for the statutory exemption allowing him or her to practice under supervision.

3. NEEDS AND BENEFITS:

The changes to the existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011 authorized the Department to establish, in regulation, several significant components of the practice, including the requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of holders of limited permits, occupational therapy assistants, and occupational therapy assistant students. These regulations are necessary to implement the provisions of Chapter 460.

4. COSTS:

(a) Cost to State government: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 460 of the Laws of 2011 will be offset by the licensure and registration fees authorized by the law.

(b) Cost to local government: The proposed amendments to section 76.4(c) and 76.8 of the Commissioner's regulations require the preparation of a written supervision plan governing the supervision of holders of limited permits and occupational therapy assistants, respectively. This may impose some additional small cost required to create and maintain these plans, consisting primarily of the time that the supervisor and occupational therapy assistant will spend in developing the supervision plan. The development of the plan should yield a more effective working relationship and use of the skills of the occupational therapy assistant.

(c) Cost to private regulated parties: The regulations impose certain supervision requirements not currently found in regulation for holders of limited permits, occupational therapy assistants and occupational therapy assistant students. Depending on the costs of supervision currently provided, this may create additional costs to those entities that employ these professionals. The amount of this cost is unknown at this time. As authorized by Chapter 460 of the Laws of 2011, the proposed regulations also establish fees for licensure and triennial registration.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the proposed amendment does not impose costs on the State Education Department beyond those covered by the proposed licensure and registration fees for occupational therapy assistants.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendments to section 76.4(c) and 76.8 of the Commissioner's regulations require the preparation of a written supervision plan governing the supervision of holders of limited permits and occupational therapy assistants, respectively.

7. DUPLICATION:

The amendment does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

Alternative were considered to various aspects of these regulations, particularly as to the supervision requirements for holders of limited permits and occupational therapy assistants.

Not requiring a written supervision plan was considered as an alternative for both supervision of holders of limited permits and occupational therapy assistants. However, given the wide range of settings in which these professionals practice, and the wide range of experience possessed by these professionals, it is believed that a written supervision plan provides the most effective and flexible method for the development and documentation of proper supervision. The requirement for a plan will provide the supervisor with the opportunity to establish supervision guidelines that are unique for each supervised professional and the opportunity to modify the plan as circumstances dictate.

An alternative regarding the nature of the supervisory contacts set out in the plan and how these supervisory contacts are documented was also considered, which would require all supervisory contacts to be addressed and documented. It is believed that limiting these requirements to formal supervisory contacts is a reasonable limitation that will decrease the required paperwork of this regulation.

Various alternatives were considered regarding the number of holders of limited permits and occupational therapist assistants that may be supervised by a single occupational therapist or physician, including not imposing a limit on this number. To ensure safe and effective practice, it is believed that some limit on this number must be imposed. The scope of practice of a holder of a limited permit in occupational therapy or an oc-

cupational therapy assistant is substantially the same as that of an occupational therapist, in terms of delivery of treatment. Hence, although the qualifications of these limited permittees and occupational therapy assistants are not the same of those of a therapist, the assistant or permittee is permitted to perform the same therapeutic tasks, with supervision. Given that the supervision is the only limit imposed on practice, it is believed that a reasonable limit on the number of supervised individuals should be imposed. A strict limit of five was considered, as well as a limit of five or its full-time equivalent. It was determined that the full-time equivalent of five was the appropriate number, with an outside limit of ten individuals.

Alternatives to the supervision requirements for occupational therapy assistant students were considered. Virtually all of such students in New York State attend programs accredited by the Accreditation Council for Occupational Therapy (ACOTE), and there is no other recognized national body for accreditation of such programs. ACOTE has established accreditation standards governing the fieldwork of occupational therapy assistant students, and it is believed that these are adequate to protect the public. The alternative would be to create new standards, but this may create a duplicative set of standards that may not be consistent with those used by a given educational program. It was also noted that the ACOTE accreditation standards permit supervision of students by either occupational therapists or occupational therapist assistants. The statute is clear, however, in requiring that students be directly supervised by an occupational therapist.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the matters addressed by these regulations.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed amendment is to implement Chapter 460 of the Laws of 2011 which made a variety of changes to the law affecting the practice of occupational therapy.

As of July 2011, there were 10,712 occupational therapists licensed in New York State and 4,032 certified occupational therapy assistants. Reliable data on the number of these individuals employed by a small business is not available for New York State. However, a national workforce study conducted by the American Occupational Therapy Association in 2010 reflected that, nationally, 53% of these professionals work in either a hospital, a school setting or academia. If that pattern holds true for New York State, it follows that the potential maximum number of professionals employed by a small business would be the remaining 47%, or 6,930. The number is likely to be substantially smaller than this.

2. COMPLIANCE REQUIREMENTS:

Small businesses subject to the proposed amendments to the Commissioner's regulations would be subject to supervision requirements applicable to holders of limited permits in occupational therapy and to occupational therapy assistants. These include a requirement for a written supervision plan.

3. PROFESSIONAL SERVICES:

The proposed regulation will require no small businesses to need professional services.

4. COMPLIANCE COSTS:

The proposed section 76.7(g) of the Commissioner's regulations establishes a fee for an initial license and for each triennial registration for an occupational therapy assistant. The establishment of this fee is mandated by statute. The proposed regulation would set this fee at one-half of the amount imposed on occupational therapists, which would yield a fee of \$147 for initial licensure and three-year registration, and a fee of \$90 for the subsequent three-year re-registrations. Currently, these fees for occupational therapy assistants are set at \$103 for initial licensure and three year registration, and \$54 for the subsequent three year registrations only. The increase is required because occupational therapy assistants are now subject to discipline and moral character review by the Department, and the cost of these processes must be covered by fee revenue.

In addition, the proposed amendments to section 76.4(c) and 76.8 of the Commissioner's regulations require the preparation of a written supervision plan governing the supervision of holders of limited permits and occupational therapy assistants, respectively. This may impose some additional small cost to the professionals required to create and maintain these plans, consisting primarily of the time that the supervisor and occupational therapy assistant will spend in developing the supervision plan. The development of the plan should yield a more effective working relationship and use of the skills of the occupational therapy assistant.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological require-

ments on regulated parties, including those that are classified as small businesses, and the regulation is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The proposed fee structure was determined to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. The written supervision plan was determined to be a method whereby the professionals involved could fashion supervision that is flexible and meets the needs of those involved with minimal adverse impact. This was determined to be a better alternative than imposing more detailed supervision requirements.

7. SMALL BUSINESS PARTICIPATION:

The New York State Occupational Therapy Association (NYSOTA), which represents both occupational therapists and occupational therapy assistants, and includes members who have experience in a small business environment, was consulted and provided input into the development of the proposed regulation. In addition, individual professionals provided the State Education Department with comments, and meetings were held in Albany and Middletown to discuss concerns over the proposed amendments.

(b) Local Governments:

The purpose of the proposed amendment is to implement Chapter 460 of the Laws of 2011 which made a variety of changes to the law affecting the practice of occupational therapy. As of July 2011, there were 10,712 occupational therapists and 4,032 occupational therapy assistants licensed in New York State. Reliable data on the number of these individuals employed by local government in New York State is not available, but a national workforce study conducted by the American Occupational Therapy Association in 2010 reflected that nationally, 26.5% of these professionals work in government, which would include both state and local government. This study also found that 21.7% work in schools. The flexibility analysis for local government entities employing these individuals would be the same as that set forth above for small businesses.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendments apply to all occupational therapy assistants and holders of limited permits in occupational therapy, and those occupational therapists and physicians who supervise these professionals who live in the 44 rural counties with less than 200,000 inhabitants 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:

The proposed amendments to sections 76.4(c) and 76.8 of the Commissioner's regulations establish standards for supervision for holders of limited permits and occupational therapy assistants, respectively. The establishment of such standards is mandated by statute. These amendments also require the preparation of a written supervision plan governing the supervision of holders of limited permits and occupational therapy assistants, respectively.

3. COSTS:

The proposed section 76.7(g) of the Commissioner's regulations establishes a fee for an initial license and for each triennial registration for an occupational therapy assistant. The establishment of this fee is mandated by statute. The proposed regulation would set this fee at one half that amount imposed on occupational therapists, which would yield a fee of \$147 for initial licensure and three year registration, and a fee of \$90 for the subsequent three year re-registrations. Currently, these fees are set at \$103 for initial licensure and three year registration, and at \$54 for the subsequent three year registrations only. The increase is required because occupational therapists are now subject to discipline and moral character review by the Department, and the cost of these processes must be covered by fee revenue.

In addition, the proposed amendments to section 76.4(c) and 76.8 of the Commissioner's regulations require the preparation of a written supervision plan governing the supervision of holders of limited permits and occupational therapy assistants, respectively. This may impose some additional small cost to the professionals required to create and maintain these plans, consisting primarily of the time that the supervisor and occupational therapy assistant will spend in developing the supervision plan. The development of the plan should yield a more effective working relationship and use of the skills of the occupational therapy assistant.

4. MINIMIZING ADVERSE IMPACT:

The proposed fee structure was determined to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. The written supervision plan was determined to be a method whereby the professionals involved could fashion supervision that is flexible and meets the needs of those involved with minimal adverse impact. This was determined to be a better alternative than imposing more detailed supervision requirements.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed amendments from the New York State Occupational Therapy Association (NYSOTA), and Department staff attended a meeting of the Capital District NYSOTA (which includes Schenectady, Rensselaer, Columbia and Greene counties) in Albany and the Hudson-Taconic NYSOTA (which includes Ulster, Sullivan, Dutchess and Delaware counties) in Middletown to discuss these proposed amendments.

Job Impact Statement

1. NATURE OF IMPACT:

The proposed regulation is required to implement changes to the existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011. This law authorized the Department to establish, in regulation, several significant components of the practice, including the requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of holders of limited permits, occupational therapy assistants, and occupational therapy assistant students.

Existing regulations state that the direct supervision of occupational therapy assistants shall include meeting with and observing the occupational therapy assistant on a regular basis to review the implementation of treatment plans and to foster professional development. There is no provision in existing regulation governing the supervision of holders of limited permits in occupational therapy.

The proposed regulations contain more detailed provisions for the supervision of occupational therapy assistants and holders of limited permits. These include a requirement for a written supervision plan and requirements for the documentation of formal supervisory contacts. Entities that employ occupational therapy assistants and holders of limited permits might believe that the additional cost associated with compliance will result in the loss of jobs or job opportunities.

In addition, a new limit on the number of individuals who can be supervised by a single individual is proposed. The supervisor may supervise no more than five individuals, or its full time equivalent, provided that the total number of individuals being supervised by a single occupational therapist or licensed physician cannot exceed ten.

2. CATEGORIES AND NUMBERS AFFECTED:

As of July 2011, there were 4,032 certified occupational therapy assistants currently registered with the Department, and 10,712 licensed occupational therapists so registered. In 2011, approximately 155 limited permits in occupational therapy were issued.

3. REGIONS OF ADVERSE IMPACT:

There is no region of the state that would experience a disproportionate adverse impact on jobs or employment opportunities.

4. MINIMIZING ADVERSE IMPACT:

As this proposed regulation was being drafted, several provisions were developed to minimize adverse impact. A provision was added to the requirement that supervision be limited to five professional to allow the full time equivalent of these five individuals. This would allow for the supervision of up to ten individuals on a part-time basis. The requirement that supervisory contacts needed to be documented was limited to formal supervisory contacts as identified in the supervision plan. A requirement that the supervisor devote a fixed percentage of time to supervision was considered and rejected. The written supervision plan was determined to be a method whereby the professionals involved could fashion supervision that is flexible and meets the needs of those involved with minimal adverse impact. This was determined to be a better alternative than imposing more specific and detailed supervision requirements.

5. SELF EMPLOYMENT OPPORTUNITIES:

Not applicable.

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

Concussion Management and Awareness

I.D. No. EDU-11-12-00011-P

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

Proposed Action: Addition of section 136.5; and amendment of section 135.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), (42) and 2854(1)(b); and L. 2011, ch. 496

Subject: Concussion management and awareness.

Purpose: To establish criteria relating to mild traumatic brain injury sustained by pupils during instruction or school activities.

Text of proposed rule: 1. Section 136.5 of the Regulations of the Com-

missioner of Education is added, effective June 13, 2012, to read as follows:

§ 136.5 Concussion Management and Awareness.

(a) Applicability.

(1) The provisions of this section relate to pupils who have sustained, or are believed to have sustained, mild traumatic brain injuries (also referred to as a "concussion") while receiving instruction or engaging in any school sponsored or related activity.

(2) The provisions of this section:

(i) shall apply to each school district and charter school;

(ii) may be implemented by nonpublic schools if they so authorize;

and

(iii) shall be deemed to be the minimum standards that must be complied with; provided that nothing in this section shall prohibit any public school or nonpublic school from adopting and implementing more stringent standards.

(b) Course of instruction.

(1) Each school coach, physical education teacher, nurse and athletic trainer, who works with and/or provides instruction to pupils engaged in school sponsored athletic activities, shall complete, on a biennial basis, a course of instruction relating to recognizing the symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for pupils who suffer mild traumatic brain injuries.

(2) Components of such course shall include, but not be limited to:

(i) the definition of a mild traumatic brain injury;

(ii) signs and symptoms of mild traumatic brain injuries;

(iii) how mild traumatic brain injuries may occur;

(iv) practices regarding prevention; and

(v) guidelines for the return to school and school activities of a pupil who has suffered a mild traumatic brain injury, regardless of whether such injury occurred outside of school.

(3) Such course shall be completed by means of instruction approved by the Department including, but not limited, to courses provided online and by teleconference.

(c) Information.

(1) The Department shall post on its internet website information relating to mild traumatic brain injuries including, but not limited to:

(i) the definition of a mild traumatic brain injury;

(ii) signs and symptoms of mild traumatic brain injuries;

(iii) how mild traumatic brain injuries may occur; and

(iv) department guidelines for return to school and school activities of a pupil who has suffered a mild traumatic brain injury, regardless of whether such injury occurred outside of school.

(2) A school shall include the information required under paragraph

(1) of this subdivision in any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports.

(3) A school shall include the information required under paragraph

(1) of this subdivision, or reference how to obtain such information from the websites of the State Education Department and the Department of Health, on the school's internet website if one exists.

(d) Removal from athletic activities.

(1) A school shall require the immediate removal from athletic activities of any pupil who has sustained, or who is believed to have sustained, a mild traumatic brain injury. In the event that there is any doubt as to whether a pupil has sustained a concussion, it shall be presumed that the pupil has been so injured until proven otherwise.

(2) No such pupil shall resume athletic activity until the pupil has been symptom free for not less than twenty-four hours, and has been evaluated by and received written and signed authorization from a licensed physician; and for extra class athletic activities, has received clearance from the medical director to participate in such activity.

(i) Such authorization shall be kept on file in the pupil's permanent health record.

(ii) The school shall follow any directives issued by the pupil's treating physician with regard to limitations and restrictions on school attendance and activities for the pupil.

(e) Concussion Management Team

(1) Each school or school district, in its discretion, may establish a concussion management team.

(2) The concussion management team may be composed of:

(i) the athletic director;

(ii) a school nurse;

(iii) the school physician;

(iv) a coach of an interscholastic team;

(v) an athletic trainer; or

(vi) such other appropriate personnel as designated by the school or school district.

(3) The concussion management team shall oversee the implementation of subdivision (42) of Education Law section 305 and the provisions

of this section as it pertains to their associated school and may establish and implement a program which provides information on mild traumatic brain injuries to parents and persons in parental relation throughout each school year.

2. Sub-item (2) of item (c) of subparagraph (i) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective June 13, 2012, to read as follows:

(2) Teachers with coaching qualifications and experience certified only in areas other than physical education may coach any sport in any school, provided they have completed:

(i) the first aid requirement set forth in section 135.5 of this Part; [and]

(ii) an approved pre-service or in-service education program for coaches or will complete such a program within five years of appointment. Such program shall include an approved course in philosophy, principles and organization of athletics, which shall be completed within two years after initial appointment as a coach, and approved courses in health sciences applied to coaching, and theory and techniques of coaching that is sport specific, which shall be completed within five years after initial appointment as a coach. Such approved programs for coaches will consist of one of the following (credits and hours vary depending upon the contact and endurance involved in the sport): a department-approved college program of from two to eight credits; or a department approved in-service education program, conducted by schools, colleges, professional organizations or other recognized groups or agencies, from 30 to 120 clock hours; or an equivalent experience which is approved by the Commissioner of Education. Upon application to the Commissioner of Education in a format prescribed by the commissioner and setting forth the reasons for which an extension is necessary, the period in which to complete such training may be extended to no more than seven years after such appointment; provided that coaches who have a lapse in service due to maternity leave, military leave, or other extenuating circumstances may apply to the commissioner for an additional extension of no more than two years to complete course work; and

(iii) on a biennial basis, a course of instruction relating to mild traumatic brain injuries pursuant to section 136.5(b) of this Title.

3. Sub-item (3) of item (c) of subparagraph (i) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective June 13, 2012, to read as follows:

(3) Temporary coaching license. Except as provided in subclause (4) of this clause and notwithstanding the provisions of section 80-5.10 of this Title, other persons with coaching qualifications and experience satisfactory to the board of education may be appointed as temporary coaches of interschool sport teams whether in a paid or non-paid (volunteer) status, when certified teachers with coaching qualifications and experience are not available, upon the issuance by the commissioner of a temporary coaching license. A temporary coaching license, valid for one year, will be issued under the following conditions:

(i) . . .

(ii) . . .

(iii) candidates for the first renewal of a temporary license shall have completed or be enrolled in an approved course in philosophy, principles and organization of athletics; [and]

(iv) candidates for any subsequent renewal of a temporary license shall have completed an approved pre-service or in-service education program for coaches which shall include an approved course in philosophy, principles and organization of athletics, which shall be completed within two years after initial appointment as a coach, and approved courses in health sciences applied to coaching, and theory and techniques of coaching that is sport specific, which shall be completed within five years after initial appointment as a coach. Such approved programs for coaches shall consist of one of the following (credits and hours vary depending upon the contact and endurance involved in the sport): a department-approved college program of from two to eight credits; or a department approved in-service education program, conducted by schools, colleges, professional organizations or other recognized groups or agencies, from 30 to 120 clock hours; or an equivalent experience which is approved by the Commissioner of Education. Upon application in a format prescribed by the Commissioner of Education and setting forth the reasons for which an extension is necessary, the period in which to complete such training may be extended to no more than seven years after such appointment; provided that coaches who have a lapse in service due to maternity leave, military leave, or other extenuating circumstances may apply to the commissioner for an additional extension of no more than two years to complete course work; and

(v) on a biennial basis, candidates shall have completed a course of instruction relating to mild traumatic brain injuries pursuant to section 136.5(b) of this Title.

4. Sub-item (A) of item (i) of subclause (4) of clause (c) of subparagraph (i) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations

of the Commissioner of Education is amended, effective June 13, 2012, to read as follows:

(A) the candidate has completed the requirements set forth in items (3)(ii), (iii) [and], (iv) and (v) of this clause; and

5. Item (xi) of subclause (2) of clause (d) of subparagraph (i) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective June 13, 2012, to read as follows:

(xi) professional development and responsibilities, including:

(A) . . .

(B) . . .

(C) educating the community of health care professionals as to the role of the certified athletic trainer; [and]

(D) informing parents, coaches and athletes as to the importance of quality health care for the physically active; and

(E) on a biennial basis, completing a course of instruction relating to mild traumatic brain injuries pursuant to section 136.5(b) of this Title.

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: NYSEDPI2@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 207 empowers the Regents and Commissioner of Education to adopt rules and regulations to carry out State education laws and functions and duties conferred on the Education Department by law.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties as are charged by the Regents.

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 305(42), as added by Chapter 496 of the Laws of 2011, authorizes the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate and review as necessary rules and regulations relating to pupils who suffer mild traumatic brain injuries, also referred to as concussions, while receiving instruction or engaging in any school sponsored or related activity.

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.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2011 which requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate regulations with regard to pupils who sustain, or are believed to have sustained, mild traumatic brain injuries, also referred to as a "concussion," while receiving instruction or engaging in any school sponsored or related activity.

3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2011 by establishing standards for the required instruction of key school personnel in the signs and symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for pupils suffering such injuries. The needs and benefits of the proposed rule rest upon the knowledge that inadequate identification and management of a mild traumatic brain injury may result in long term disability or death.

4. COSTS:

a. Costs to State government: None.

b. Costs to local governments: None.

c. Costs to private regulated parties: None.

d. Costs to the regulating agency for implementation and continuing compliance: None.

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any additional costs on the State, local governments or the State Education Department beyond those imposed by the statute. The proposed rule does not apply to nonpublic schools unless they authorize implementation of the rule. Further, the Department anticipates approving a course of instruction relating to recognizing the symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for such pupils, which will have no costs to school districts and charter schools.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by the statute.

Consistent with the statute, the proposed rule:

(1) requires each school coach, physical education teacher, nurse and athletic trainer, who works with and/or provides instruction to pupils engaged in school sponsored athletic activities, to complete, on a biennial basis, a course of instruction relating to recognizing the symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for pupils who suffer such injuries. The proposed rule establishes standards for the required instruction including how such injuries occur, practices regarding prevention, and guidelines for the return to school and to school activities of a pupil who has suffered a mild traumatic brain injury, regardless of whether such injury occurred outside of school;

(2) requires the State Education Department to post on its internet website information regarding mild traumatic brain injuries, and requires schools to place such information on their websites, or reference on their websites how to obtain such information from the websites of the State Education Department and the Department of Health. In addition, schools are required to include such information on any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports;

(3) requires the immediate removal from athletic activities of any pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, and provides that such pupil may not resume athletic activity until he/she has been symptom free for not less than 24 hours, and has been evaluated by and received written and signed authorization from a licensed physician. The proposed rule requires that such authorization shall be kept on file in the pupil's permanent health record, and that the school follow any directives issued by the pupil's treating physician with regard to limitations and restrictions on school attendance and activities for the pupil; and

(4) provides standards for schools that decide to establish Concussion Management Teams to oversee and implement the statutory and regulatory provisions relating to concussion management and awareness.

6. PAPERWORK:

The proposed amendment does not impose any additional reporting or paperwork requirements beyond those imposed by Chapter 496 of the Laws of 2011.

Consistent with the statute, the proposed rule requires schools to:

(1) include in any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports, information relating to mild traumatic brain injury including the definition of mild traumatic brain injury, signs and symptoms of mild traumatic brain injuries, how such injuries may occur, and guidelines for return to school and school activities of a pupil who has suffered such injury;

(2) include such information, or reference how to obtain such information from the websites of the State Education Department and the Department of Health, on the school's internet website, if one exists; and

(3) maintain in the pupil's permanent health records, the written, signed authorization of a licensed physician permitting a pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, to resume athletic activity.

7. DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2011 of the State of New York.

8. ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed amendment is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any additional compliance requirements or costs beyond those imposed by the statute.

9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2011 which requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate regulations with regard to pupils in public schools who sustain, or are believed to have sustained, mild traumatic brain injuries while receiving instruction or engaging in any school sponsored or related activity.

The proposed rule does not impose any adverse economic impact, reporting, recordkeeping 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 affirmative steps are 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:

The proposed amendment applies to all school districts and charter schools in the State. At present, there are 695 school districts (including New York City) and approximately 190 charter schools.

1. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any compliance requirements upon local governments beyond those imposed by the statute.

Consistent with the statute, the proposed rule:

(1) requires each school coach, physical education teacher, nurse and athletic trainer, who works with and/or provides instruction to pupils engaged in school sponsored athletic activities, to complete, on a biennial basis, a course of instruction relating to recognizing the symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for pupils who suffer such injuries. The proposed rule establishes standards for the required instruction including how such injuries occur, practices regarding prevention, and guidelines for the return to school and to school activities of a pupil who has suffered a mild traumatic brain injury, regardless of whether such injury occurred outside of school;

(2) requires the State Education Department to post on its internet website information regarding mild traumatic brain injuries, and requires schools to place such information on their websites, or reference on their websites how to obtain such information from the websites of the State Education Department and the Department of Health. In addition, schools are required to include such information on any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports;

(3) requires the immediate removal from athletic activities of any pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, and provides that such pupil may not resume athletic activity until he/she has been symptom free for not less than 24 hours, and has been evaluated by and received written and signed authorization from a licensed physician. The proposed rule requires that such authorization shall be kept on file in the pupil's permanent health record, and that the school follow any directives issued by the pupil's treating physician with regard to limitations and restrictions on school attendance and activities for the pupil; and

(4) provides standards for schools that decide to establish Concussion Management Teams to oversee and implement the statutory and regulatory provisions relating to concussion management and awareness.

The proposed amendment does not impose any additional reporting or paperwork requirements beyond those imposed by Chapter 496 of the Laws of 2011.

Consistent with the statute, the proposed rule requires schools to:

(1) include in any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports, information relating to mild traumatic brain injury including the definition of mild traumatic brain injury, signs and symptoms of mild traumatic brain injuries, how such injuries may occur, and guidelines for return to school and school activities of a pupil who has suffered such injury;

(2) include such information, or reference how to obtain such information from the websites of the State Education Department and the Department of Health, on the school's internet website, if one exists; and

(3) maintain in the pupil's permanent health records, the written, signed authorization of a licensed physician permitting a pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, to resume athletic activity.

2. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on local governments.

3. COMPLIANCE COSTS:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any additional costs on local governments beyond those imposed by the statute.

4. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

5. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012, and will not impose any additional compliance requirements or costs on local governments beyond those imposed by the statute. Because these statutory requirements specifically apply to public schools it is not possible to exempt them from the proposed rule's requirements or impose a lesser standard. The proposed rule has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on public schools. Where possible, the proposed rule provides for local flexibility in meeting statutory requirements.

6. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule have been provided to the State Department of Health, the chief school administrators of the Big 5 city school districts, and to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Additionally, the Department has worked extensively with stakeholders on guidance documents which will provide assistance in the implementation of these regulations.

Rural Area Flexibility Analysis**1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

The proposed amendment will apply to all school districts, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less. The proposed rule also applies to charter schools. At present, there is one charter school in a rural area. The proposed rule does not apply to nonpublic schools unless they authorize implementation of the rule.

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

The proposed amendment is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any reporting, recordkeeping or other compliance requirements upon local governments beyond those imposed by the statute.

Consistent with the statute, the proposed rule:

(1) requires each school coach, physical education teacher, nurse and athletic trainer, who works with and/or provides instruction to pupils engaged in school sponsored athletic activities, to complete, on a biennial basis, a course of instruction relating to recognizing the symptoms of mild traumatic brain injuries and monitoring and seeking proper medical treatment for pupils who suffer such injuries. The proposed rule establishes standards for the required instruction including how such injuries occur, practices regarding prevention, and guidelines for the return to school and to school activities of a pupil who has suffered a mild traumatic brain injury, regardless of whether such injury occurred outside of school;

(2) requires the State Education Department to post on its internet website information regarding mild traumatic brain injuries, and requires schools to place such information on their websites, or reference on their websites how to obtain such information from the websites of the State Education Department and the Department of Health. In addition, schools are required to include such information on any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports;

(3) requires the immediate removal from athletic activities of any pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, and provides that such pupil may not resume athletic activity until he/she has been symptom free for not less than 24 hours, and has been evaluated by and received written and signed authorization from a licensed physician. The proposed rule requires that such authorization shall be kept on file in the pupil's permanent health record, and that the school follow any directives issued by the pupil's treating physician with regard to limitations and restrictions on school attendance and activities for the pupil; and

(4) provides standards for schools that decide to establish Concussion Management Teams to oversee and implement the statutory and regulatory provisions relating to concussion management and awareness.

The proposed amendment does not impose any additional professional services requirements on local governments.

The proposed amendment does not impose any additional reporting or paperwork requirements beyond those imposed by Chapter 496 of the Laws of 2011.

Consistent with the statute, the proposed rule requires schools to:

(1) include in any permission form or consent form or similar document that may be required from a parent or person in parental relation for a pupil's participation in interscholastic sports, information relating to mild traumatic brain injury including the definition of mild traumatic brain injury, signs and symptoms of mild traumatic brain injuries, how such injuries may occur, and guidelines for return to school and school activities of a pupil who has suffered such injury;

(2) include such information, or reference how to obtain such information from the websites of the State Education Department and the Department of Health, on the school's internet website, if one exists; and

(3) maintain in the pupil's permanent health records, the written, signed authorization of a licensed physician permitting a pupil who has sustained, or is believed to have sustained, a mild traumatic brain injury, to resume athletic activity.

3. COSTS:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012 and does not impose any additional costs on local governments beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2012, and will not impose any additional compliance requirements or costs on rural areas beyond those imposed by the statute. The proposed rule has been carefully drafted to meet statutory requirements while minimizing the impact on public schools. Where possible, the proposed rule provides for local flexibility in meeting statutory requirements. The statute which the proposed rule implements applies to all public schools throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREA PARTICIPATION:

Copies of the proposed amendment were provided to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas. Additionally, the Department has worked extensively with stakeholders on guidance documents which will provide assistance in the implementation of these regulations.

Job Impact Statement

The proposed rule is necessary to implement and conform the Commissioner's regulations to Chapter 496 of the Laws of 2011 which requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate regulations with regard to pupils in public schools who sustain, or are believed to have sustained, mild traumatic brain injuries while receiving instruction or engaging in any school sponsored or related activity.

The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Sanitary Condition of Shellfish Lands

I.D. No. ENV-48-11-00001-A

Filing No. 170

Filing Date: 2012-02-28

Effective Date: 2012-03-14

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

Action taken: Amendment of Part 41 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary Condition of Shellfish Lands.

Purpose: To classify certain shellfish lands in Nicoll Bay and Cutchogue Harbor as uncertified for the harvest of shellfish.

Text or summary was published in the November 30, 2011 issue of the Register, I.D. No. ENV-48-11-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: Gina Fanelli, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0482, email: gmfanell@gw.dec.state.ny.us

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

Assessment of Public Comment

The agency received no public comment.

Department of Financial Services

NOTICE OF ADOPTION

Variable Life Insurance

I.D. No. DFS-52-11-00008-A

Filing No. 168

Filing Date: 2012-02-27

Effective Date: 2012-03-14

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

Action taken: Amendment of Part 54 (Regulation 77) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 301 and 302; and Insurance Law, sections 301, 3201 and 4240

Subject: Variable life insurance.

Purpose: To amend 11 NYCRR Part 54 to authorize and provide exceptional treatment for private placement variable life insurance.

Text or summary was published in the December 28, 2011 issue of the Register, I.D. No. DFS-52-11-00008-P.

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

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

Assessment of Public Comment

The purpose of the proposed amendment is to extend the timeframes for insurers to make payment of variable death benefits, cash surrender values, policy loans, partial withdrawals or partial surrenders under private placement individual variable life insurance policies.

The proposed amendment includes a requirement for a prominent disclosure statement to be set forth in an application for an individual private placement variable life insurance policy. The disclosure notifies the applicant that due to the illiquid nature of the investment options, the payment of the death benefit, cash surrender value, policy loans, partial withdrawals or partial surrenders, as applicable, may be delayed. It also advises the applicant to refer to the policy for further details on any delay of payments.

The Department of Financial Services received one comment during the public comment period. An insurer commented that to include the disclosure language in applications for private placement variable life insurance policies where no illiquid investment options are offered would create confusion.

The Department considered the insurer's suggestion but determined that it is not necessary to make any changes to the proposed rule for several reasons. A private placement individual variable life insurance policy typically offers illiquid investment options. In the event that an insurer submits a life insurance application for use with a private placement variable life insurance policy that does not offer illiquid investment options, the Department would permit the insurer to add clarifying language in conjunction with the required disclosure statement. Finally, no other insurer has raised a similar issue as a result of the Department's outreach to the industry prior to beginning the SAPA process or during the SAPA public comment period.

Department of Health

EMERGENCY RULE MAKING

Medicaid Managed Care Programs

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

Filing No. 164

Filing Date: 2012-02-24

Effective Date: 2012-02-24

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, 360-11 and sections 300.12, 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 Medicaid 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 April 23, 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 care 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.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

NOTICE OF ADOPTION

October 2011 Ambulatory Patient Groups (APGs) Payment Methodology

I.D. No. HLT-50-11-00015-A

Filing No. 172

Filing Date: 2012-02-28

Effective Date: 2012-03-14

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

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

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

Subject: October 2011 Ambulatory Patient Groups (APGs) Payment Methodology.

Purpose: To refine the APG payment methodology.

Text or summary was published in the December 14, 2011 issue of the Register, I.D. No. HLT-50-11-00015-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

NOTICE OF ADOPTION

Clinic Treatment Programs

I.D. No. OMH-46-11-00006-A

Filing No. 169

Filing Date: 2012-02-27

Effective Date: 2012-03-14

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

Action taken: Amendment of Part 599 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 43.01 and 43.02; Social Services Law, art. 33, sections 364, 364-a and 365-m

Subject: Clinic Treatment Programs.

Purpose: Amend and clarify existing regulation and enable providers to seek reimbursement for certain services using State-only dollars.

Substance of final rule: This final adoption amends Part 599 of Title 14 NYCRR which governs the licensing, operation, and Medicaid fee-for-service funding of mental health clinics. 14 NYCRR Part 599 was originally adopted as final on October 1, 2010 and resulted in major changes in the delivery and financing of mental health clinic services. When the regulation was promulgated, the Office of Mental Health understood that there would be issues that might require clarification once providers and recipients of services had experience in operating under the new regulation. This rule making was designed to address those issues and add relatively minor program modifications that have occurred since the initial regulation was promulgated. Non-substantive changes were made to the final rule to further clarify the requirements found in 14 NYCRR Part 599. A summary of all changes, including those non-substantive changes that were made since publication of the Notice of Proposed Rule Making, are found in the narrative below.

- Clarification of the distinction between “injectable psychotropic medication administration” and “injectable psychotropic medication administration with monitoring and education” and the provisions regarding reimbursement for these services;

- Clarification of the definition of “health monitoring”, “hospital-based clinic”, “modifiers”, and “psychiatric assessment”, and inclusion of definitions for “Behavioral Health Organization” and “concurrent review”. The final version of this regulation also expands the definitions of “diagnostic and treatment center”, “hospital-based clinic” and “health monitoring”. The term “smoking status” has been changed to “smoking cessation” for both adults and children, and the definition of “health monitoring” now includes “substance use” as an indicator for both adults and children - see new Subdivisions (r), (w) and (ab) of Section 599.4;

- Repeal of provisions requiring a treating clinician to determine the need for continued clinic treatment beyond 40 visits for adults and children;

- Amendment of the provisions regarding screening of clinic treatment staff by the New York Statewide Central Register of Child Abuse and Maltreatment;

- Clarification of requirements regarding required signatures on treatment plans. The final version of the regulation further clarifies that, for recipients receiving services reimbursed by Medicaid on a fee-for-service basis, the signature of the physician is required on the treatment plan. For recipients receiving services that are not reimbursed by Medicaid on a fee-for-service basis, the signature of the physician, licensed psychologist, LCSW, or other licensed individual within his/her scope of practice involved in the treatment plan is required - see Section 599.10(j)(4);

- Addition of provisions regarding reimbursement modifications for visits in excess of 30 and 50 respectively (excluding crisis visits) for fiscal years commencing on or after April 1, 2011. Note - the final version of the regulation lists other services that are excluded from the 30/50 thresholds. These services, in addition to crisis visits, include off-site visits, complex care management and any services that are counted as health services - see Section 599.13(e);

- Addition of “State-operated mental health clinic” to the peer group listing;

- Specification of time limits for services, including correction of an inaccurate time limit in existing regulation related to psychotropic medication treatment;

- Clarification of allowable Medicaid claims for services provided on the same day for an individual;

- Inclusion of requirements regarding duration of school-based services;

- Clarification of billing using the “physician modifier”;

- Elimination of clause (e) in the existing regulation found at 599.14(d)(2)(ii) regarding billing for a family therapy/collateral procedure. This clause is unnecessary as these provisions are found in the new 599.14(d)(6)(iii);

- Amendment of the “Modifier Chart” in Section 599.14 to include only services provided on-site. The final version of the regulation removes the row in the Modifier Chart that references outreach and off-site visits - see Section 599.14(e). In addition, the service, “Injectable Psychotropic Medication Administration”, was clarified to include the “After Hours” modifier when the medication is provided at no cost to the clinic. This is consistent with guidance;

- Inclusion of provisions regarding the Office’s expectations concerning clinic programs cooperating with Behavioral Health Organizations;

- Existing regulations specify that Medicaid reimbursement of outreach services and off-site services is contingent upon Federal approval. The Office has recently been advised that Federal approval will not be granted for outreach and off-site services, and has, therefore, removed language stating that Federal approval is pending - see Sections 599.3(d) and 599.14(d). In recognition of the fact that clinics continue to provide off-site services and have not been able to seek reimbursement for them, the Office will allow reimbursement for off-site Crisis Intervention-Brief Services for all Medicaid recipients, and for certain off-site services for children up to age 19 on a Federally-non-participating basis. This provision is retroactive to October 1, 2010, the effective date of 14 NYCRR Part 599. References to outreach services have been eliminated in this final regulation - see Sections 599.1(e); 599.3(d); 599.4(aj); 599.8(b)(1); 599.9(b)(18); 599.13(m)(3); 599.14(d) and (e).

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 599.1(e), 599.3(d), 599.4, 599.8(b)(1), 599.9(b)(18), 599.10(j)(4), 599.13(e), (m) and 599.14(d), (e).

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

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the changes to the final version of the rule making are non-substantive. The changes serve to provide clarification of requirements within the regulation and improve readability and comprehension.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes to the final version of the rule making are non-substantive. The changes serve to provide clarification of requirements within the regulation and improve readability and comprehension. The amendments to 14 NYCRR Part 599 will not have an adverse economic impact upon small businesses or local governments.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not submitted with this notice because the changes to the final version of the rulemaking are non-substantive. The changes serve to provide clarification of requirements within the regulation and improve readability and comprehension. The amendments to 14 NYCRR Part 599 will not impose any adverse economic impact on rural areas.

Revised Job Impact Statement

A revised Job Impact Statement is not submitted with this notice because the changes to the final version of the rulemaking are non-substantive. The changes serve to provide clarification of requirements within the regulation and improve readability and comprehension. There will be no

adverse impact on jobs and employment opportunities as a result of these changes.

Assessment of Public Comment

The agency received two letters of comment regarding the amendments to 14 NYCRR Part 599, “Clinic Treatment Programs”.

Issue: The writer requested clarification of the language permitting Physician Assistants “with specialized training approved by the Office” to participate in the provision of clinic services, and suggested language permitting such participation of a Physician Assistant working with a supervising physician.

Response: The Office of Mental Health (“Office”) has not amended provisions regarding the role of Physician Assistants in this rule making. As the commenter noted, 14 NYCRR Part 599 allows for Physician Assistants to participate “with specialized training approved by the Office.” The regulations also state that the Office may approve other qualified staff to provide services, as appropriate. It is believed that the current language adequately and accurately describes the regulatory intent of the agency.

Issue: The writer expressed concern regarding the threshold provisions in the rule making which reduce payments to providers by 25 percent for visits in excess of 30 (excluding crisis visits, off-site visits, complex care management, and any services that are counted as health services) provided during a state fiscal year to any individual who is 21 years or older on the first day of the fiscal year, and 50 percent for any visit in excess of 50 (excluding crisis visits, off-site visits, complex care management, and any services that are counted as health services) provided during such fiscal year to any recipient, for fiscal years commencing on or after April 1, 2011. The commenter felt that the thresholds would ultimately limit visits and have a negative impact on patients.

Response: The payment reduction was included in the 2011-2012 enacted State budget as part of a proposal put forth by Governor Cuomo’s Medicaid Redesign Team and adopted by the Legislature. The commenter states that limiting visits in such a drastic way is likely to result in a discontinuation of care. This appears to be a mistaken interpretation of the regulation to prohibit the provision of services-or reimbursement for services-above the thresholds. Providers of service may continue to see patients beyond the stated 30/50 visits, but will receive a reduced rate for these services.

The elimination of thresholds, as preferred by the commenter, or the modification of the thresholds along the lines suggested by the commenter as an alternative, would necessitate the adoption of reductions in the rates paid to providers through other measures, which the Office believes would be less conducive to continuity and quality of care.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Provisions for Medical Director Coverage in Article 16 Clinics

I.D. No. PDD-43-11-00016-A

Filing No. 171

Filing Date: 2012-02-28

Effective Date: 2012-03-14

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

Action taken: Amendment of section 679.3 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Provisions for medical director coverage in Article 16 clinics.

Purpose: To scale medical director coverage to the size of the clinic.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. PDD-43-11-00016-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

OPWDD received three comments from three not-for-profit providers in its system.

Comment: A provider submitted a comment in support of the proposed rule which reduces the minimum medical director coverage required and scales coverage to the size of the clinic. The provider indicated that the current requirement for 34 FTE “far exceeded” the provider’s needs and that the proposed rule “allows sufficient time” for its medical director to provide the proper clinic services to individuals. The provider also added that “while the medical director’s insight has proven valuable in making clinical decisions” for individuals in its clinics, “oversight beyond a base level seems excessive and unnecessary.” The provider stated, “Best practice would dictate that the individual’s primary medical provider be given the task of addressing any needs that lie beyond the base level.”

Response: OPWDD appreciates the provider’s support for the regulations.

Comment: A provider commended OPWDD “for providing greater flexibility to providers in how they staff their Article 16 Clinics.” The provider agrees with OPWDD’s approach to scale coverage to the size of the clinic and recognized that this is a “regulatory modernization that makes sense.” The provider requested that OPWDD consider calculating the medical director full time equivalent by the number of “patient” visits, rather than the number of assessments conducted. The provider expressed that this might be easier to monitor and that it “better comports with how productivity and staffing metrics are measured in health care.”

Response: In developing the regulation, OPWDD evaluated various indicators which could be used to correlate with the workload of the medical director. Among the measures that it considered was the use of total number of patient visits. However, OPWDD selected an indicator which approximates the number of individuals served (number of annual physician assessments), rather than the number of patient visits. OPWDD considers that the oversight of the clinic medical director is more closely correlated with the number of patients than with the number of patient visits. This is because of the wide variation in the number of services received by individuals in a given year. Some individual receive a large number of similar services (e.g. physical therapy twice a week) and others receive a small number (e.g. routine dentistry a few times a year). OPWDD considers that the oversight provided by the medical director is generally related to a review of each individual’s treatment plan rather than related to a review of each specific instance of service delivery. The level of oversight provided by the medical director may be modestly greater for an individual receiving more patient visits, but the amount of time needed to provide this oversight is not in proportion to the difference in the number of services. Because of the variation in the average number of patient visits per patient per year between clinics, the use of the suggested indicator of patient visits might result in the minimum being too high for some clinics and too low for others. OPWDD is therefore finalizing the regulation using the indicator used in the proposed regulation (annual physician assessments).

Comment: A provider commented that the proposed regulation would be an improvement over existing regulations. However, the provider asserts that the best solution would be to mirror the regulations in place for Article 28 clinics. The Article 28 regulations do not prescribe the amount of time necessary for the medical director to be employed by the clinic and therefore, this ensures that there is clinical oversight while allowing the clinics to manage a medical director’s time based on the needs of the patients.

Response: OPWDD considers that it is important to specify the minimum requirements for adequate medical director coverage for

clinics to make sure that the necessary oversight is provided and to safeguard the quality of services. OPWDD has therefore historically included such minimum requirements in its regulations for Article 16 clinics and intends to continue to specify the minimum FTE for the clinic medical director. OPWDD considers that the proposed regulations continue to provide for adequate oversight by a medical director while “right-sizing” the minimum FTE and is therefore finalizing the regulations as proposed.

Request for clarification: OPWDD received a question about whether the proposed rule would change required duties of the clinic medical director.

Response: OPWDD notes that the new regulations only changes requirements for medical director coverage. The new regulations do not add any new requirements or change any requirements pertaining to the duties of the clinic medical director.

Public Service Commission

NOTICE OF ADOPTION

Petition of the Village of Briarcliff Manor as it Complies with the Order Authorizing Transfer of Assets

I.D. No. PSC-28-11-00009-A

Filing Date: 2012-02-24

Effective Date: 2012-02-24

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

Action taken: On 2/16/12, the PSC adopted an order approving the petition of the Village of Briarcliff Manor as it complies with the Order Authorizing Transfer of Assets issued February 9, 2001 and confirmed February 22, 2001 in Case 00-W-0231.

Statutory authority: Public Service Law, section 89(h)

Subject: Petition of the Village of Briarcliff Manor as it complies with the Order Authorizing Transfer of Assets.

Purpose: To approve the petition of the Village of Briarcliff Manor as it complies with the Order Authorizing Transfer of Assets.

Substance of final rule: The Commission, on February 16, 2012 adopted an order approving the petition of the Village of Briarcliff Manor as it complies with the Order Authorizing Transfer of Assets issued February 9, 2001 and confirmed February 22, 2001 in Case 00-W-0231, for the transfer of a portion of United Water New Rochelle’s water system to the Village of Briarcliff Manor, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-W-0308SA1)

NOTICE OF ADOPTION

Denying the Petition for Accelerated Recovery of its Capital Costs Associated with Adding Gas Burning Capability

I.D. No. PSC-35-11-00009-A

Filing Date: 2012-02-22

Effective Date: 2012-02-22

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

Action taken: On 2/16/12, the PSC adopted an order denying Consolidated Edison Company of New York, Inc.’s petition for accelerated recovery of

its capital costs associated with adding gas burning capability at the 59th & 74th Street Stations.

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

Subject: Denying the petition for accelerated recovery of its capital costs associated with adding gas burning capability.

Purpose: To deny the petition for accelerated recovery of its capital costs associated with adding gas burning capability.

Substance of final rule: The Commission, on February 16, 2012 adopted an order denying Consolidated Edison Company of New York, Inc.'s petition for the accelerated recovery of its capital costs associated with adding gas burning capability at the 59th and 74th Street Stations through its monthly steam Fuel Adjustment Clause, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(09-S-0794SA4)

NOTICE OF ADOPTION

Waiver of Tariff Provisions and 16 NYCRR Parts 501 and 502

I.D. No. PSC-49-11-00004-A

Filing Date: 2012-02-22

Effective Date: 2012-02-22

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

Action taken: On 2/16/12, the PSC adopted an order approving the Joint Petition of Saratoga Water Services, Inc. and Columbia Malta 2539, LLC, for a waiver of existing tariff provisions of 16 NYCRR Parts 501 and 502 regarding main extensions.

Statutory authority: Public Service Law, sections 4(1), 20(1) and 89-b

Subject: Waiver of tariff provisions and 16 NYCRR Parts 501 and 502.

Purpose: To approve a waiver of tariff provisions and 16 NYCRR Parts 501 and 502.

Substance of final rule: The Commission, on February 16, 2012 adopted an order approving the Joint Petition of Saratoga Water Services, Inc. and Columbia Malta 2539, LLC, for a waiver of tariff provisions and the applicability of 16 NYCRR Parts 501 and 502 regarding main extensions, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-W-0108SA1)

NOTICE OF ADOPTION

Petition of NYSEG and Sheldon Energy LLC for the Transfer of the Ownership Interests in Electric Interconnection

I.D. No. PSC-52-11-00009-A

Filing Date: 2012-02-22

Effective Date: 2012-02-22

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

Action taken: On 2/16/12, the PSC adopted an order approving the petition of New York State Electric & Gas Corporation (NYSEG) and Sheldon Energy LLC for the transfer of the ownership interests in certain electric interconnection facilities.

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

Subject: Petition of NYSEG and Sheldon Energy LLC for the transfer of the ownership interests in electric interconnection.

Purpose: To approve petition of NYSEG and Sheldon Energy LLC for the transfer of the ownership interests in electric interconnection.

Substance of final rule: The Commission, on February 16, 2012 adopted an order approving the petition of New York State Electric & Gas Corporation (NYSEG) and Sheldon Energy LLC for the transfer of the ownership interests in certain electric interconnection facilities that tie Sheldon's High Wind Farm located in Wyoming County, New York to NYSEG's existing transmission system, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-E-0619SA1)

NOTICE OF ADOPTION

Petition of RHL and Dreyfus to Transfer Ownership Interests in Rensselaer Cogeneration LLC

I.D. No. PSC-52-11-00016-A

Filing Date: 2012-02-22

Effective Date: 2012-02-22

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

Action taken: On 2/16/12, the PSC adopted an order approving the petition of Rensselaer Holdings LLC (RHL) & Louis Dreyfus Highbridge Energy LLC (Dreyfus) to transfer from RHL to Dreyfus ownership interests in Rensselaer Cogeneration LLC, located in Rensselaer, NY.

Statutory authority: Public Service Law, sections 2(11), 5(1)(b) and 70

Subject: Petition of RHL and Dreyfus to transfer ownership interests in Rensselaer Cogeneration LLC.

Purpose: To approve petition of RHL and Dreyfus to transfer ownership interests in Rensselaer Cogeneration LLC.

Substance of final rule: The Commission, on February 16, 2012 adopted an order approving the petition of Rensselaer Holdings LLC (RHL) and Louis Dreyfus Highbridge Energy LLC (Dreyfus) to transfer from RHL to Dreyfus ownership interests in Rensselaer Cogeneration LLC and its 80 MW gas-fired combined cycle electric generating facility located in Rensselaer, New York, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-E-0663SA1)

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

Whether to Grant, Deny or Modify, in Whole or Part, Hegeman's Petition for a Waiver of Commission Policy and Con Edison Tariff

I.D. No. PSC-11-12-00002-P

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

Proposed Action: The Public Service Commission is considering whether

to grant, deny or modify, in whole or part, the petition of Hegeman Ave. Housing LP for a waiver to allow rent inclusion of electricity (master metering) at 39 Hegeman Avenue, Brooklyn, New York.

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

Subject: Whether to grant, deny or modify, in whole or part, Hegeman's petition for a waiver of Commission policy and Con Edison tariff.

Purpose: Whether to grant, deny or modify, in whole or part, Hegeman's petition for a waiver of Commission policy and Con Edison tariff.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Hegeman Avenue Housing LP for waiver of the Commission's policy contained in Opinion 76-17 to allow for the rent inclusion of electricity (master metering) in new or refurbished residential construction and the tariff of Consolidated Edison Company of New York, Inc. for a housing facility serving chronically homeless individuals, located at 39 Hegeman Avenue, Brooklyn, New York.

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.

(12-E-0040SP1)

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

Net Metering

I.D. No. PSC-11-12-00003-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 Incorporated Village of Rockville Centre to make revisions to electric tariff schedule, P.S.C. No. 4 — Electricity.

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

Subject: Net Metering.

Purpose: To establish net metering tariffs to facilitate development of solar and wind generation.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the Incorporated Village of Rockville Centre to establish net metering tariffs to facilitate development of solar and wind generation. The proposed filing has an effective date of June 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.

(12-E-0058SP1)

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

Water Rates and Charges

I.D. No. PSC-11-12-00004-P

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

Proposed Action: The Public Service Commission is considering a filing by Pabst Water Company, Inc. requesting approval to increase its annual revenues by approximately \$4,172 or 13.75%, and establish an escrow account funded by a \$20 customer surcharge per billing period.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To approve an increase in annual revenues by about \$4,172 or 13.75%, and establish a \$20 customer surcharge per billing period.

Substance of proposed rule: On February 15, 2012, Pabst Water Company, Inc. (Pabst or the company) filed tariff amendment Leaf No.12 Revision 4, Leaf No. 5 Revision 2, and Statement No.2 to become effective July 1, 2012 to its tariff PSC No. 3 - Water. Under the company proposed changes the annual residential customer charge would increase from \$463.20 to \$530.97; Pabst's proposed rates are designed to produce additional annual revenues of approximately \$4,172 or 13.75%.

The company is also requesting to establish a replenishable interest bearing escrow account with a maximum balance of \$24,000 to cover the cost of extraordinary repairs and/or plant replacement. The escrow account would be funded through a customer surcharge of \$20 per billing period effective with the customer billing July 1 2012.

In addition, the company proposes to change the language under paragraph J of leaf No. 5, to state that "All mains, services (up to the property line including the curb valve) and other water system facilities will be maintained and replaced by the company.", instead of "All mains, services (up to the property line) and other water system facilities will be maintained and replaced by the company."

Pabst provides flat rate water service to 65 year-round residential customers in an area known as Northern Westchester County Club in the Town of North Salem, Westchester County. Fire protection service is not provided.

The company's tariff and the pending rate increase request will be available online on the Commission's web site on the World Wide Web (www.dps.state.ny.us) located under Commission (Document-Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's rates.

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, NY 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, NY 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-W-0604SP2)

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

Transfer of Land and Water Supply Assets

I.D. No. PSC-11-12-00005-P

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

Proposed Action: The Public Service Commission is considering whether

to approve, reject or modify a petition filed by Robert Groman to transfer the land and associated water assets from Groman Shores, LLC to Robert Groman.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 89-h

Subject: Transfer of land and water supply assets.

Purpose: Transfer the land and associated water supply assets of Groman Shores, LLC to Robert Groman.

Substance of proposed rule: On February 7, 2012, Robert J. Groman petitioned the Commission requesting approval to transfer the ownership of the land containing the two wells of Groman Shores LLC water system currently leased and operated by Groman Shores Homeowners Association. Robert J. Groman is the President of the Groman Shores LLC and holds a fifty percent interest in the corporation.

On January 20, 2012, Oswego County Court Judge Norman Seiter ordered the sale of all of the parcels of property owned by the Groman Shores LLC. Robert J. Groman will purchase the property containing the two wells, as well as two adjacent parcels of land. Groman Shores Homeowners Association provides unmetered water service to approximately 83 seasonal customers, from April 15 through October 15, in the real estate subdivision of Groman Shores, Inc. located in the Town of Sandy Creek, Oswego County. The Commission may approve or reject, in whole or in part, or modify the petition.

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, NY 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, NY 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

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

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

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

(12-W-0050SP1)

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

Revisions to Existing Rules

I.D. No. PSC-11-12-00006-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 existing provisions in P.S.C. No. 214 — Electricity.

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

Subject: Revisions to existing rules.

Purpose: To make minor revisions to existing rules and offerings and further clarification to existing rules and service classifications.

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 and provide further clarification to its existing rules and provisions in P.S.C. No. 214 – Electricity. The proposed filing has an effective date of May 21, 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.

(12-E-0069SP1)

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

Net Metering

I.D. No. PSC-11-12-00007-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 City of Jamestown Board of Public Utilities to make revisions to electric tariff schedule, P.S.C. No. 7 — Electricity.

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

Subject: Net Metering.

Purpose: To establish net metering tariffs to facilitate development of solar and wind generation.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the Jamestown Board of Public Utilities to establish net metering tariffs to facilitate development of solar and wind generation. The proposed filing has an effective date of June 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.

(12-E-0062SP1)

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

Water Rates and Charges

I.D. No. PSC-11-12-00008-P

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

Proposed Action: The PSC is considering a request from Debora A. Lambert, d/b/a Green Meadow Park Water Company to increase its annual revenues by \$12,000 or 77%, for a surcharge to recover costs of several expenditures, and to convert its tariff to an electronic tariff.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: For approval to increase Green Meadow Park Water Company annual revenues by about \$12,000 or 77%.

Text of proposed rule: On February 7, 2012, Debora A. Lambert, d/b/a Green Meadow Park Water Company (Green Meadow or the company) filed a request to increase its annual revenues by about \$12,000 or 77%, to become effective July 1, 2012. The company also requested to implement a surcharge to recover the actual costs of several extraordinary expenditures they were directed to undertake. Green Meadow also requested that its existing tariff be converted to an electronic tariff schedule. The company provides metered water service 89 residential customers in the Town of LaGrange, Dutchess County.

The company's proposed tariff is available on the Commission's

Home Page on the World Wide Web (www.dps.ny.gov) located under Commission Documents – Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(12-W-0041SP1)

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

Waiver of 16 NYCRR Sections 894.1 Through 894.4(b)(2)

I.D. No. PSC-11-12-00009-P

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

Proposed Action: The PSC is considering a Petition of The Heart of the Catskills Communication, Inc. d/b/a MTC Cable to waive 16 NYCRR sections 894.1 through 894.4(b)(2) pertaining to the franchising process for the Town of Hardenburgh, NY.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1 through 894.4(b)(2).

Purpose: To allow the Town of Hardenburgh to waive certain preliminary franchising procedures to expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject the Petition of Time Warner NY Cable LLC, d/b/a Time Warner, to waive sections 894.1, 894.2, 894.3, and 894.4 regarding franchising procedures for the Town of Hardenburgh, Ulster County, New York.

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.

(12-V-0024SP1)