

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Economic Development

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### EMERGENCY RULE MAKING

#### Empire State Jobs Retention Program Tax Credit

**I.D. No.** EDV-05-13-00001-E

**Filing No.** 38

**Filing Date:** 2013-01-11

**Effective Date:** 2013-01-11

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

**Action taken:** Addition of Parts 210-216 to Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 20

**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 Empire State Jobs Retention Program ("the Program") which was created by Chapter 56 of the Laws of 2011. The Program is created to support the retention of the state's most strategic businesses in the event of an emergency. The program creates a jobs tax credit for each job of a strategic business directly impacted by an emergency and retained and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor.

The emergency rule is required in order to immediately implement the statute contained in Article 20 of the Economic Development Law, creating the Empire State Jobs Retention 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.

In 2011, many parts of New York State were devastated by Hurricane Irene and Tropical Storm Lee. The impact of these storms is still being felt and the State needs to be able to respond quickly to provide economic development assistance to strategic businesses whose operations were several damaged or destroyed by these disasters and ensure that the impacted jobs are retained in NYS.

The Empire State Jobs Retention Program will be one of the State's key economic development tools for assisting strategic businesses impacted by Hurricane Irene and Tropical Storm Lee. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and potential job losses that resulted from the devastation caused at certain facilities.

It bears noting that section 426 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:** Empire State Jobs Retention Program tax credit.

**Purpose:** Allow Department to implement the Empire State Jobs Retention Program tax credit.

**Substance of emergency rule:** The regulation creates new Parts 210-216 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the empire state jobs retention program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, preliminary schedule of benefits, impacted jobs, new business, significant capital investment and substantial physical damage and economic harm.

2) The regulation creates the application and review process for the Program. In order to become a participant in the Program, an applicant must submit a complete application within (1) one hundred eighty days of the declaration of an emergency by the governor in the county in which the business enterprise is located or (2) one hundred eighty days of the enactment of Chapter 56 of the Laws of 2011, if such date is later than the date specified in (1) above. An applicant must also 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 disqualified for empire zones benefits at any location or locations that qualify for empire state jobs retention benefits if admitted into the Program for such location or locations.

3) 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 4 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 by year based on the applicant's projections as set forth in its application.

4) The regulation sets forth the eligibility criteria for the Program. In order to qualify for the Program, a participant must: (1) be operating predominantly in one of the following strategic industries: (a) financial services data center or a financial services back office operation; (b) manufacturing; (c) software development and new media; (d) scientific research and development; (e) agriculture; (f) the creation or expansion of back office operations in the state; or (g) distribution center; and (2) must be located in a county in which an emergency has been declared by the governor on or after January first, two thousand eleven, must demonstrate substantial physical damage and economic harm resulting from the event leading to the emergency declaration by the governor, and must have had

at least one hundred full-time equivalent jobs in the county in which an emergency has been declared by the governor on the day immediately preceding the day on which the event leading to the emergency declaration by the governor occurred, and must retain or exceed that number of jobs in New York state. Jobs impacted but not retained by a participant are not eligible for the jobs retention tax credit.

In addition a business entity must be in compliance with all worker protection and environmental laws and regulations and must not owe past due federal or state taxes or local property taxes, unless those taxes are being paid pursuant to an executed payment plan. 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, a business entity engaged predominantly in the retail or entertainment industry, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity are not eligible to participate in the program.

5) The regulation sets forth the eleven (11) 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, but not limited to, the impact of any direct and indirect jobs that will be retained or 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 or would not occur 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.

6) The regulation states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

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

8) 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://esd.ny.gov/BusinessPrograms.html>.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 10, 2013.

**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](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Chapter 56 of the Laws of 2011 established Article 20 of the Economic Development Law, creating the Empire State Jobs Retention Program credit and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing 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 to retain strategic businesses and jobs that are at risk of leaving the state due to the impact on

its business operations of an event leading to an emergency declaration by the governor. The Empire State Jobs Retention Program is created to support the retention of the state's most strategic businesses in the event of an emergency. The Program creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor. 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 20 of the Economic Development Law, creating the Empire State Jobs Retention 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.

In 2011, many parts of New York State were devastated by Hurricane Irene and Tropical Storm Lee. The impact of these storms is still being felt and the State needs to be able to respond quickly to provide economic development assistance to strategic businesses whose operations were several damaged or destroyed by these disasters and ensure that the impacted jobs are retained in New York State.

The Empire State Jobs Retention Program will be one of the State's key economic development tools for assisting strategic businesses impacted by Hurricane Irene and Tropical Storm Lee. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and potential job losses that resulted from the devastation caused at certain facilities.

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.

##### **COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Empire State Jobs Retention 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 Empire State Jobs Retention Program. This emergency rule does not impose any costs to local governments for administration of the Empire State Jobs Retention Program.

##### **PAPERWORK:**

The emergency rule requires businesses choosing to participate in the Empire State Jobs Retention Program to establish and maintain complete and accurate books relating to their participation in the 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 retention 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.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the Empire State Jobs Retention 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 Empire State Jobs Retention Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and ac-

curate 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 Empire State Jobs Retention 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 Empire State Jobs Retention Program would be required to keep is 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 Empire State Jobs Retention Program must retain jobs in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job retention, such businesses would not receive the tax incentives. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Empire State Jobs Retention 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 Empire State Jobs Retention Program is a tax credit program which creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor. 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 Empire State Jobs Retention Program. The proposed program creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor.

This Program, given its design and purpose, will have a substantial positive impact on job retention. The emergency rule will immediately enable the Department to fulfill its mission of job retention in the state's most strategic businesses. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to firms that retain jobs that are at the risk of the leaving the state due to an event leading to an emergency declaration by the governor, 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.

## EMERGENCY RULE MAKING

### **Excelsior Jobs Program**

**I.D. No.** EDV-05-13-00002-E

**Filing No.** 46

**Filing Date:** 2013-01-14

**Effective Date:** 2013-01-14

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, L. 2011, ch. 61; L. 2010, ch. 59; art. 17

**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:** Administer 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 Commis-



sioner 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 predominantly 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 an emergency adoption, to be valid for 90 days or less. This rule expires April 13, 2013.

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

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

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.

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## **Education Department**

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### **NOTICE OF ADOPTION**

#### **Diploma Requirements for Students with Disabilities**

**I.D. No.** EDU-27-12-00010-A

**Filing No.** 55

**Filing Date:** 2013-01-15

**Effective Date:** 2013-01-30

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

**Action taken:** Amendment of section 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided) and 309 (not subdivided)

**Subject:** Diploma Requirements for Students with Disabilities.

**Purpose:** Provide new safety net option for students with disabilities to earn a local diploma through the use of compensatory scoring.

**Text or summary was published** in the July 3, 2012 issue of the Register, I.D. No. EDU-27-12-00010-P.

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

**Revised rule making(s) were previously published in the State Register** on October 31, 2012.

**Text of 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) 474-6400, email: legal@mail.nysed.gov

#### Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 31, 2012, the State Education Department (SED) received the following new comments that were not otherwise addressed in the Summary of Assessment of Public Comment resulting from the Notice of Proposed Rule Making published on July 3, 2012.

#### COMMENT:

Comments in support: the rule addresses students who will never meet Regents standards; considers attendance rate and passing grades in the courses; recognizes students seldom do poorly across all academic courses, and allows another opportunity to meet graduation requirements; will allow students to transition into programs aligned to career interests sooner rather than continuing to try to pass exams; is realistic and achievable for students with disabilities; and will provide students with confidence and encouragement to succeed. Allowing scores between 45-54 on Regents exams may encourage students to take more rigorous coursework.

#### DEPARTMENT RESPONSE:

Comments supportive in nature; no response necessary.

#### COMMENT:

Students with learning disabilities should be expected to achieve same high standards as other students. Premise of a safety net is an antiquated, out-of-step, paternalistic approach that creates second class outcomes and reinforces stigma that individuals with disabilities are less capable.

#### DEPARTMENT RESPONSE:

In order to earn a local diploma through the compensatory option students must satisfactorily pass the same required coursework as for a Regents diploma. Therefore, the rule does not result in a separate, secondary or less valuable education. Rather, it addresses the real concern that, while many students with disabilities can pass the required courses, they often have difficulty with the Regents examinations because of disability-related factors.

#### COMMENT:

Regents' College and Career Readiness agenda should be addressed in a more comprehensive, systemic and responsible fashion, rather than through isolated policy decisions. Establish more opportunities for all students to earn diplomas by creating incentives for school to work with over-age students and remove penalties for schools with strong 5 and 6-year graduation rates.

#### DEPARTMENT RESPONSE:

These comments will be taken into consideration as the Regents continue to discuss broader policy on college and career readiness and pathways to graduation for all students.

#### COMMENT:

Phase-out of RCTs, elimination of IEP diploma, limitation of the Skills and Achievement Commencement Credential to only students participating in NYS Alternate Assessment, and confusion regarding development of Phase II high school exiting credential have seriously compromised secondary educational opportunities and future access to career and post-secondary endeavors for students with disabilities. Disagree that compensatory option is better than continuing RCTs. It is not "better" for more students to drop out or to leave school with no credential. Question what diploma students not eligible for alternate assessment or able to pass Regents exams will obtain. In effort to raise standards for all, this group of students will leave school without a diploma or credential.

#### DEPARTMENT RESPONSE:

RCTs are not aligned with the Regents coursework and were meant to terminate once districts had revised their instructional programs to provide full access to the general education standards both in elementary school and when students reached secondary level classes. The compensatory option is intended to address the group of students with disabilities, who, with appropriate accommodations, supports and services, can reach the

State's learning standards at the Commencement Level, but because of disability-related factors cannot pass all of the Regents exams. The rule is intended to provide this group of students the opportunity to exit school with a regular high school diploma that would be recognized for entry into post-secondary schools and employment. SED has, under a separate rule-making, proposed regulations to provide a Regents Certificate of Work Readiness for students with disabilities who cannot graduate with a regular diploma, even with the various safety net options.

#### COMMENT:

SED's data overstates number of students with disabilities that will graduate with local diploma. New examinations are based on common core standards, which teachers are not adequately prepared to teach.

#### DEPARTMENT RESPONSE:

SED recognizes that the data projections based on the 2006 cohort are not necessarily predictive on what will happen when districts and students move to a greater focus on the common core standards, Regents courses and assessments versus relying on the RCTs to generate hypotheses. However, they were useful to generally project, given all things equal, that a significant number of students with disabilities are likely to benefit from the proposed safety net option.

#### COMMENT:

English language learners, students whose education has been disrupted, students who are homeless or in shelters, and students with multiple disciplinary suspensions are the general education students most likely to be in danger of not graduating with a Regents diploma. Without an alternate pathway, these students may be referred for special education services solely as a means of getting a local diploma.

#### DEPARTMENT RESPONSE:

Comment is beyond the scope of this rulemaking, which is intended to address the group of students with disabilities who, with appropriate accommodations, supports and services, can reach the State's learning standards at the Commencement Level, but because of disability-related factors, cannot pass all of the Regents exams.

#### COMMENT:

Make compensatory options available to both special education students and students with Section 504 plans.

#### DEPARTMENT RESPONSE:

Students with a Section 504 accommodation plan are considered students with disabilities under 504 of the Rehabilitation Act and would qualify for the compensatory safety net option if recommended and documented by the 504 Multidisciplinary team on the student's Accommodation Plan.

#### COMMENT:

Many students cannot meet requirement of having an acceptable attendance rate for the school year during which they took the Regents examination in which the score of 45-54 was obtained. Attendance should be for the year the student took the course, not the year the student took the examination.

#### DEPARTMENT RESPONSE:

The attendance criterion that is based on the year in which the student took the Regents is to ensure that a student's score on the exam is due to disability related factors rather than lack of attendance. District policy could address extenuating circumstances that might affect a student's attendance in the year the student took the examination.

#### COMMENT:

Rule should be revised to not require that students earn scores of 55 or higher on math and English exams and to allow students to use compensatory score on exams in all subject areas.

#### DEPARTMENT RESPONSE:

The rule is based on the principle that all students who graduate with a regular diploma must have an appropriate level of knowledge in foundation skills (literacy/English language arts and mathematics) which are fundamental to career or postsecondary education and/or training.

#### COMMENT:

Lowering standards is fundamental alteration of high school diploma and is not required by either Americans with Disabilities Act or Section 504. Postsecondary institutions do not lower standards for students with disabilities. Lower standards provide a false sense of accomplishment and overstate student's ability to succeed in college. Students may develop an expectation of lower standards in postsecondary institutions and/or employment settings. Lowering standards for local diploma will impact community colleges, particularly if there is no corresponding increase for disability support services.

#### DEPARTMENT RESPONSE:

We disagree that the proposed safety net lowers standards for students with disabilities. The rule is intended to address the group of students with disabilities who, with appropriate accommodations, supports and services, can reach the State's learning standards at the Commencement Level, but because of disability-related factors, cannot pass all of the Regents exams. It was developed based on the guiding principles that students with dis-



abilities must demonstrate an appropriate level of knowledge in foundation skills (literacy/English language arts and mathematics) which are fundamental to career or postsecondary education and/or training; while recognizing the unique challenges presented by students' disabilities in demonstrating certain knowledge, students with disabilities must show competence in a range of key content subject areas through successful coursework and an objective and recognized measure of their knowledge; and diploma standards should recognize completion of rigorous career-related skill development coursework and a formal process for demonstration of competence in these areas, which can lead to employment or more advanced postsecondary training.

**COMMENT:**

Tests should follow principles of universal design, rather than lowering standards to mitigate for poorly designed tests and poorly accommodated students. Proposal to reduce test score punishes schools/districts and does not acknowledge current testing standards are not helping students.

**DEPARTMENT RESPONSE:**

It is up to each Committee on Special Education (CSE) to recommend the appropriate testing accommodations for each student with a disability. SED has not proposed to "reduce test scores" but rather to recognize that some students have disability-related factors that impact on their ability, even with appropriate accommodations, supports and services, to earn a higher score on a Regents exam. There is nothing in the rule that would "punish" schools/districts.

**COMMENT:**

Provision regarding RCTs is confusing.

**DEPARTMENT RESPONSE:**

The rule relating to RCTs is intended to clarify that students may use either the RCT safety net option (provided they entered grade nine before September 2011) or the compensatory safety net option to graduate with a local diploma. Students may combine both the RCT and 55 low pass safety net options to graduate with a local diploma. The compensatory option (use higher scores to compensate for lower scores) may be not used for RCT examinations.

**COMMENT:**

Local diploma should be based on meeting NYS standards and core curriculum, and measured by passing each subject with a final comprehensive or project based exam.

**DEPARTMENT RESPONSE:**

Standardized measures of achievement of State learning standards are essential to provide statewide and objective measures to determine which students should be granted a New York State diploma.

**COMMENT:**

Proposal will require students to take and retake courses in order to pass, and make it difficult to participate in career and tech education. Students with disabilities are being forced to learn material that is too difficult for them and which they will not need. One-size-fits-all educational policy is not acceptable. Many students, despite huge efforts of support and assistance, cannot pass a Regents exam, yet deserve same opportunities that high school diploma affords.

**DEPARTMENT RESPONSE:**

The compensatory option is proposed in consideration of current graduation requirements, which include earning 22 credits. It was not intended to establish an alternate pathway to a high school diploma. The policy recommended by the Regents on a local diploma must represent a rigorous standard that would indicate that the school district has appropriately and sufficiently prepared a student with a disability for his or her readiness for post-school education and/or employment.

**COMMENT:**

Appears amendment is being proposed to help with graduation rates in failing districts rather than to help individual students.

**DEPARTMENT RESPONSE:**

Most students with disabilities have the intellectual ability to be successful in careers and go on to further courses of study after high school, but many have real disability-related factors that impede students from earning scores between 55 and 64 on one or more of the five required Regents exams. State policy should meaningfully recognize these disability-related factors, while at the same time hold school districts accountable for ensuring that a local diploma represents a legitimate route to a meaningful future for students with disabilities. The rule addresses the concern that, while many students with disabilities can pass the coursework required for a Regents exam, they often have difficulty passing the exam because of disability-related factors. The rule is intended to provide this group of students the opportunity to exit school with a diploma that would be recognized for entry into post-secondary schools and employment. In the 2006 cohort, 7,382 students with disabilities graduated with a local diploma. 4,971 of those students relied on the RCTs. Regardless of whether this diploma is recognized for federal accountability purposes, this rule will provide an opportunity for many of these students to earn a diploma credential.

**COMMENT:**

Question if requirements for local diploma will be uniform in all school districts across the State.

**DEPARTMENT RESPONSE:**

The Regulations of the Commissioner of Education, which include requirements for a local diploma, apply to all public school districts in the State.

## NOTICE OF ADOPTION

### Renewals of a Provisional SAS Certificate and Reissuances of Initial Certificates

**I.D. No.** EDU-45-12-00011-A

**Filing No.** 53

**Filing Date:** 2013-01-15

**Effective Date:** 80-1.7 eff. 2013-09-01/80-1.8 eff. 2013-01-30

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

**Action taken:** Amendment of sections 80-1.7 and 80-1.8 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), 3001(2), 3006(1)(b) and 3009(1)

**Subject:** Renewals of a provisional SAS certificate and reissuances of initial certificates.

**Purpose:** Change requirements for renewal of a SAS certificate and requirements for a reissuance of an initial certificate.

**Text of final rule:** 1. Subdivision (c) of section 80-1.7 of the Regulations of the Commissioner of Education is repealed and a new subdivision (c) is added, effective September 1, 2013, to read as follows:

(c) *The commissioner shall not accept an application for the renewal of a provisional school administrator and supervisor certificate submitted to the commissioner after September 1, 2013 unless the certificate holder has achieved a satisfactory score on the school building leader assessment(s) that is required at the time the renewed provisional certificate is issued.*

2. Section 80-1.8 of the Regulations of the Commissioner of Education is amended, effective January 30, 2013, to read as follows:

§ 80-1.8 Reissuance of an initial certificate.

(a) The holder of an initial certificate whose certificate has expired and who has not successfully completed three school years of teaching experience, or its equivalent, as is required for a professional certificate, shall be [issued] *reissued* an initial certificate on one occasion only, for a period of five years from the date of reissuance [, provided that the candidate has met the requirements in subdivision (b) of this section].

(1) *For candidates applying for a reissuance on or before September 1, 2013, any candidate whose certificate has been expired for two or more years at the time of application for the reissuance shall meet the requirements in subparagraphs (i) and (ii) of this paragraph. For candidates applying for a reissuance on or after September 1, 2013, all candidates applying for a reissuance shall meet the requirements in the following paragraphs:*

(i) *The candidate shall have successfully completed 75 clock hours of acceptable professional development within the year prior to the submission of his/her application to the department for the reissued initial certificate. The definition of acceptable professional development and the measurement of professional development study shall be that prescribed in section 80-3.6 of this Part.*

(ii) *The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area required for the certificate sought or, where applicable, the New York State assessment for school building leadership required for a certificate as a school building leader, which shall be taken within one year of the candidate's applying to the department for the reissuance of the initial certificate.*

(b) Notwithstanding the above, an initial certificate as a school building leader may be reissued a second time if the certificate holder has met all of the requirements for the professional certificate except the experience requirement and has been employed in a school district or BOCES to provide instructional support services as defined in section 80-5.21 of this Part during three of the past five school years.

[(b) Any candidate whose certificate has been expired for two or more years at the time of application for the reissuance shall meet the requirements in both of the following paragraphs:

(1) The candidate shall successfully complete 75 clock hours of acceptable professional development within one year of applying to the department for the reissued initial certificate. The definition of acceptable

professional development and the measurement of professional development study shall be that prescribed in section 80-3.6 of this Part.

(2) The candidate shall submit evidence of having achieved a satisfactory level of performance on the new York State Teacher Certification Examination content specialty test(s) in the area required for the certificate sought or the New York State assessment for school building leadership required for a certificate as a school building leader, which shall be taken within one year of the candidate's applying to the department for the reissuance of the initial certificate.]

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 80-1.8(a)(1).

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

#### **Revised Regulatory Impact Statement**

Since publication of the Notice of Proposed Rule Making in the State Register on November 7, 2012, a non-material revision was made to the following sections of the proposed amendment:

Section 80-1.8(a)(i) of the Commissioner's regulations is amended to clarify that an initial certificate will not be reissued until 75 hours of professional development are completed.

This amendment does not require changes to the previously published Regulatory Impact Statement.

#### **Revised Regulatory Flexibility Analysis**

Since publication of the Notice of Proposed Rule Making in the State Register on November 7, 2012, a revision was made to the proposed rule as set forth in the Revised Regulatory Impact Statement set forth herewith.

The revision does not require any changes to the previously published Regulatory Flexibility Analysis.

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

Since publication of the Notice of Proposed Rule Making in the State Register on November 7, 2012, a revision was made to the proposed amendment as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision does not require any changes to the previously published Rural Area Flexibility Analysis.

#### **Revised Job Impact Statement**

Since publication of the Notice of Proposed Rule Making in the State Register on November 7, 2012, a revision was made to the proposed amendment as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, amends the requirements for renewal of a SAS provisional certificate and the requirements for the reissuance of an initial certificate. Because it is evident from the nature of the proposed revised rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further 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.

#### **Assessment of Public Comment**

Since publication of a Notice of Revised Rule Making in the State Register on November 7, 2012, the State Education Department (SED) received the following comments on the revised proposed amendment.

COMMENT: We recommend that the State Education Department clarify the proposed regulatory language in Part 80-1.8(a)(1)(i) to clearly state that an initial certificate will not be reissued until 75 hours of professional development are completed by the applicant. The proposed language currently states "within one year of applying." This allows for the possibility that an applicant will misinterpret this to mean the certificate would be reissued prior to completion of hours.

RESPONSE: The Department has made a non-material change to the regulation to clarify the proposed amendment to clearly state an initial certificate will not be reissued until the candidate has completed 75 hours of professional development. The 75 hour requirement must be met within one year of applying to the department for the reissuance of his/her certificate.

COMMENT: In addition, we recommend that the State Education Department clarify the meaning of the phrase "acceptable professional development" for individuals applying for the reissuance of the initial certificate in Part 80-3.6 of the regulations. Part 80-3.6 currently addresses professional development for holders of professional teaching certificates, Level III Teaching Assistant certificates, and holders of professional educational leadership certificates. This should be modified to include those seeking reissuance of the initial certificate.

RESPONSE: Section 80-1.8 of the proposed amendment clearly states that the definition of acceptable professional development and the measurement of professional development study shall be that prescribed in section 80-3.6 of this Part. Therefore, the Department believes that no change is warranted.

## NOTICE OF ADOPTION

### **Individual Evaluation and Experience Requirements for Level III Teaching Assistant Certificates**

**I.D. No.** EDU-45-12-00012-A

**Filing No.** 54

**Filing Date:** 2013-01-15

**Effective Date:** 2013-01-30

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

**Action taken:** Amendment of sections 80-3.3, 80-3.7 and 80-5.6 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), 3001(2), 3006(1)(b) and 3009(1)

**Subject:** Individual evaluation and experience requirements for Level III teaching assistant certificates.

**Purpose:** To extend the sunset date for individual evaluation and amend experience requirements for level III teaching assistant certificate.

**Text or summary was published** in the November 7, 2012 issue of the Register, I.D. No. EDU-45-12-00012-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

#### **Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### **Occupational Therapy**

**I.D. No.** EDU-46-12-00015-A

**Filing No.** 52

**Filing Date:** 2013-01-15

**Effective Date:** 2013-02-13

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

**Action taken:** Amendment of sections 76.4 and 76.9; and addition of section 76.10 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 7905(1)(c), 7906(4), and 7908(1)(a), (b) and (c), (2), (3), (4), (5) and (6); L. 2012, ch. 329, section 5 and L. 2012, ch. 444, section 2

**Subject:** Occupational therapy.

**Purpose:** Establish standards relating to continuing competency, limited permits and supervision of OT assistant students.

**Text or summary was published** in the November 14, 2012 issue of the Register, I.D. No. EDU-46-12-00015-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

#### **Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the November 14, 2012 State Register, the State Education Department received over 100 comments from the public. The following is a summary assessing these comments.

##### **1. Comment**

The Department should include fieldwork supervision in the acceptable learning activities which meet the continuing competency requirement, as set forth in the proposed subdivision (c) of section 76.10 of the regulations. The commenters noted that the National Board for Certification in Occupational Therapy (NBCOT) has a three year 36 unit continuing competency requirement for national certification in occupational therapy, and permits an occupational therapist to earn 18 of those units through fieldwork supervision. The commenters asserted that fieldwork supervision is taken on as a voluntary activity by occupational therapists; that students have a difficult time finding placements due to a shortage of



supervisors, and that the voluntary supervisors perform a needed service in the profession by taking on the supervision. The commenters asserted that the supervisors themselves gain knowledge of occupational therapy through exposure to new concepts that the students bring from their educational programs, and also gain needed supervisory experience by agreeing to supervise these students.

#### Response

The Department understands the significance of fieldwork supervision to the profession and the need to encourage occupational therapy professionals to take on this responsibility. The Department is considering an amendment to the regulations in the near future which will provide for continuing competency credit for fieldwork supervision, based upon documentation of the time expended in preparing for the supervision and an explanation of the additional competency achieved through the supervision activity.

#### 2. Comment

The Department should not restrict the mentoring opportunities permitted as a learning activity for continuing competency to mentors who are licensed in occupational therapy or as occupational therapy assistants. The regulation should provide that continuing competency credits may be received through mentoring by other licensed professionals and non-professionals. The commenters asserted that occupational therapy professionals develop specialized areas of practice as they become more advanced. This specialization requires them to develop knowledge and skills in fields outside of occupational therapy in order to maintain competence, and that, therefore, mentoring by non-occupational therapists is a valuable learning activity.

#### Response

As noted above, the Department is considering an amendment to these regulations that will expand the qualifications of the mentor to include other individuals qualified to provide mentoring in a professional or related subject, as required by statute.

#### 3. Comment

The Department should permit occupational therapy professionals to receive continuing competency credits though in-service training offered by an employer who is not an approved provider.

#### Response

The Department recognizes the value of in-service training provided by employers. However, subdivision (4) of section 7908 of the Education Law, as added by Chapter 444 of the Laws of 2012, provides that learning activities must be taken from a sponsor approved by the Department. Given this statutory mandate, the Department has no authority to exempt employers who wish to offer in-service training from the requirement that they become approved sponsors.

#### 4. Comment

The proposed limit of six continuing competency hours over a three year period for independent study is too low, and will discourage advanced practitioners from pursuing educational activities that are relevant to their competency needs.

#### Response

The Department finds that six continuing competency hours in independent study is an appropriate limitation on this activity. However, an expansion of this limit will be considered in conjunction with consideration of the recognition of fieldwork supervision for continued competency credit.

#### 5. Comment

The Department should add the American Occupational Therapy Association to those entities the Department will recognize as approving sponsors of acceptable learning activities for continuing competency.

#### Response

The proposed regulation does not specify all organizations that will be determined to be an "equivalent organization". We anticipate that the American Occupational Therapy Association will be recognized in this capacity under existing regulatory authority.

#### 6. Comment

One commenter disagreed with the \$900 triennial fee assessed for Department approval of continuing competency sponsors.

#### Response

This fee is mandated by subdivision (7) of section 7908 of the Education Law, as added by Chapter 444 of the Laws of 2012, and is intended to cover the necessary costs incurred by the Department.

#### 7. Comment

One commenter suggested allowing professionals to gain needed continuing competency credits while they are practicing, when circumstances prevent them from obtaining the necessary credits in a timely manner.

#### Response

The proposed regulations provide for this situation through the issuance of a conditional registration, authorized in section 76.10(f) of the proposed regulations.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Conforming the Requirement for Best Available Retrofit Technology to Recent Statutory Changes and Court Decisions

**I.D. No.** ENV-50-11-00003-A

**Filing No.** 37

**Filing Date:** 2013-01-10

**Effective Date:** 30 days after filing

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

**Action taken:** Amendment of Part 248 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0323, 71-2103 and 71-2105

**Subject:** Conforming the requirement for best available retrofit technology to recent statutory changes and court decisions.

**Purpose:** To make Part 248 consistent with the amendments to New York ECL section 19-0323 and recent court decisions.

**Text or summary was published in** the December 14, 2011 issue of the Register, I.D. No. ENV-50-11-00003-P.

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

**Revised rule making(s) were previously published in the State Register on** September 5, 2012.

**Text of rule and any required statements and analyses may be obtained from:** James Bologna, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: [airregs@gw.dec.state.ny.us](mailto:airregs@gw.dec.state.ny.us)

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

#### Assessment of Public Comment

6 NYCRR Part 248, Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit Technology for Heavy Duty Vehicles

Comments received from September 5, 2012 through 5:00 P.M., October 5, 2012

It should be noted that the Department received intelligible comments from Commentor 3 on October 23, 2012 which is after the comment deadline. Commentor 3 initially submitted comments prior to the close of the comment period that were garbled by the electronic transmission. However, since the Department determined that a good faith effort was made by Commentor 3 to submit the comments in a timely manner, we have decided to accept and respond to those comments as part of this record.

#### Applicability

1. Comment: I am looking for any information I can find on the Diesel Emissions Reduction Act. Any info would be appreciated. (Commentor 1)

Response to Comment 1: Heavy Duty Vehicles (HDVs) operated by or operating "on behalf of" state agencies and public authorities are subject to the use of Ultra Low Sulfur Diesel Fuel (ULSD) and Best Available Retrofit Technology (BART) requirements. Paragraph 248-1.1(b)(14) defines subject vehicles, and specifically excludes certain HDVs from applicability. Section 248-2.1 includes exemptions from applicability for certain heavy duty vehicles. Additional information regarding DERA and the Part 248 requirements, including applicability, can be found on the Department's website ([www.dec.ny.gov](http://www.dec.ny.gov)). Also, questions relating to specific requirements of the regulation can be directed to the NYSDEC Division of Air Resources, Bureau of Mobile Sources and Technology Development at (518) 402-8292.

2. Comment: NYMaterials reiterates that the proposed regulations as currently drafted do not clearly define the scope of applicability and are unnecessarily broad. (Commentor 3)

Response to Comment 2: The Diesel Emission Reduction Act of 2006 (DERA) states that those HDVs operated by or operating "on behalf of" state agencies and public authorities are subject to the use of Ultra Low Sulfur Diesel Fuel (ULSD) and Best Available Retrofit Technology (BART) requirements. Pursuant to two court decisions, the proposed revision

sions to this regulation remove the applicability of Part 248 to subcontractors and limit applicability to prime contractors' vehicles. See *Matter of N.Y. Constr. Material Ass'n v. DEC*, 83 A.D.2d 1323, 1328 (3d Dep't 2011) (*Matter of N.Y. Construction Materials*) and *Riccelli Enterprises, Inc. v. Grannis*, 30 Misc. 3d 573, 579 (Sup. Ct. Onondaga Co. 2010) (*Riccelli*). Paragraph 248-1.1(b)(14), pursuant to DERA, defines subject vehicles, and specifically excludes certain HDVs from applicability. This provision is not being changed in this rulemaking. Section 248-2.1 also continues to include additional exemptions from applicability for certain heavy duty vehicles and is also not being changed in this rulemaking. Prime contractor applicability remains as originally adopted in Part 248. See, also previous "Assessment of Public Comments 6NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012".

#### Costs/Economics

3. Comment: The proposed regulations as currently drafted drastically underestimate the potentially severe direct and indirect effects on the State's economy. (Commentor 3)

4. Comment: The Regulatory Flexibility Analysis for Small Businesses and Local Governments notes that affected small businesses will incur substantial costs to comply with the regulatory requirements, and businesses may elect to reduce the number of their employees to cover the costs of purchasing/installing BART devices on their affected HDVs or place higher bids on state contracts. Affected local governments may also elect to reduce the number of their employees to cover the costs of the BART devices. Affected small businesses may also choose not to bid on state agency/public authority projects and local governments may choose not to enter or renew contracts with state agencies/public authorities. NYMaterials believes Part 248 imposes an unfunded mandate on both the public and private sectors. Likewise, we have noted before that it is unconscionable for DEC to suggest regulations that result in significant and costly mandates for a technology that decreases fuel economy and increases the production of greenhouse gases. Moreover, the Department continues to fail to realize (or even attempt to quantify) the true impact that this regulation will have on the regulated community. (Commentor 3)

Response to Comments 3 and 4: The Department identified the anticipated costs of the program to the best of our ability in the Regulatory Impact Statement (RIS) and other supporting documents, and understands that there may be significant economic impact to some businesses, including those related to the trucking industry, state agencies and public authorities when complying with the retrofit requirements. However, under DERA, the Legislature directed the Department to develop and promulgate regulations to implement the BART requirements. Two court decisions, *Riccelli* and *Matter of N.Y. Construction Materials*, have narrowed the scope of applicability and these revisions are being proposed in order to comply with these court decisions. Specifically, the Department is removing subcontractors from applicability. Even if these regulations were not in place, the provisions of DERA, enacted in 2006, require the retrofit of vehicles owned and operated by state agencies and authorities, as well as prime contractors to state agencies and authorities, by a date certain. See, also previous "Assessment of Public Comments 6 NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012".

5. Comment: The re-drafted Part 248 regulations again go beyond the intent of the Legislature and recent court decisions, while promising job losses and higher construction costs. The proposed Part 248 regulations are completely counter to the Governor's "business friendly" New York initiative and invite further litigation. (Commentor 3)

Response to Comment 5: The Department is aware that there will be additional costs associated with this program. The Department's evaluation of costs is included in the RIS and other supporting documents. We are obligated under DERA to develop and implement the regulatory program for the BART requirements. The Department believes that the proposed regulation conforms to DERA and the recent court decisions regarding prime and subcontractors. See *Riccelli* and *N.Y. Construction Materials*. Even if these regulations were not in place, the provisions of DERA, enacted in 2006, require the retrofit of vehicles owned and operated by state agencies and authorities, as well as to their prime contractors, by a date certain. See, also previous "Assessment of Public Comments 6 NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012".

6. Comment: There must be some form of justification for those of us who complied with the DEC rulings; perhaps in a form of reimbursement, grant money or tax credit, for trucking companies that tossed away a great deal of money. In this economy none of us has money to just spend foolishly. I certainly understand fully, what the DEC was trying to accomplish and I did my best to do as told, but it certainly backfired for my company. How can I recoup my money? (Commentor 2)

Response to Comment 6: The Department is not aware of any current source of funding for those DERA related retrofits. The court decisions

directed the Department to remove subcontractors from the Part 248 regulation. However, as a result of the timing of the decisions and the Part 248 rulemaking process, subcontractors may have incurred retrofit costs. (See also Response to Comment 11). The Department is aware of state legislation in the form of Bill A137 which would amend the tax law to allow a tax credit for those taxpayer businesses that retrofitted their heavy duty vehicles to comply with DERA. The amount of the credit would be 50 percent of the cost to the taxpayer for retrofitting their HDVs for taxable years beginning on or after January 1, 2009.

#### Definitions

7. Comment: The proposed revisions continue to be ambiguous, creating additional regulatory uncertainty. As an example, the determination of what is considered a "regular and frequent basis" is up to each regulated entity. (Commentor 3)

Response to Comment 7: As noted in the previous "Assessment of Public Comments 6 NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012", according to the American Heritage College Dictionary, Third Edition (2000), "regular" means customary, usual or normal. *Ballentine's Law Dictionary* (2010) defines "regular" as conforming to an established rule, principle or custom...consistent...following a fixed procedure or schedule...acting or happening at uniform intervals. *Black's Law Dictionary*, Sixth Edition (1990) defines "regular" as...steady or uniform in course, practice or occurrence. *American Heritage* defines "frequent" as occurring or appearing quite often or at close intervals. *Webster's New World College Dictionary*, Fourth Edition (2005), defines "frequent" as occurring often, happening repeatedly at brief intervals. Each agency and authority must determine what is regular and frequent for its own business model and is in the best position to make that determination.

#### Legal Authority

8. Comment: Two important DERA lawsuits prompted the Part 248 revisions, but the regulations fail to satisfy the court orders or the Legislative intent of the statute. Specifically, the re-drafted regulations require prime contractors to comply with BART requirements without describing the "direct agency relationship" with the contracting agency described by the court. The Legislature clearly did not intend for DERA to establish two classes of private sector vehicles - prime contractors and all others. The regulations should be revised to clearly define that only state vehicles, and not prime or subcontractor vehicles, are subject to the BART requirements, as determined by the court. (Commentor 3)

Response to Comment 8: The removal of subcontractors from applicability was not a part of the revised rulemaking. However, the Department continues to believe that the New York State Legislature clearly intended that DERA and any subsequent implementing regulations include both state and prime contractor owned and operated vehicles. Revisions to Part 248 concerning applicability conform to the intent of the legislature as determined by two courts, *N.Y. Construction Materials Association* and *Riccelli*. Both *N.Y. Construction Materials* and *Riccelli* specifically mention prime contractors with reference to applicability. ("Accordingly, we conclude that the Legislature did not intend to impose DERA's requirements on vehicles other than those used by prime contractors under direct contract with state agencies." *Matter of N.Y. Construction Materials Association*). The court in *Riccelli* went so far as to provide the exact regulatory language for use in revising Part 248 concerning prime contractors in its decision including "all heavy duty vehicles used to perform entity work by a prime contractor. Those vehicles include, but not limited to, heavy duty vehicles owned, operated or leased by a prime contractor...". Further, the court stated "[p]rime contractor means any person or entity that contracts directly with the regulated entity to perform regulated entity work ("prime contract" and who is responsible for the completion of the contract with the regulated entity. This definition shall not include subcontractors". See previous "Assessment of Public Comments 6 NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012".

#### Miscellaneous

9. Comment: NYMaterials continues to object to the proposed revisions to Part 248 as currently drafted. (Commentor 3)

Response to Comment 9: The Department acknowledges that NYMaterials objects to the proposed regulatory revisions.

#### Record Keeping/Reporting

10. Comment: Each regulated entity is responsible for determining the schedule for which they are to receive each prime contractor's vehicle inventory and annual report. Therefore every regulated entity could have different reporting deadlines and different determinations of what vehicles may be exempt considered from Part 248. (Commentor 3)

Response to Comment 10: The record keeping provisions were not a part of the revised rulemaking. However, the record keeping requirements noted in Section 248-7 of the proposed regulation are necessary to ensure compliance, and will assist the regulated entity and prime contractors in meeting the reporting requirements listed in Section 248-6 of the proposed

regulation. In order for the Department to report on the use of ULSD, it must receive information from the agencies and prime contractors, and determine compliance. DEC has no way to determine who is a prime contractor to each agency and therefore has no way to determine compliance with the reporting requirement and therefore compliance with DERA. Requiring agencies to keep track of their contractors reporting is a reasonable way to ensure compliance. This requirement is not a new requirement; it was included in the initial rulemaking adopted in 2009. See previous "Assessment of Public Comments 6 NYCRR Part 248, Comments received from December 14, 2011 through 5:00 P.M., January 26, 2012".

#### Timing

11. Comment: I was one of the trucking companies (A.T.&A Trucking Corp.) that followed the rules pertaining to the BART emissions regulations in 2010. We were given a date of November 1, 2010 to comply or no longer work on state projects. I submitted all of the necessary paperwork and I spent a large amount of money on retrofit kits for my vehicles. It was long, laborious process, a very expensive process and I later found out I was one of the very few trucking companies in the area to follow through and "do as I was told" to comply with regulations. The ground work that it took to even locate a reputable company to purchase retrofit kits was ridiculous. Shortly after purchasing all of these expensive kits, close to \$50,000, rulings were in the news that things had changed and subcontractors may not need to retrofit trucks. I was aware of the outcome to the Richard Riccelli case making it clear subcontractors were not to be included with the retrofits, although, it seemed that eventually the rule would still go through, so I never said anything and hoped that my money was not a 100 percent waste. Recently, I received the Friday Final Publication and read that the DEC has revised rulemaking and that subcontractors do not need to comply with the regulations only main contractors. I am a subcontractor trucking company. Well, isn't this just great after I was one of the few to follow directions and spend so much money for no reason at all. Previously, the DEC had me jumping through hoops to comply or not be able to work on the Thruway Jobs I was working on. (Commentor 2)

Response to Comment 11: In 2006 the Legislature passed and the Governor signed DERA. DERA contained specific deadline for compliance with BART. The Department's subsequent rulemaking, Part 248, which became effective on July 30, 2009, was required to include those same deadlines. The BART compliance deadline for all covered vehicles as required under DERA/Part 248 was December 31, 2010. Subcontractors along with prime contractors were included for applicability purposes.

The New York Construction Materials Association (NYCMA) filed a lawsuit against the Department in November 2009. The court decision in that case, rendered in April 2010, favored the Department. In May 2010, NYCMA filed an appeal to that decision. In October 2010, Riccelli filed a complaint against the Department.

In December 2010, the Department issued an enforcement discretion letter indicating that the DEC would not enforce the Part 248 requirements until ten days after the Notice of Entry was served following the court decision on the NYCMA appeal. Also in December 2010, a court decision on the Riccelli case was issued indicating that subcontractors were not covered under DERA/Part 248. In early 2011, the Legislature approved an extension of the December 31, 2010 BART compliance deadline to December 31, 2012 by amending DERA. In April 2011, the court decision of the NYCMA appeal was issued also removing subcontractors from applicability under DERA/Part 248. Shortly thereafter, the Department began a rulemaking to revise the Part 248 regulation to conform to the court decisions (including the removal of "subcontractor" from Part 248 requirements) and the legislative amendments. A stakeholders meeting was held in July 2011 with members of the regulated community to discuss the proposed rulemaking. A Notice of Proposed Rulemaking was issued in December 2011, a public comment period was opened and public hearings were held. In early 2012, the Legislature again approved an extension of the December 31, 2012 BART compliance deadline to December 31, 2013 by amending DERA. As a result, the Department issued a subsequent Notice of Revised Rulemaking to include the December 31, 2013 BART extension date.

#### Waivers

12. Comment: In addition, due to poor legislative revisions, the regulations now propose a "useful life waiver" that ends on the day jurisdiction begins. The waiver is now moot, because neither the agency nor the regulated community benefit. (Commentor 3)

Response to Comment 12: The waiver deadline was not a part of the revised rulemaking. The waiver deadline is in DERA and therefore the Department may not change that deadline in regulation.

#### List of Commentors

1. Mark Miller, SUNY College of Environmental Science and Forestry
2. Annemarie Tripi, A.T.&A Trucking Corp.
3. David S. Hamling, President and Chief Executive Officer, New York Construction Materials Association

## NOTICE OF ADOPTION

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

**I.D. No.** ENV-39-12-00011-A

**Filing No.** 49

**Filing Date:** 2013-01-14

**Effective Date:** 2013-01-30

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

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

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

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

**Purpose:** Allow the use of fluridone pellets in waters less than two feet deep for the control of invasive species.

**Text or summary was published in** the September 26, 2012 issue of the Register, I.D. No. ENV-39-12-00011-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anthony Lamanno, Department of Environmental Conservation, Division of Materials Management, 625 Broadway, 9th Floor, Albany, NY 12233-7254, (518) 402-8788, email: pestmgt@gw.dec.state.ny.us

**Additional matter required by statute:** SEQR Negative Declaration, Coastal Assessment Form.

#### Assessment of Public Comment

Only one comment was received associated with the amendment of 6 NYCRR 326.2(b)(4)(ii) to allow the pellet formulation of Fluridone to be permitted in waters less than two feet deep. This comment was received on November 2, 2012.

#### Comment Summary:

The commenter does not want to see the chemical control of invasive species to be a cost friendly alternative to mechanical barriers and manual/mechanical harvesting of aquatic vegetation. They feel that chemical applications should be seen as a last resort and that mechanical barriers are better able to discriminate between species. This comment described Fluridone as an indiscriminate systemic herbicide with the inability to discriminate between target and non-target species. The commenter also requested that if this rule is amended that curtains be used to contain the pesticide treated areas and that the Adirondack Park be excluded from this amendment.

#### DEC Response:

It is the position of the New York State Department of Environmental Conservation (Department) that in certain cases involving invasive species, such as the highly invasive species Hydrilla, the possible adverse effects from pesticide use must be balanced against the detrimental impacts that would result from the presence of the invasive species. The unchecked growth of an invasive species can be much more damaging to both to the ecology of an infested water body and human recreational activities than the generally temporary impacts of pesticide use.

In order to find this balance the Department uses the Article 15 Aquatic Pesticide Permit process which allows regulators to develop specific permit conditions which may incorporate alternatives to pesticide use, such mechanical control methods, and may include the use of curtains to contain the pesticide treatment areas. These permits are a mechanism for Department staff to determine the environmental impacts associated with aquatic pesticide use and allow the Department to put conditions upon aquatic pesticide applicators to mitigate any environmental and health concerns associated with an application. In addition, widespread aquatic vegetation control proposals usually require a comprehensive review under the State Environmental Quality Review Act (SEQRA) which is specific to the location in which the aquatic pesticide application will take place, including the Adirondacks. This review could lead to the development of a site specific Environmental Impact Statement (EIS) to identify and evaluate potential alternatives and recommend mitigation measures.

For the control of most aquatic vegetation, the use of Fluridone in less than two feet of water would not be necessary and the Department would not encourage this use. However, for the complete eradication of Hydrilla, which may have tubers growing in less than two feet of water, this type of application may be one of the only viable control options. The Fluridone two foot restriction was originally put in place to avoid the attractive nuisance of the pellets, so that children would not be tempted to pick them up. This issue, for invasive species control, is effectively mitigated through the Aquatic Pesticide Permit process which includes permit conditions



requiring widespread notification, warning signs and the closing of access to treated areas.

While the Department is reluctant to encourage or promote the use of chemical herbicides over any viable alternatives, the Department has found that mechanical barriers, hand harvesting and benthic mats do have their limitations as well. Mechanical barriers restrict water exchange causing an increase in water temperature; benthic mats may suffocate aquatic invertebrates living in the sediments; and hand harvesting in shallow, murky waters is not always effective. In the case of highly invasive species it is often necessary to use the most effective means of control. This amendment will give the Department the opportunity to evaluate all control options in order to combat these invasive species.

In order to combat invasive species prior to their introduction the Department has also supported programs to educate boaters, lakefront property owners, and others who use the lake about invasive species, how they are introduced, and what can be done to keep invasive species from being introduced in the first place.

For the reasons set forth above, including the ability of the Department to develop site specific conditions through the Article 15 Aquatic Pesticide Permit process, the proposed regulation will not be amended and the suggested alternatives will be taken into consideration during the permitting process.

### NOTICE OF ADOPTION

#### To Amend Part 189 in Response to the Discovery of Chronic Wasting Disease in Pennsylvania

**I.D. No.** ENV-44-12-00014-A

**Filing No.** 50

**Filing Date:** 2013-01-15

**Effective Date:** 2013-01-30

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

**Action taken:** Amendment of Part 189 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 11-0325, 11-1905 and 27-0703

**Subject:** To amend Part 189 in response to the discovery of chronic wasting disease in Pennsylvania.

**Purpose:** To prevent importation of chronic wasting disease infectious material from Pennsylvania into New York.

**Text or summary was published** in the October 31, 2012 issue of the Register, I.D. No. ENV-44-12-00014-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Patrick Martin, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4750, (518) 402-9001, email: pxmartin@gw.dec.state.ny.us

**Additional matter required by statute:** A negative declaration has been prepared pursuant to Article 8 of the Environmental Conservation Law and is on file with the Department of Environmental Conservation.

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Uniform Procedures for Processing Permit Applications Submitted to the Department

**I.D. No.** ENV-44-12-00017-A

**Filing No.** 36

**Filing Date:** 2013-01-10

**Effective Date:** 30 days after filing

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

**Action taken:** Amendment of Part 621 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0107, 70-0109, 71-2103 and 71-2105

**Subject:** Uniform procedures for processing permit applications submitted to the Department.

**Purpose:** To ensure permit applications are handled uniformly.

**Text or summary was published** in the October 31, 2012 issue of the Register, I.D. No. ENV-44-12-00017-P.

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

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

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

#### Assessment of Public Comment

The agency received no public comment.

## Office for People with Developmental Disabilities

### NOTICE OF ADOPTION

#### Financial Reporting for Providers of OPWDD Services

**I.D. No.** PDD-43-12-00007-A

**Filing No.** 56

**Filing Date:** 2013-01-15

**Effective Date:** 2013-02-01

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

**Action taken:** Amendment of Subpart 635-4 and sections 679.6, 686.13 and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02

**Subject:** Financial Reporting for Providers of OPWDD Services.

**Purpose:** To expand the applicability of reporting requirements and to revise the sanctions for failure to report.

**Substance of final rule:** Financial Reporting for Providers of OPWDD Services

Effective Date: February 1, 2013

The final regulations amend pre-existing OPWDD regulations concerning financial reporting, record keeping and audit requirements.

Pre-existing OPWDD regulations in 14 NYCRR Subpart 635-4 applied to facilities certified as Individualized Residential Alternatives, Community Residences, Day Treatment Facilities and ICF/DDs. The final amendments expand the applicability of this Subpart to include Medicaid Service Coordination, clinic treatment facilities ("Article 16 Clinics") and all Home and Community Based Waiver Services. All of the requirements in Subpart 635-4 now apply to the additional services except that the requirement for submission of budget information apply only to providers which are applying for an operating certificate.

The pre-existing regulations provided for two 30 day extensions of the cost report filing deadlines. The final regulations allow only one 30 day extension.

For providers which fail to file their cost reports by the reporting deadline, prior regulations allowed for the imposition of a 5 percent reduction in the operating portion of the rates, fees or prices. In lieu of this, the final regulations require that for the period of time during which a provider's cost report is outstanding, providers shall be subject to a reduction in reimbursement in an amount equal to 2 percent. For a provider subject to this sanction, the 2 percent reduction shall apply to reimbursements for the following: ICF/DD services (Intermediate Care Facilities for Persons with Developmental Disabilities), Medicaid service coordination, day treatment services, clinic services, and the following HCBS waiver services: residential habilitation services (community residential habilitation in a community residence, residential habilitation in an IRA, and residential habilitation in family care), community habilitation services, day habilitation services, prevocational services, supported employment services, respite services, plan of care support services, and family education and training services. This penalty will not be restored once a provider's cost report is received. Providers will also be subject to this sanction if they fail to meet deadlines for revised cost reports or other requested information.

As is the case with the pre-existing regulations, a penalty applies if a provider does not submit a cost report by the due date and also if OPWDD

determines that a cost report must be revised and the provider does not submit a revised cost report within 30 days. The final regulations require OPWDD to give the provider written notice that it missed the cost report deadline or that it must submit a revised cost report. The OPWDD notice will give the provider a final opportunity to submit the cost report (15 days for an initial cost report and 30 days for a revised cost report) or explain that it cannot submit the cost report in that time period because of unforeseeable factors beyond its control. If the provider submits the cost report or shows that there were unforeseeable factors beyond its control that prevented it from submitting on time, it will avoid the penalty. However, the penalty will be imposed if the provider submits an explanation of the unforeseeable factors and OPWDD sets a new deadline for the cost report, but the provider misses this new deadline.

The final regulations change the procedures in cases where it is the provider that discovers that a cost report is incomplete, inaccurate or incorrect, and where the provider makes this discovery before receiving its new base period rate, fee or price. The final regulations eliminate the pre-existing requirement that the provider first give OPWDD notice and then follow up with a revised cost report within 30 days. Instead, the final regulations simply require the provider to submit a revised cost report. Also, the final regulations eliminate the pre-existing penalty in this situation, but keep the provision that allows, rather than requires, that OPWDD revise the rate, fee or price based on the revised cost data, and then only if and when OPWDD receives the revised cost report.

The final regulations apply the provisions in section 635-4.6 to HCBS Waiver services and MSC. Section 635-4.6 states that provider records, reports and information are subject to audit for six years and contains procedures for review of audit findings. However, the law already subjects providers of these services to audit and record retention requirements.

The final regulations make several clarifications to requirements for the records that providers must keep. First, the regulations clarify that service-specific records of expenditures and revenues shall be accounted for on either a program type or a site specific basis. Second, the regulations state that providers must maintain underlying records which formed the basis for or which support the cost, budget and other reports and data submitted to OPWDD. Third, the regulations clarify that reports and records that were not used to establish a rate, price or fee must be kept until the later of six years from the due date or date of submission, and that reports and records that were used to establish a rate, price or fee must be kept for six years after the rate, price or fee was set.

The final regulations change pre-existing regulations in sections 679.6, 686.13 and 690.7, concerning clinic treatment facilities ("Article 16 clinics"), residential habilitation services and day treatment services respectively, to conform to the new language in Subpart 635-4 and/or to refer to Subpart 635-4.

The final regulations also make non-substantive changes to pre-existing language to enhance clarity and comprehension.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 635-4.5(a).

**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.

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

Minor changes were made to the proposed regulation in response to a public comment which requested clarification of a specific requirement. The revised language clarifies that service-specific financial records shall be accounted for on either a program type or a site specific basis.

These changes do not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

#### **Assessment of Public Comment**

A provider association submitted one comment which contained a suggestion to clarify one aspect of the regulations.

**Comment:** A provider association commented that, as currently written, the second sentence in subdivision 635-4.5(a): "These service-specific financial records shall be maintained at either the program or site level. . ." is easily misinterpreted to mean that the records must be physically kept at the program site. The provider association recommended that OPWDD reword the sentence in question to clarify the requirement. The provider association recommended the following language: "Providers must utilize unique cost identifiers that will allow expenses to be clearly attributable to specific programs/sites. . ."

**Response:** OPWDD appreciates the provider association's recommendation and agrees that the sentence could be reworded to provide clarification about the requirement. OPWDD took the suggested language into consideration and decided to reword the second sentence in subdivision 635-4.5(a) to read as follows: "These service-specific financial records shall be accounted for on either a program type or a site specific basis in order to correspond with the cost report form and format specified by OPWDD." OPWDD considers that this language provides the necessary clarification and is consistent with the intent of the requirement.

## Public Service Commission

### NOTICE OF ADOPTION

**Approval of the Transfer of a 115kV Circuit Breaker from NYSEG to AES ES Westover, LLC, on a Permanent Basis**

**I.D. No.** PSC-45-12-00003-A

**Filing Date:** 2013-01-14

**Effective Date:** 2013-01-14

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

**Action taken:** On 1/14/13, the PSC adopted an order approving on a permanent basis, a transfer of a 115kV circuit breaker from New York State Electric & Gas to AES ES Westover LLC.

**Statutory authority:** Public Service Law, section 70

**Subject:** Approval of the transfer of a 115kV circuit breaker from NYSEG to AES ES Westover, LLC, on a permanent basis.

**Purpose:** To approve the transfer of a 115kV circuit breaker from NYSEG to AES ES Westover, LLC, on a permanent basis.

**Substance of final rule:** The Public Service Commission, on January 14, 2013, adopted an order approving, on a permanent basis, a transfer of a 115 kV circuit breaker from New York State Electric & Gas Corporation (NYSEG) to AES ES Westover, LLC (AES ES).

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

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@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.

(12-E-0411EA1)

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

**To Increase the Charge Per Customer from \$100.00 to \$150.00**

**I.D. No.** PSC-05-13-00004-P

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

**Proposed Action:** The Commission is considering a petition for rehearing by Arbor Hills Waterworks, Inc. requesting that the escrow account charge be increased from a maximum \$100.00 to \$150.00 quarterly per customer, due to increases in costs of radiological testing.

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

**Subject:** To increase the charge per customer from \$100.00 to \$150.00.

**Purpose:** To approve the Company's petition to increase the charge per customer from \$100.00 to \$150.00.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or deny a petition for rehearing by Arbor Hills Waterworks, Inc. requesting that the escrow account charge be increased from a maximum \$100.00 to \$150.00 quarterly per customer, due to increases in costs of radiological testing. The Commission may resolve related matters and may take this action for other utilities.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:* Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

*Data, views or arguments may be submitted to:* Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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-0313SP2)

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

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

**I.D. No.** PSC-05-13-00005-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 a Petition from the Town of Williamstown, NY, to waive 16 NYCRR Sections 894.1 through 894.4 pertaining to the franchising process for the Town of Williamstown, 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 Williamstown, NY, 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 the Town of Williamstown, NY, to waive Sections 894.1, 894.2, 894.3, and 894.4 regarding franchising procedures for the Town of Williamstown, Oswego 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.ny.gov/f96dir.htm>. For questions, contact:* Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

*Data, views or arguments may be submitted to:* Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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-0573SP1)

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

**Waiver of the Retirement Notice Period So That the Danskammer Facility May be Transferred and Demolished**

**I.D. No.** PSC-05-13-00006-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 petition filed by Dynegy Danskammer LLC requesting waiver of the retirement notice period for the Danskammer Generation Facility located in Newburgh, New York so that the facility may be transferred and demolished.

*Statutory authority:* Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (8), (10) and 70

*Subject:* Waiver of the retirement notice period so that the Danskammer Facility may be transferred and demolished.

*Purpose:* Consideration of the waiver of the retirement notice period so that the Danskammer Facility may be transferred and demolished.

*Substance of proposed rule:* The Public Service Commission is considering a petition filed on January 3, 2013 by Dynegy Danskammer LLC requesting waiver of the 180 day period for providing notice that the Danskammer Generation Facility located in Newburgh, New York will be retired, so that the facility may be promptly demolished by ICS NY Holdings LLC (ICS), commencing before the 180 day period would otherwise end. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve issues arising out of a transfer of ownership interests in the Danskammer Generation Facility and its site to ICS, or any other matters related to 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.ny.gov/f96dir.htm>. For questions, contact:* Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

*Data, views or arguments may be submitted to:* Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-E-0012SP1)

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

**To Consider the Asset Purchase Agreement with Princetown Cable Company, Inc. by Time Warner Cable Northeast LLC**

**I.D. No.** PSC-05-13-00007-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 petition from Time Warner Cable Northeast LLC requesting a transfer of assets from Princetown Cable Company, Inc.

*Statutory authority:* Public Service Law, section 222

*Subject:* To consider the Asset Purchase Agreement with Princetown Cable Company, Inc. by Time Warner Cable Northeast LLC.

*Purpose:* To allow the Princetown Cable Company, Inc. to distribute its equity interest to Time Warner Cable Northeast LLC.

*Substance of proposed rule:* The Public Service Commission is considering whether to approve, modify, or reject the Petition of Time Warner Cable Northeast LLC for the transfer of assets including the franchise agreement and facilities from Princetown Cable Company, Inc. in accordance with Section 222.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:* Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

*Data, views or arguments may be submitted to:* Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-V-0010SP1)



## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### To Increase the Charge Per Customer from \$100.00 to \$150.00

**I.D. No.** PSC-05-13-00008-P

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

**Proposed Action:** The Commission is considering a petition for rehearing by Arbor Hills Waterworks, Inc. requesting that the escrow account charge be increased from a maximum \$100.00 to \$150.00 quarterly per customer, due to increases in costs of radiological testing.

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

**Subject:** To increase the charge per customer from \$100.00 to \$150.00.

**Purpose:** To approve the Company's petition to increase the charge per customer from \$100.00 to \$150.00.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or deny a petition for rehearing by Arbor Hills Waterworks, Inc. requesting that the escrow account charge be increased from a maximum \$100.00 to \$150.00 quarterly per customer, due to increases in costs of radiological testing. The Commission may resolve related matters and may take this action for other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: [secretary@dps.ny.gov](mailto: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-0300SP2)

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## Racing and Wagering Board

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### EMERGENCY RULE MAKING

#### Ability of a New Owner of a Claimed Horse to Void the Claim

**I.D. No.** RWB-05-13-00003-E

**Filing No.** 51

**Filing Date:** 2013-01-15

**Effective Date:** 2013-01-15

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

**Action taken:** Amendment of section 4038.5 of Title 9 NYCRR.

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

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

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

Between November 2011 and March 2012, 21 thoroughbred horses in New York State died or were euthanized while racing at Aqueduct Race Track. Their deaths prompted a comprehensive analysis of the circumstances and possible causes for the deaths of these horses by the New

York State Task Force on Racehorse Health and Safety. One common aspect in these races was the fact that the horse that broke down was involved in a claiming race. This rule is necessary to remove an incentive that a trainer or owner may have for entering an unsound horse in claiming race for the purpose of racing and potentially transferring a horse without proper regard to the horse's well-being and the integrity of racing. The Board previously adopted an amendment to Section 4038.5 that allowed for a claim to be voided if the horse died during the race or was euthanized on the racetrack. The Task Force recommended this amendment be adopted on an emergency basis to more adequately remove any incentive for racing unsound claiming horses.

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

This rule is also necessary to protect the general welfare of the horse racing industry and the thousands of jobs that are created through it. Public confidence in both the process of racing and in pari-mutuel wagering system is necessary for the sport to survive, and with it the jobs and revenue generated in support of government. Claiming races play an essential part of thoroughbred racing and pari-mutuel wagering. This rule is necessary to ensure integrity in the claiming process, and in turn ensure that the when a horse steps onto a race track, it doing so for the purpose of winning and not merely to foster a transaction.

**Subject:** Ability of a new owner of a claimed horse to void the claim.

**Purpose:** To remove the incentive to horse owners to race substandard horses in a claiming race.

**Text of emergency rule:** Under subdivision (a) of Section 4038.5 of Title 9 NYCRR, Item (iii) is added and Item (i) is amended to read as follows:

i. the claim is voidable at the discretion of the new owner pursuant to the conditions stated in section [4038.18] 4038.19 of this subchapter unless the age or sex of such horse has been misrepresented, and subject to the provisions of subdivision (b) of this section; and

ii. a claim shall be void for any horse that dies during a race or is euthanized on the track following a race[.]; and

iii. a claim is voidable at the discretion of the new owner, for a period of one hour after the race is made official, for any horse that is vanned off the track after the race.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 14, 2013.

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

#### **Regulatory Impact Statement**

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

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

3. Needs and benefits: This rulemaking is necessary to assure integrity, safety and public confidence in claiming races by removing incentives to use the claiming race process as a means of racing and transferring unsound horses. This rulemaking removes the incentive to enter an unsound horse in a claiming race with the intended goal of protecting both the health and safety of the equine and human athlete.

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

This amendment will reduce the incidence of injuries/deaths in horse races by changing the claiming rule to allow a successful claimant to void a claim when the horse is unable to walk off the track and must be transported – or vanned – off the race track. The current rule provides a regulatory mechanism by which a successful claimant may void a claim in the event that a horse dies during the race or is euthanized on the track.

Adoption of this amendment was recommended by the New York Task Force on Racehorse Health and Safety, which recently released its report

of investigation concerning the death of 21 thoroughbred race horse between November 2011 and March 2012. The report stated: "The Task Force recommends that the NYSRWB Rule 4038.5 be amended to provide that a claim is voidable, at the discretion of the claimant and within one hour of the conclusion of the race, for a horse that is vanned off the track." The report further states: "The Task Force believes the NYSRWB emergency amendment to Rule 4038 (in April 2012) represents an improvement by establishing a deterrent to the willful entry of a compromised horse, but that it should be further amended to provide that a claim is voidable by the claimant within one hour of the conclusion of the race if the horse is vanned off the track. The voiding of a claim should not require the death of a horse."

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

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

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: Board staff reviewed the cost factors and determined that the rule can be implemented using the existing system for voiding a claim, and no additional costs will be added.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. Not applicable.

5. Local government mandates: None. The New York State Racing and Wagering Board is the only governmental entity authorized to regulate pari-mutuel harness racing activities.

6. Paperwork: There will be no additional paperwork. The process will rely on the existing administrative forms and processes for voiding a claim.

7. Duplication: None.

8. Alternatives. Proposals include allowing the claimant to void a claim immediately after a race for no reason or giving race secretaries authority to include the above condition in claiming races. These alternatives were considered impractical.

The Board also considered a rule to required the stewards to consult with a designated veterinarian before voiding a claims for a horse that has suffered a catastrophic injury or death before it was unsaddled following its race. This alternative was rejected in favor of the proposed rule, which is a bright line threshold rather than an arguably judgmental determination.

9. Federal standards: None.

10. Compliance schedule: As an emergency rule, the amendments can be implemented immediately upon submission to the Department of State.

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

As is evident by the nature of this rulemaking, this proposal affects the voiding of claims where a horse is injured during a race and requires transportation off the track and will not have an adverse affect on jobs or small businesses. The narrow economic impact of this amendment is limited to those instances where a claim on a thoroughbred race horse is voidable if the horse is unable to walk off the race track and is transported off the track. The Board previously adopted a similar rule that allowed a claim to be voided if the horse dies on the track or is euthanized. Since that rule was adopted as an emergency rule in April 2012, there has been only one instance of a claimed horse dying on the track. The indirect economic impact of this rule is that it will discourage horse owners from entering unsound horses in claiming races. The Board believes that this limited economic impact will not adversely impact rural areas, jobs, small businesses or local governments and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. This amendment is intended to reduce an incentive to race an unsound horse. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely affect small business, local governments, public entities, private entities, or jobs in rural areas. There will be no impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. A Jobs Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either.

***Assessment of Public Comment***

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