

# RULE MAKING ACTIVITIES

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

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

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

---

---

## Department of Agriculture and Markets

---

---

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

#### Growth and Cultivation of Industrial Hemp

I.D. No. AAM-17-15-00011-RP

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

**Proposed Action:** Addition of Part 159 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18 and 508

**Subject:** Growth and cultivation of industrial hemp.

**Purpose:** To set forth procedures for authorizing and regulating the growth and cultivation of industrial hemp.

**Text of revised rule:** Chapter III of 1 NYCRR is amended by adding thereto a new Subchapter F, to read as follows:

*Subchapter F Industrial Hemp*

*Part 159 Industrial Hemp Agricultural Pilot Programs*

(Statutory Authority: Agriculture and Markets Law sections 16 and 18 and article 29)

§ 159.1 Definitions

For the purpose of this Part, the following terms shall have the following meanings:

(a) "Authorization holder" means an institution of higher education that has been granted authority by the Commissioner to acquire and possess industrial hemp to study its growth and cultivation.

(b) "Commissioner" means the Commissioner of Agriculture and Markets of the State of New York.

(c) "Department" means the Department of Agriculture and Markets of the State of New York.

(d) "Dispose", and any variant thereof, means to render unusable for any purpose.

(e) "Industrial hemp" means the same as that term is defined in subdivision (1) of Agriculture and Markets Law section 505.

(f) "Institution of higher education" means the same as that term is defined in subdivision (2) of Agriculture and Markets Law section 505.

(g) "Person" means an individual, partnership, corporation, limited liability company, association, or any business entity by whatever name designated and whether or not incorporated, unless the context clearly indicates otherwise.

(h) "Registered premises" means any facility, location, or property owned, leased, or licensed, which is under the control of the authorization holder and certified by the Commissioner as a site where industrial hemp may be grown or cultivated, harvested, stored, studied, or disposed of.

(i) "Secured facility" means a building or structure where access is restricted only to authorized persons.

(j) "State" means the State of New York.

§ 159.2 Authorization to grow and cultivate industrial hemp

(a) Industrial hemp and industrial hemp seeds may not be possessed, grown, or cultivated unless an application therefor has been submitted to and authority has been granted by the Commissioner.

(b) Only an institution of higher education may submit an application to the Commissioner for authorization to grow or cultivate industrial hemp.

(c) Industrial hemp may only be grown or cultivated upon registered premises.

(d) An application to grow and cultivate industrial hemp shall be made upon a form prescribed by the Commissioner and shall include an application fee of \$500.00. Each application and renewal application shall provide the information deemed necessary by the Commissioner for the administration of this Part, including but not limited to:

(1) a description of each premises where industrial hemp will be grown or cultivated, harvested, stored, studied or disposed of, by physical address and by GPS co-ordinates;

(2) a diagram for each premises that visually depicts the buildings, structures and improvements on the premises and identifies their use, and that sets forth the relevant activities conducted at the premises; and

(3) a detailed summary of the issues and matters that the applicant intends to study in conjunction with growing or cultivating industrial hemp which may include:

i. the soils, growing conditions, and harvest methods suitable for the growth or cultivation of various types of industrial hemp in the State;

ii. the cultivars suitable for the growth or cultivation of various types of industrial hemp, including the cost of each cultivar; the yield of industrial hemp attributable to each such cultivar; and the inputs required to assure that each such cultivar, when planted, results in a satisfactory yield of industrial hemp;

iii. the markets that the applicant has identified, in consultation with appropriate commercial interests, that exist or that could feasibly be developed for various types of industrial hemp, including but not limited to markets for apparel, energy, food, paper, and tools;

iv. the means and methods that could feasibly be used to advertise, expose, or publicize products that contain, in whole or in predominate part, industrial hemp, to facilitate the wholesale and/or retail sale thereof.

(4) a transportation plan, if industrial hemp will be moved from one location on the registered premises to another or from one registered premises to another registered premises, that sets forth information relevant to the security requirements set forth in section 159.6 of this Part.

(5) a security plan that sets forth the measures that the applicant intends to take to ensure that the security requirements set forth in section 159.6 of this Part are complied with.

(e) Applications to grow and cultivate industrial hemp shall be evaluated in the order in which they are received. In the event that two or more

applications are received at the same time, the Department will determine the order of receipt at random.

(f) The Commissioner may decline to grant authority to grow and cultivate industrial hemp, and may revoke or decline to renew an authorization to grow and cultivate industrial hemp, if he or she finds, after investigation and opportunity to be heard, that:

(1) the application does not set forth the information required pursuant to subdivision (d) of this section and fails to set forth such information within twenty days after the applicant has received notice that the required information was not set forth on the application; or

(2) ten authorizations to grow and cultivate industrial hemp have been issued and are in effect; or

(3) the applicant or authorization holder is not capable for whatever reason of complying, or has failed to comply, with the provisions of this Part or with state or federal law relating to the possession, sale, or cultivation of industrial hemp; or

(4) the Department determines, in its sole discretion, that it is or will be impracticable to regulate the applicant's or authorization holder's adherence to the requirements set forth in this Part; or

(5) the authorization holder has not complied with the requirements set forth in subdivision (e) of section 159.3 of this Part.

(g) Authorization to grow and cultivate industrial hemp shall be for a period of three years from the date application therefor was approved by the Commissioner. Notwithstanding the preceding, the Commissioner may grant or renew an authorization to grow and cultivate industrial hemp for a period of more than three years if he or she determines that the issues and matters that the applicant or authorization holder intends to study or is studying cannot be adequately and fully studied within three years from the date that authorization is granted or renewed.

An application for renewal shall be submitted to the Commissioner no later than thirty days prior to the date that the authorization expires and shall include an application fee of \$500.00.

(h) The Commissioner may grant or renew an authorization to grow and cultivate industrial hemp with conditions, including but not limited to one or more of the following:

(1) industrial hemp is grown and cultivated on a limited number of acres; or

(2) industrial hemp is grown and cultivated in a limited volume.

(i) An authorization holder may surrender its authorization at any time; however, the requirements set forth in section 159.6 of this Part shall remain applicable and binding upon such authorization holder until its authorization period would otherwise have expired.

#### § 159.3 Requirements

##### (a) Studies and reports.

(1) An authorization holder shall, no later than three months after the date of application to grow or cultivate industrial hemp was approved by the Commissioner, furnish to the Commissioner a report that provides, in detail, its findings and conclusions regarding the issues and matters set forth in its application to grow or cultivate industrial hemp.

(2) An authorization holder shall every three months after furnishing a report of the type referred to in paragraph (1) of this subdivision, furnish a report that supplements, in detail, the findings and conclusions set forth in earlier report(s).

(3) An authorization holder may study issues and matters different from those set forth in its application to grow or cultivate industrial hemp, with the prior written approval of the Commissioner, and all reports required pursuant to this section, furnished after the date of the Commissioner's approval, shall set forth findings and conclusions regarding such different issues and matters.

(b) Except as provided in subdivision (a) of section 159.6 of this Part and in this subdivision, industrial hemp may be grown or cultivated, harvested, stored, and disposed of only on the registered premises. Industrial hemp that has been harvested shall be stored in a secured facility except when it is being transported within the registered premises, to a laboratory for testing, or to another registered premises or facility approved by the Commissioner.

(c) Industrial hemp may be transported off registered premises only if it is being transported to a laboratory for testing or to another registered premises or facility approved by the Commissioner. Industrial hemp may be transported only in an enclosed, locked compartment of a truck or van where it cannot be seen from the outside of the vehicle, the contents of the vehicle are not disclosed, and the operator of the vehicle has been approved by the authorization holder to transport industrial hemp, as indicated in the record required to be maintained pursuant to paragraph (1) of subdivision (a) of section 159.4 of this Part.

##### (d) Testing and disposition.

(1) An authorization holder shall prepare, maintain, and make available to the Commissioner, upon request, a record that sets forth an accurate inventory of industrial hemp plants and seeds and shall reasonably ensure that no plant is possessed or grown or cultivated that would not

meet the definition of industrial hemp because it contains a concentration of more than 0.3 percent of delta-9 tetrahydrocannabinol, on a dry basis.

(2) An authorization holder shall ensure that a representative sample of plants grown or cultivated from each variety of seed used for the purpose of growing or cultivating industrial hemp is analyzed at a laboratory approved by the Commissioner, to determine the concentration of delta-9 tetrahydrocannabinol therein. The authorization holder shall furnish a report that sets forth the results of analysis(es) to the Commissioner promptly after such analysis(es) is made, in a form approved by the Commissioner.

(3) An authorization holder shall dispose of all plants determined, after laboratory analysis, to have a concentration of more than 0.3 percent of delta-9 tetrahydrocannabinol on a dry basis, and shall prepare and maintain on the registered premises for a period of two years, a record that sets forth the information required in section 159.4(a)(4)(iii) of this Part. The authorization holder shall make available to the Department such records upon request, in a form and at a location satisfactory to the Commissioner.

(e) An authorization holder shall, no later than fifteen days after having been granted authorization, notify, in writing, the applicable unit or units of law enforcement, including the unit or units of law enforcement in the political subdivision in which the registered premises is located, that it has received such authorization and shall provide such unit or units of law enforcement a copy of the security plan referred to in section 159.2(d)(5) of this Part. The authorization holder shall, no later than fifteen days after having notified such unit or units of law enforcement, provide the Department with a copy of such notification. An authorization holder shall adequately monitor registered premises under its control and shall notify the appropriate unit or units of law enforcement and the Department regarding facts and circumstances that indicate that industrial hemp has been or may be held or possessed in violation of the provisions of this Part.

(f) (1) Notwithstanding any provision of this Part to the contrary, an authorization holder may enter into a contract with a person for that person to be involved in growing or cultivating, harvesting, storing, studying, transporting, and/or disposing of industrial hemp, if:

i. the contract has, prior to execution, been approved by the Commissioner; and

ii. the contract requires such subcontractor to comply with all relevant provisions of this Part.

(2) The Commissioner may decline to renew or may revoke an authorization to grow and cultivate industrial hemp if he or she finds, after investigation, that such subcontractor has failed to comply with all relevant provisions of this Part.

#### § 159.4 Recordkeeping

(a) An authorization holder shall create, maintain, and make available accurate records, in a form and at a location satisfactory to the Commissioner, that set forth the following information:

(1) a description of the registered premises at which industrial hemp is grown or cultivated that is in substantially the same form as the description required to be provided pursuant to paragraph (1) of subdivision (d) of section 159.2 of this Part;

(2) the name of the cultivar(s) grown and the volume of each cultivar purchased, acquired and/or used, for the appropriate growing season; and

(3) the volume of industrial hemp grown or cultivated, for the appropriate growing season; and

i. the volume of industrial hemp harvested; and

ii. the volume of industrial hemp studied and the name and address of each person who or that has conducted or been involved in such study; and

iii. the volume of industrial hemp disposed of, the date and location of each disposal, and the method of each disposal.

(b) The records and materials referred to in subdivision (a) of this section shall be maintained on the registered premises and made available to the Commissioner for two years from the date they were made or prepared.

#### § 159.5 Inspections

(a) The authorization holder shall inspect the registered premises as often as necessary to ensure compliance with the requirements set forth in this Part.

(b) The registered premises of an authorization holder are subject to inspection by the Commissioner and by his or her authorized agents, employees, or officers, pursuant to Agriculture and Markets Law section 20, as often and to the extent necessary to ensure compliance with the provisions of this Part and state and federal law relating to the possession, sale, or cultivation of industrial hemp. The Commissioner may authorize agents, employees, or officers of the New York State Department of Health and/or local law enforcement to accompany him or her during an inspection of the registered premises of an authorization holder.

#### § 159.6 Security measures

(a) An authorization holder shall take all actions necessary to ensure that:

(1) industrial hemp is not removed from registered premises except for transportation to a laboratory for testing pursuant to the provisions of section 159.3(d)(2) of this Part or except as allowed by the Commissioner pursuant to his/her written authorization.

(2) industrial hemp is not acquired, possessed, grown or cultivated, harvested, stored, transported, or disposed of except under conditions that ensure that it will not be removed from registered premises or used in violation of state or federal law.

(b) The authorization holder shall take measures, satisfactory to the Commissioner, to ensure compliance with the requirements set forth in subdivision (a) of this section, including but not limited to:

(1) restricting access to areas of the registered premises where industrial hemp is grown or cultivated; and

(2) posting signs, each of which set forth, in readily observable block letters, the words "NO TRESPASSING. FACILITY CONTAINS INDUSTRIAL HEMP. UNAUTHORIZED POSSESSION OF INDUSTRIAL HEMP IS SUBJECT TO PROSECUTION PURSUANT TO ARTICLE 220 OF THE PENAL LAW". A sufficient number of signs shall be posted so that a sign and the information required to be set forth on a sign can be read, from a distance of not less than 100 feet, from any location around the perimeter of the registered premises where industrial hemp is grown or cultivated, or held; and

(3) providing for equipment and/or other fixtures such as fences that are reasonably designed to prevent unauthorized persons from entering the registered premises and/or having their presence therein undetected.

(c) Nothing in this section is intended to apply to any finished or marketable product which contains industrial hemp but from which the hemp may not practically be extricated in the form of industrial hemp.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 159.1(h) and (i), 159.2(d)(3), (g), (h), 159.3(d)(1) and 159.6(b).

**Text of revised proposed rule and any required statements and analyses may be obtained from** Chris Logue, Director, Division of Plant Industry, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-2087, email: Chris.Logue@agriculture.ny.gov

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

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

**Summary of Revised Regulatory Impact Statement**

1. Statutory authority:

Agriculture and Markets Law ("A&ML") sections 16, 18, and article 29.

2. Legislative objectives:

The legislature has authorized the Department of Agriculture and Markets ("Department") to allow a limited number of educational institutions to study the growth and cultivation of industrial hemp. The proposed rule will set forth requirements that will ensure that industrial hemp is properly grown and cultivated and, thereafter, held, studied, and disposed of in a manner designed to protect the public health, safety and welfare.

3. Needs and benefits:

The proposed rule will add a new Part 159 to 1 NYCRR. The proposed rule is needed to provide procedures and authorization so that those institutions of higher education that want to conduct research on industrial hemp may do so. The proposed rule will require each such institution to submit an application to the Commissioner of Agriculture and Markets ("Commissioner") for authorization to grow and cultivate industrial hemp, including information about the premises upon which the hemp will be grown or cultivated, stored, studied, and disposed of. The Commissioner may deny authority if he or she determines that the applicant cannot or will not comply with the requirements of Part 159. An institution of higher education that has received authorization must submit periodic reports regarding its research, have samples of industrial hemp analyzed in an approved laboratory, maintain records, and provide proper security. Such requirements are needed to ensure that industrial hemp, which is defined in Public Health Law section 3302(21) to be marijuana but contains only a relatively insignificant amount of delta-9 tetrahydrocannabinol, is not improperly diverted or used. The State's agricultural industry will benefit if the proposed rule is adopted because relevant policy makers will be in a better position to determine whether the industrial hemp can be grown and cultivated in New York and whether it is a commercially-viable product.

4. Costs:

a. Cost to regulated parties:

An educational institution that applies for authorization to grow and cultivate industrial hemp is required to submit a \$500.00 application fee. An educational institution that has been granted authorization (an "authorization holder") will, thereafter, incur costs in growing and cultivating a field of industrial hemp – the amount of such costs is dependent upon the

acreage of the field where it is grown and the costs of seeds, fertilizer, and crop protectants, as well as the cost of harvesting, storage, and processing.

An authorization holder will also be required to study industrial hemp and prepare periodic reports reflecting its findings. The cost associated with this requirement will depend in large part upon whether the institution will need to hire new staff or can utilize staff presently employed.

An authorization holder will, furthermore, need to provide proper security and to post signs, at the premises where industrial hemp is grown or cultivated, and held. The cost associated with this requirement will depend upon a site specific analysis of the risks posed by possible theft or unauthorized use.

b. Costs to state and local government:

None.

5. Local government mandates:

None.

6. Paperwork:

An authorization holder will be required to furnish periodic reports to the Commissioner and to maintain and update such reports as necessary.

7. Duplication:

Section 7606 of the federal Agricultural Reform, Food and Jobs Act of 2013 (Public Law 113-79) amended Title 7 of the United States Code to add section 5940 thereto to authorize states to enact statutes allowing educational institutions to grow and cultivate industrial hemp. Pursuant to such authorization, the New York State legislature passed, and the Governor signed, a bill that enacted Article 29 of the Agriculture and Markets Law, entitled "Growth of Industrial Hemp" (see Chapter 524 of the Laws of 2014). The federal law referred to above does not set forth any duplicative, overlapping or conflicting requirements for educational institutions authorized by the Commissioner to grow and cultivate industrial hemp must comply with.

8. Alternatives:

On February 24, 2015, a meeting of the Industrial Hemp Work Group was held at the Department's offices. This group consisted of Department representatives; manufacturers of products that contain industrial hemp; representatives of educational institutions involved in the study of industrial hemp; and a state assemblywoman. Prior to the meeting, the participants were furnished with a copy of the proposed express terms of the rule. At the meeting, several participants suggested amendments to the express terms and, after the meeting was concluded, the Department assessed such comments and made substantial revisions to the express terms. The Department amended the proposed express terms so that an educational institution, in its application to grow and cultivate industrial hemp, could indicate that it intended to study the methods that could be used to advertise, expose, or publicize industrial hemp and products containing that substance. Furthermore, the express terms were amended to allow the Commissioner to grant authorization to grow and cultivate industrial hemp for more than one year, to require reports to be submitted quarterly rather than biannually, and to allow an authorized institution to subcontract with another entity to allow that entity to conduct regulated activities, if such entity were required to comply and did comply with applicable regulatory provisions. Although certain participants requested that the proposed express terms be amended to lessen the security requirements, the Department initially chose not to do so. However, at the hearing held to consider whether the proposed rule should be adopted, additional information regarding the impact of the security requirements set forth in the proposed rule was provided. After assessing such information, the Department decided to make such requirements less stringent, and the express terms presently require an authorized educational institution only to restrict access to areas of the registered premises where industrial hemp is grown or cultivated; to post warning signs; and to maintain equipment, facilities, and fixtures reasonably designed to ensure that industrial hemp is not improperly handled, in violation of the provisions of the proposed rule.

9. Federal standards:

The proposed rule is authorized by Agriculture and Markets Law section 508 which, in turn, is authorized pursuant to 7 USC section 5940.

10. Compliance schedule:

An educational institution that has been authorized to grow and cultivate industrial hemp will be required to comply with all of the provisions of the proposed rule immediately upon being granted authorization.

**Revised Regulatory Flexibility Analysis**

1. Effect of rule:

This rule amends 1 NYCRR by adding thereto a Part 159, entitled "Industrial Hemp".

It is anticipated that the rule may have only an incidental impact on local governments, but only to the extent those governments decide to increase the number of police patrols in areas where industrial hemp is grown or cultivated by the limited number of institutions of higher education authorized to do so ("authorization holders"). The rule will have no impact on small businesses, will not impose any compliance requirements upon them, will not require them to obtain any professional services, and will not cause them to incur any compliance costs.

## 2. Compliance requirements:

The rule does not regulate local governments. The rule, also, does not directly regulate small businesses. An authorization holder may, pursuant to proposed section 159.3(f), enter into a contract with a small business that would allow that small business to participate in the cultivating and growing, holding, studying, and disposing of industrial hemp. Depending upon the provisions of the contract, a small business may be required to conduct studies and prepare periodic reports relating to such growth or cultivation. A small business may also be required to ensure that cultivars of industrial hemp grown or cultivated by it are tested in a laboratory to determine their chemical composition, and may also be required to ensure that industrial hemp is properly disposed of after having been used or studied. Finally, a small business may be required to ensure that proper security equipment and procedures are installed and instituted to prevent industrial hemp from being improperly diverted.

## 3. Professional services:

None.

## 4. Compliance costs:

(a) Initial capital costs that will be incurred by a small business that has contracted with an authorized institution of higher education:

A small business that has entered into a contract with an authorization holder (“contractor”) may, generally, be required to ensure that the premises where industrial hemp is grown or cultivated, and held, are secure; that a breach in security is capable of being detected; and that signs are posted warning against a breach in security and unauthorized possession of industrial hemp. The capital costs associated with complying with these requirements will vary greatly depending upon, inter alia, the location of the premises where industrial hemp is grown or cultivated, or held (for example, whether the premises are located in a populated area and whether they are readily accessible by common modes of transportation) and the size of the premises to be so used.

(b) Annual cost for continuing compliance with the proposed rule:

A contractor may be required to conduct studies and complete reports. It is impossible to determine how much a contractor will need to spend to study industrial hemp and to prepare a report setting forth its possible commercial uses.

## 5. Economic and technological feasibility:

The rule will require authorization holders to, inter alia, prepare a report(s) regarding its experience in growing or cultivating industrial hemp and the possible commercial uses thereof; to maintain required records, and to ensure that proper security equipment and procedures are installed and instituted to ensure that industrial hemp is not improperly diverted from its premises; a contractor may, depending upon the provisions of its contract, engage in such activities. Every one of the requirements that an authorization holder must comply with, and that a contractor may have to comply with, is technologically and economically feasible.

## 6. Minimizing adverse impact:

The rule will not have an adverse impact upon local governments. Furthermore, the rule does not regulate small businesses; rather, only those small businesses that choose to enter into a contract with an authorization holder will, indirectly, be regulated by the rule.

## 7. Small business and local government participation:

On February 24, 2015, a meeting of the Industrial Hemp Work Group was held at the Department’s offices. This group consisted of Department representatives; manufacturers of products that contain industrial hemp; representatives of educational institutions involved in the study of industrial hemp; and a state assemblywoman. Prior to the meeting, the participants were furnished with a copy of the proposed express terms of the rule. At the meeting, several participants suggested amendments to the express terms and, after the meeting was concluded, the Department assessed such comments and made substantial revisions to such express terms.

On May 20, 2015, a hearing to consider whether the express terms of the proposed rule, as revised as referred to above, should be adopted. Numerous interested persons provided oral and written comments prompting additional revisions.

## Revised Rural Area Flexibility Analysis

The proposed rule implements the provisions of Article 29 of the Agriculture and Markets Law, entitled “Industrial Hemp”. The proposed rule sets forth procedures for the Commissioner of Agriculture and Markets to authorize institutions of higher education to grow and cultivate industrial hemp and requires authorized institutions to study industrial hemp and issue periodic reports regarding the results of such study, to maintain certain required records, to ensure that samples of industrial hemp are tested in an approved laboratory, and to install and institute proper security equipment and procedures so that industrial hemp is not improperly diverted.

Because this proposal does not impose an adverse impact upon rural areas and because it imposes no reporting, recordkeeping or other compliance requirements on public or private entities in rural areas that have not

applied and have not been granted authorization to grow and cultivate industrial hemp, no rural area flexibility has been prepared in connection with the proposed rule, pursuant to SAPA section 202-bb(4)(a).

## Revised Job Impact Statement

The proposed rule implements the provisions of Article 29 of the Agriculture and Markets Law, entitled “Industrial Hemp”. The proposed rule sets forth procedures for the Commissioner of Agriculture and Markets to authorize institutions of higher education to grow and cultivate industrial hemp and requires authorized institutions to study industrial hemp and issue periodic reports regarding the results of such study, to maintain certain required records, to ensure that samples of industrial hemp are tested in an approved laboratory, and to install and institute proper security equipment and procedures so that industrial hemp is not improperly diverted.

The proposed rule is expected to have no impact, or perhaps a minimally positive impact, on jobs and employment opportunities in authorized institutions and among agricultural workers and security guards.

## Assessment of Public Comment

The Department of Agriculture and Markets (“Department”) received public comment from individuals, representatives of trade organizations and commercial interests, and state legislators, regarding various provisions of proposed 1 NYCRR Part 159. Set forth, below, is a list of the provisions of Part 159 which were commented upon, a summary of the comments, and the Department’s response.

1. Proposed subdivision (g) of section 159.1 – definition of the term “person”.

One commentator proposed that the definition of the word “person” should be amended so that it would refer to individuals and juridical entities, regardless of the context in which such word was used (the definition currently provides that that word could mean either an individual or a juridical entity, or both, depending upon the context in which it is used). This suggestion was not incorporated; certain provisions of proposed 1 NYCRR Part 159 use the word “person” to refer to an individual only, and other provisions use that word to refer to individuals as well as to juridical entities.

Another commentator suggested that the word “person” was sexist and that the word “person” should be substituted therefor. This suggestion was not adopted; the word “person” is used throughout the law and regulations and is commonly understood to refer to both genders.

2. Proposed subdivision (h) of section 159.1 – definition of the term “registered premises”.

Several commentators proposed that the definition of the term “registered premises” be amended to broaden its scope so that it would include leased or licensed premises; this suggestion was incorporated.

3. Paragraph (4) of subdivision (d) of section 159.2 – requirement that an application must set forth an employee’s or staff member’s social security number and criminal history.

Several commentators proposed that an applicant to grow and cultivate industrial hemp (“applicant”) should not be required to set forth, in its application, its employer identification number and the social security number, and the criminal history, of each person involved, generally, in the handling of industrial hemp. This suggestion was not incorporated. Regarding the requirement that an application set forth the applicant’s federal employer identification number, Tax Law section (5) requires all applications of the type required to grow and cultivate industrial hemp to set forth such information. Regarding the requirement that an application set forth the social security number and the criminal history of each person employed by the applicant in, generally, handling industrial hemp, the Department believes that, because industrial hemp is marijuana, within the meaning of Public Health Law (“PHL”) section 3302(21), and because marijuana is a controlled substance pursuant to PHL section 3306(d)(13), it is reasonable that the Commissioner of Agriculture and Markets (“Commissioner”) be able to determine if an applicant’s staff members have, in the past, improperly handled or abused controlled substances, or otherwise acted contrary to law, when determining whether to grant such application. Furthermore, most of the applications for permits or licenses, issued by the Commissioner, require the provision of such information.

4. Proposed subparagraph (iv) of paragraph (3) of subdivision (d) of section 159.2 – required topics of study.

A commentator suggested that an institution of higher education that has been authorized to grow and cultivate industrial hemp (“authorized institution”) may not be equipped, and should, therefore, not be required to study and report regarding methods and means to advertise industrial hemp or products that contain such plant; this suggestion was incorporated insofar as the application to grow and cultivate industrial hemp may, but is not required to, provide that that activity will be studied and reported on.

5. Subdivision (i) of section 159.1 – definition of the term “secured facility”.

A commentator proposed that the definition of the term “secured facil-

ity” be amended to refer only to a structure the doors of which have hardened locks. The substance of this suggestion was incorporated; in place of the stringent security requirements previously incorporated in the definition of such term, a “secured facility” will be defined as, basically, a structure to which only authorized persons have access. An authorized institution will, therefore, have flexibility to determine and utilize those procedures and equipment that will ensure that unauthorized access to a secured facility is prevented.

6. Paragraph (2) of subdivision (d) of section 159.2 – requirement that an application must set forth a diagram of the registered premises.

A commentator proposed that an applicant should not be required to set forth, in its application, a diagram of the premises where industrial hemp is to be grown or cultivated or held. This suggestion was not incorporated; the Department believes that it will be in a better position to determine whether an applicant will engage in productive activities and research if it can review and assess a diagram of the applicant’s facilities.

7. Subparagraphs (i) and (iii) of paragraph (3) of subdivision (d) of section 159.2 – issues and matters to be studied by an authorized institution.

A commentator proposed that an authorized institution should not be required to study the soils, growing conditions and harvest methods suitable for the growth and cultivation of industrial hemp, or to study the possible commercial uses thereof. This suggestion was incorporated to a certain extent in that an applicant may, but is not required, to conduct such studies.

8. Paragraphs (1) and (2) of subdivision (f) of section 159.2 – grounds for denial of an application, or revocation of an authorization, to grown and cultivate industrial hemp.

A commentator proposed that an applicant be allowed fifteen days or twenty days to correct an application that does not set forth the required information instead of fourteen days, the period presently prescribed. This suggestion was incorporated to provide that an applicant will have twenty days from the date of notification that its application was insufficient to make the necessary corrections and/or additions.

This commentator also proposed that the Commissioner not be authorized to deny an application if ten authorizations to grow and cultivate industrial hemp have already been granted. This suggestion was not incorporated; Agriculture and Markets Law (“AML”) section 508 precludes the issuance of more than ten authorizations.

9. Subdivision (f) of section 159.2 – grounds for denial of an application, or revocation of an authorization, to grown and cultivate industrial hemp.

A commentator proposed that a new paragraph (6) be added to subdivision (f) of section 159.2, to allow the Commissioner to revoke an authorization only after the authorization holder has been given an opportunity to remedy a failure to adequately study industrial hemp, consistent with its application. This suggestion was not incorporated; the Department intends to review the quarterly reports that all authorized institutions are required to provide and if a particular authorized institution has been determined to have not made adequate progress, the Department will contact such institution to determine the cause of, and possible remedies for, such failure.

10. Subdivision (g) of section 159.2 – authorization period.

Several commentators suggested that each authorization to grow and cultivate industrial hemp should be for a three-year period while one commentator suggested that a five-year period was appropriate. The first commentator’s suggestion was incorporated. The Department concurs that a one-year authorization period, as initially proposed, would discourage an authorized institution from adequately providing the necessary capital improvements to grow and cultivate industrial hemp and, furthermore, would make it difficult for such an institution to procure monetary grants which are, typically, given for more than a one-year period. The Department believes that a three-year authorization period will provide the necessary assurances that an authorized institution will be legally entitled to grow and cultivate industrial hemp for a reasonable period of time so as to justify providing for capital improvements and applying for monetary grants.

11. Section 159.2 – amendment of application to study new issues and matters.

A commentator suggested that proposed section 159.2 be amended to set forth a new subdivision, allowing an authorized institution to amend its application to allow it to grow and cultivate industrial hemp on different premises, and to study issues and matters different from those set forth in its application. This suggestion was not incorporated since section 159.3(a)(3) currently allows an authorized institution to study issues and matters different from those set forth in its application, with the prior approval of the Commissioner.

12. Subdivision (h) of section 159.2 – conditional authorizations.

A commentator proposed that the Commissioner not be allowed to issue conditional authorizations. This suggestion was not incorporated; the Department believes that its ability to issue conditional authorizations will better enable it to manage and oversee the growing and cultivating of

industrial hemp, and its handling, so that such plant is not impermissibly used or diverted. Furthermore, the Commissioner is currently authorized to issue conditional licenses in other contexts (see, for example, AML section 258-c, which allows the Commissioner to issue conditional milk dealer licenses).

13. Paragraph (3) of subdivision (h) of section 159.2 – authorization condition.

A commentator proposed that the Commissioner not be allowed to issue an authorization that prohibits the authorized institution from having any affiliation, association, or contact with a person who has acted in a manner demonstrating his or her inability or unwillingness to properly grow or cultivate industrial hemp, or handle such plant. This suggestion was incorporated.

14. Paragraphs (1) and (2) of subdivision (a) of section 159.3 – periodic reporting.

Several commentators suggested that an authorized institution should be required to submit a report regarding its study of industrial hemp every six months, rather than every three months as presently provided. This suggestion was not incorporated; the Department intends to actively monitor the activities of all authorized holders and can do so only if it receives frequent reports that describe either facts and conclusions ascertained, or obstacles encountered, regarding growing and cultivating industrial hemp, and handling, studying, and disposing of such plant. Furthermore, most institutions that award grants require grantees to submit quarterly reports; as such, this requirement should not impose an additional burden upon most authorized institutions.

15. Subdivision (b) of section 159.3 – permissible areas for holding and transporting industrial hemp.

One commentator suggested that industrial hemp should not be required to be held, once harvested, in a building where it would not be visible from the outside. This suggestion was incorporated.

Another commentator suggested that industrial hemp should be allowed to be transported not only within a registered premises or to a laboratory for testing, but also to another registered premises. This suggestion was incorporated.

16. Subdivision (d) of section 159.3 – testing requirements.

Two commentators suggested that an authorized institution would incur a cost in having to test industrial hemp plants to determine their concentration of delta-9 tetrahydrocannabinol (“THC”). Neither commentator suggested, however, that this requirement be jettisoned.

17. Subdivision (e) of section 159.3 – notification to law enforcement.

Two commentators suggested that an authorized institution should be allowed to notify law enforcement units that it has been authorized to cultivate and grow industrial hemp, within fifteen days of receiving authorization rather than within five days as presently provided. This suggestion was incorporated.

18. Paragraph (2) of subdivision (f) of section 159.3 – declining or revoking authorizations.

A commentator suggested that an authorized institution should be allowed to “cure” a violation of Part 159, prior to the Commissioner declining to renew or to revoke an authorization. This suggestion was not incorporated. As set forth above, the Department intends to actively monitor the activities of authorized institutions; if it determines that an authorized institution is not complying or has not complied with applicable requirements, it intends to aid and assist such institution to so comply. Furthermore, the Department retains discretion to excuse minor violations of applicable requirements and/or to encourage compliance, before instituting a proceeding to decline to renew, or to revoke, an authorization.

19. Section 159.5 – inspections.

A commentator suggested that inspections of registered premises be made only by Department inspectors who have been designated as peace officers. This commentator suggested that a Department inspector who encountered a plant with a level of THC above the legal maximum for industrial hemp would, in essence, be a witness to and have to deal with a violation of applicable federal and state drug laws, an activity for which the inspector would not be properly trained to deal with.

The suggestion referred to above was not incorporated. Department inspectors typically inspect premises and observe violations of applicable provisions of the AML, each of which is a misdemeanor pursuant to AML section 41. The Department believes that authorized institutions will be careful to grow and cultivate plants that do not have levels of THC above the legal maximum and, in the event that plants are found to contain excessive amounts of such substance, will immediately and properly dispose of such plants in compliance with section 159.3(d)(3). The Department does not believe that an authorized institution’s registered premises is, under any circumstances, a location that is of a type that should be inspected only by a Department inspector who has been designated as a peace officer.

20. Section 159.6 – security requirements.

All commentators, including representatives of educational institutions,

prospective growers, commercial interests, and state legislators, objected to the security requirements set forth in this section. The security requirements previously required that an authorized institution had to erect eight foot high fences around the perimeter of the premises, install a security surveillance system, providing for forgery resistant security badges to authorized personnel, and employ security staff. Commentators objected to each of these requirements upon the basis that they would be too expensive to implement and would, therefore, discourage educational institutions from applying to grow and cultivate industrial hemp; or would be unnecessary in light of the fact that industrial hemp contains such a low level of THC (the substance in marijuana that causes a hallucinogenic effect) that areas where it is grown or cultivated, or held, would not be "attractive nuisances"; or would convey the idea that industrial hemp is not an agricultural product but, is, rather, a dangerous or harmful commodity that needs to be subject to the highest level of security. Some commentators suggested that certain security requirements be eliminated entirely while others suggested that certain such requirements be modified or amended to be less burdensome.

The suggestions referred to above were incorporated to the extent that the security requirements previously provided for were substantially amended so that an authorized institution will only be required to restrict access to areas of the registered premises where industrial hemp is grown or cultivated, or held; to post signs that set forth certain information; and to provide security reasonably designed to ensure that industrial hemp is not improperly diverted or held. These amendments should dramatically lessen the costs associated with the requirements that were previously provided for. Authorized institutions will be required to block private roadways and post signs; both of these requirements should impose only a nominal cost. Such institutions will, also, be required to take measures reasonably designed to prevent unauthorized persons from entering the premises; this requirement does not mandate that certain equipment or personnel be provided but, rather, provides for a flexible standard. As such, an authorized institution may, depending upon the location and size of its registered premises, incur only a nominal cost in ensuring that industrial hemp is not improperly held or diverted.

21. Part 159 – proposed new section allowing the Commissioner to waive requirements.

A commentator suggested that a new section be added, allowing the Commissioner to waive any requirement set forth in Part 159 upon being asked to do so, in writing. This suggestion was not incorporated; the rule has been substantially amended and contains requirements that are reasonable and can realistically be complied with. As such, the Department sees no need to amend Part 159 so that such procedure is provided for.

22. Part 159 – proposed new provision allowing farmers to visit registered premises.

A commentator suggested that Part 159 be amended to allow persons interested in growing and cultivating industrial hemp to be able to visit registered premises, to be able to assess the viability of such activity if and when it becomes legal to do so. This suggestion was not incorporated; nothing in Part 159 presently prohibits an authorized institution from allowing visitors to its registered premises nor requires such an institution to ascertain and provide the type of information, for each visitor, that it is required to ascertain and provide for staff members.

---



---

## Department of Audit and Control

---



---

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

#### Rate of Regular Interest, Rate of Estimate Earnings and Mortality Tables

**I.D. No.** AAC-39-15-00007-P

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

**Proposed Action:** This is a consensus rule making to amend section 300.1; repeal Appendix 10-A, tables 44-56; and add new Appendix 10-A, tables 44-53 to Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Rate of regular interest, rate of estimate earnings and mortality tables.

**Purpose:** To conform the rate of regular interest and the rate of estimated earnings to the current rates established by the Comptroller.

**Substance of proposed rule:** This proposed amendment conforms the rate of regular interest and the rate of estimated earnings to the current rates established by the Comptroller and updates the mortality tables used in the calculation of retirement benefits to reflect demographic trends.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: jelacqua@osc.state.ny.us

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

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

#### **Consensus Rule Making Determination**

This is a consensus rulemaking proposed for the sole purpose of conforming the rates of regular interest and estimated earnings to the rates currently established by the Comptroller and to update the mortality tables used in the calculation of retirement to reflect demographic trends. It has been determined that no person is likely to object to the adoption of the rule as written. It has been determined that no person is likely to object to the adoption of the rule as written.

---



---

## Office of Children and Family Services

---



---

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

#### **Durable and Consistent Safeguards for Vulnerable Persons**

**I.D. No.** CFS-39-15-00001-EP

**Filing No.** 779

**Filing Date:** 2015-09-10

**Effective Date:** 2015-09-10

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

**Proposed Action:** Amendment of Parts 166, 180 and 182 of Title 9 NYCRR; amendment of Parts 402, 421, 433, 435, 441, 442, 443, 447, 448, 449, 476, 477 and 489 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 34(3)(f); Executive Law, section 501(5); and L. 2012, ch. 501

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

**Specific reasons underlying the finding of necessity:** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs ("Justice Center"). The Justice Center is tasked with overseeing and improving consistency in responses to incidents of abuse and neglect of vulnerable people. The Justice Center has also been tasked with establishing standards for tracking and investigating complaints and enforcement against those who commit substantiated acts of abuse and neglect. The legislation requires the Office of Children and Family Services, as a state oversight agency of vulnerable persons, to develop standards consistent with the Justice Center. These standards are to protect vulnerable people against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment and notice to the employees. The Office of Children and Family Services must promulgate regulations to provide notice, guidance and standards to all facilities, provider agencies and employees who are affected by the legislation. The Justice Center took effect June 30, 2013.

Facilities and provider agencies covered by the legislation include voluntary agencies that operate residential programs that are licensed or certified by the Office of Children and Family Services, residential runaway and homeless youth programs, family type homes for adults, certified detention programs, OCF's operated juvenile justice programs, and any local department of social services that runs a detention program or has a contract with an authorized agency for detention services or has a contract(s) for care of foster children in out of state facilities.

Effective June 30, 2013 reports of suspected child abuse or neglect in a residential program are no longer under the jurisdiction of the Statewide

Central Register of Child Abuse and Maltreatment (SCR). Any concerns regarding abuse or neglect of a child in a residential care program must be reported to the Vulnerable Persons Central Register (VPCR). The VPCR will also register reports of suspected abuse or neglect of persons residing in Family Type Homes for Adults (FTHA). Reports registered by the VPCR will be forwarded to Justice Center investigative staff or to investigative staff at the State Agency that licenses, certifies or operates the facility or provider agency. Regulations are required to provide direction to facilities, provider agencies, employees, local government staff and the public. It is imperative that rules be in place for the proper implementation of the Justice Center legislation.

In addition, these emergency regulations re-insert language at section 182-1.5 of Title 9 NYCRR to prohibit discrimination on the basis of sexual orientation, gender identity or expression. This language had been part of the regulations until June 2014 when they were inadvertently overwritten by other regulatory changes. This language is necessary to provide protection from such discrimination for the persons receiving services in the programs regulated by section 182-1.5 of Title 9 NYCRR.

Promulgating emergency regulations will ensure compliance with legislative requirements and provide the necessary guidance to affected persons. Absent the filing of emergency regulations, guidance, protections and processes will not be available to the aforementioned listed facilities and agencies.

**Subject:** Durable and consistent safeguards for vulnerable persons.

**Purpose:** To create an immediate set of durable and consistent safeguards for vulnerable persons.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [ocfs.ny.gov](http://ocfs.ny.gov)):** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs ("Justice Center"). The legislation requires the Office of Children and Family Services ("OCFS") to promulgate regulations consistent with the Justice Center oversight, regulations and enforcement. These regulations enact changes in line with the legislation to protect vulnerable people against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment and notice to the employees. The included additions and amendments allow OCFS to comply with the statutory requirements that became effective June 30, 2013.

The facilities and provider agencies that are license, operated or certified by OCFS that are affected are the following: residential runaway and homeless youth programs; family type homes for adults; certified detention programs; OCFS operated juvenile justice programs; voluntary agency run institutions, group residences, group homes, agency operated boarding homes including supervised independent living programs; and, any local department of social services that runs a detention program or has a contract with an authorized agency for detention services or has a contract(s) for care of foster children in out-of-state facilities. In addition, additional background check requirements were added for Family Foster Boarding Homes, and families applying to adopt a child. Regulations were added or amended to incorporate reporting, investigative, record keeping, record production, administrative, and personnel requirements, among others.

The first category of regulations added or amended address jurisdiction of the newly created Vulnerable Persons Central Register (VPCR). Regulations will now reflect that reports of suspected abuse or neglect of persons receiving services in OCFS licensed, certified or operated residential care programs will be reported to the VPCR. Additionally reports regarding significant incidents that harm or put a service recipient at risk of harm at those same programs will be reported to the VPCR.

The second category of regulations added or amended addresses requirements of mandated reporters and what mandated reporters will be required to report to the VPCR. Acts of abuse/neglect and significant incidents are defined and procedures regarding making a report to the VPCR are outlined.

The third category of regulations added or amended provides for the requirement of data collection by the facility or provider agencies in response to requests by the Justice Center and standards for release of that information by the Justice Center.

The fourth category of regulations added or amended provides for the creation of incident review committees to affected facilities and provider agencies.

The fifth category of regulations added or amended provides criminal history background checks and checks of the Justice Center's list of substantiated category one reports of abuse and neglect prior to hiring certain employees, use of volunteers or contracts with certain entities have been added or amended.

Lastly, language inadvertently overwritten in June 2014 was re-inserted at section 182-1.5 of Title 9 of the NYCRR. The re-inserted language prohibits discrimination on the basis of sexual orientation, gender identity

or expression. Inclusion of this language provides protection from such discrimination for the persons receiving services in the regulated programs.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 8, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, New York State Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 473-7793, email: [info@ocfs.ny.gov](mailto:info@ocfs.ny.gov)

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

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

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

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

Section 501(5) and 532-e of the New York State Executive Law authorizes the Commissioner of OCFS to promulgate rules and regulations for the establishment, operation and maintenance of division facilities and programs.

Section 490 of the SSL as found in Chapter 501 of the Laws of 2012 requires the Commissioner of OCFS to promulgate regulations that contain procedures and requirements consistent with guidelines and standards developed by the justice center and addressing incident management programs required by the Chapter Law.

##### 2. Legislative objectives:

The proposed changes to the regulations concerning vulnerable persons in programs licensed, certified or operated by OCFS are necessary to further the legislative objective that vulnerable persons be safe and afforded appropriate care.

##### 3. Needs and benefits:

To the extent a change to the run away and homeless youth regulations is a technical change, the need is to reauthorize language already found in regulation and implemented by program.

The proposed changes to the regulations concerning vulnerable persons in programs licensed, certified or operated by OCFS providers is in response to the recognized need to strengthen and standardize the safety net for vulnerable persons, adults and children alike, who are receiving care from New York's human service agencies and programs. The Protection of People with Special Needs Act creates a set of uniform safeguards, to be implemented by a justice center whose primary focus will be on the protection of vulnerable persons. Accordingly, the benefit of this legislation is to create a durable set of consistent safeguards for all vulnerable persons that will protect them against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment to the employees upon whom they depend.

##### 4. Costs:

The proposed regulatory changes are not expected to have an adverse fiscal impact on authorized agencies, family type homes for adults, or on the social services districts with regard to reporting and record keeping requirements. Current laws and regulations impose similar levels of reporting and record keeping. In conforming to and complying with the new statutory and regulatory requirements authorized agencies and other facilities will necessarily have to reconfigure current utilization of staff and duties. The enhancement of services for the protections of Vulnerable Persons will incur additional costs.

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost.

##### 5. Local government mandates:

The proposed regulations will not impose any additional mandates on social services districts. Local Districts have been provided with an amended model contract for use in securing out of state residential services for children in foster care. This model contract replaced a model contract already in existence and used by Local Districts.

To the extent a change to the run away and homeless youth regulations is a technical change, there are no additional mandates.

##### 6. Paperwork:

The proposed regulations do not require any additional paperwork. Requirements regarding documentation are currently in regulation. These regulations will require sharing such documentation with the Justice Center.

##### 7. Duplication:

The proposed regulations do not duplicate any other State or Federal requirements.

##### 8. Alternatives:

These regulations are required to comply with Chapter 501 of the Laws of 2012 and add a technical change to 9 NYCRR 182-1.5.

9. Federal standards:

The regulatory amendments do not conflict with any federal standards.

10. Compliance schedule:

The regulations will be effective on September 9, 2015 to ensure compliance with Chapter 501 of the Laws of 2012.

**Regulatory Flexibility Analysis**

1. Types and estimated number of small businesses and local governments:

Social services districts and voluntary authorized agencies contracting with such social services districts to provide residential foster care services to children, authorized agencies providing juvenile detention services, runaway and homeless youth shelters and adult family type homes will be affected by the proposed regulations, as well as state operated juvenile justice facilities.

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

Prior to Chapter 501 of the Laws of 2012, authorized agencies, facilities and mandated reporters employed by the same were required reporters of suspected child abuse or maltreatment to the New York Statewide Central Register of Child Abuse and Maltreatment. Pursuant to the statutory requirements of Social Services Law Sections 490 and 491, those mandated reporters are now required to report all reportable incidents, which will include but not be limited to those things previously falling within the definitions of abuse and neglect of a child in residential care, to the Vulnerable Persons Central Register. Authorized Agencies and facilities will be required to maintain the same level of practice as it relates to recordkeeping, and prevention and remediation plans. Authorized agencies and facilities will be required to comply with investigations and information requests as required by the Justice Center for the Protection of People with Special Needs, as defined in Article 20 of the Executive Law.

The proposed regulations and amendments alter practice to conform to statutory obligations set forth in Chapter 501 of the Laws of 2012.

3. Costs:

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost. All affected programs such as authorized agencies or facilities are currently subject to requirements governing reporting, record keeping, management of approved procedures and policies. As such the proposed regulations should not impose any additional costs associated with those functions. The statutory and regulatory requirements will necessarily require a reconfiguration of the current utilization of administrative costs to conform and comply with the requirements of the new law and conforming regulations. The statutory scheme provides for the enhancement of services for the protections of Vulnerable Persons, which will have added costs.

4. Economic and technological feasibility:

The proposed regulatory changes would not require any additional technology and should not have any adverse economic consequences for regulated parties.

5. Minimizing adverse impact:

The proposed changes to the regulations will require authorized agencies and facilities to conform to new reporting and record keeping requirements, however inconsistent and duplicative measures have been addressed by the regulations to minimize the impact. Trainings will be taking place across systems, as well as the dissemination of guidance documentation in advance of the effective date of the regulations.

6. Small business and local government participation:

Potential changes to the regulations governing the protection of people with special needs will be thoroughly addressed through statewide trainings and guidance documentation distributed to local representatives of social services, authorized agencies and facilities.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas:

Social services districts in rural areas and voluntary authorized agencies contracting with such social services districts to provide residential foster care services to children, authorized agencies providing juvenile detention services, runaway and homeless youth shelters and adult family type homes will be affected by the proposed regulations, as well as state operated juvenile justice facilities.

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

Prior to Chapter 501 of the Laws of 2012, authorized agencies, facilities and mandated reporters employed by the same were required reporters of suspected child abuse or maltreatment to the New York Statewide Central Register of Child Abuse and Maltreatment. Pursuant to the statutory requirements of Social Services Law Sections 490 and 491, those mandated reporters are now required to report all reportable incidents, which will include but not be limited to those things previously falling

within the definitions of abuse and neglect of a child in residential care, to the Vulnerable Persons Central Register. Authorized Agencies and facilities will be required to maintain the same level of practice as it relates to recordkeeping, and prevention and remediation plans. Authorized agencies and facilities will be required to comply with investigations and information requests as required by the Justice Center for the Protection of People with Special Needs, as defined in Article 20 of the Executive Law.

The proposed regulations and amendments alter practice to conform to statutory obligations set forth in Chapter 501 of the Laws of 2012.

3. Costs:

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost. An authorized agency or facility is currently subject to requirements governing reporting, record keeping, management of approved procedures and policies, so the proposed regulations should not impose any additional costs associated with those functions. The statutory and regulatory requirements will necessarily require a reconfiguration of the current utilization of administrative costs to conform and comply with the requirements of the new law and conforming regulations. The statutory scheme provides for the enhancement of services for the protections of Vulnerable Persons, which will have added costs.

4. Minimizing adverse impact:

The proposed changes to the regulations require authorized agencies and facilities approved, licensed, certified or operated by the Office of Children and Family Services to protect Vulnerable Persons as defined by Social Services Law Section 488. The regulations are in direct response to the need to strengthen and standardize the protection of vulnerable people in residential care. The Protection of People with Special Needs Act creates uniform standards across systems to be implemented and monitored by the Justice Center.

5. Rural area participation:

Potential changes to the regulations governing implementation of the statute regarding the protection of people with special needs will be addressed through trainings and guidance documentation distributed to representatives of social services districts, authorized agencies, including those that serve rural communities.

**Job Impact Statement**

The proposed regulations are not expected to have a negative impact on jobs or employment opportunities in either public or private sector service providers. A full job statement has not been prepared for the proposed regulations as it is not anticipated that the proposed regulations will have any adverse impact on jobs or employment opportunities.

---



---

## Department of Environmental Conservation

---



---

### NOTICE OF ADOPTION

#### Petroleum Bulk Storage (PBS) and Used Oil Management

**I.D. No.** ENV-31-14-00006-A

**Filing No.** 782

**Filing Date:** 2015-09-11

**Effective Date:** 6 NYCRR Part 613 effective 30 days after filing; 6 NYCRR section 370.1(e)(2) and Subpart 374-2 effective 60 days after filing.

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

**Action taken:** Repeal of Parts 612, 613 and 614; addition of new Part 613; and amendment of section 370.1(e)(2) and Subpart 374-2 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 17-0301, 17-0303, 17-0501, 17-1001 through 17-1017 and 17-1743; art. 23, title 23, art. 27, titles 7 and 9; Navigation Law, sections 173, 175, 176, 178 and 191

**Subject:** Petroleum Bulk Storage (PBS) and Used Oil Management.

**Purpose:** Promulgation of the new Part 613 will harmonize existing State requirements (found at current Parts 612, 613, and 614 which are being repealed with this rule making) with overlapping federal requirements (found at 40 CFR Part 280) so that similar sets of regulatory requirements will govern petroleum bulk storage (PBS) facilities in the State. Addition-

ally, the requirements for all new tank systems will be updated to reflect the technology and practices that are the current state of the art for the manufacture, installation, and maintenance of PBS tank systems.

The provisions of Subpart 374-2 and section 370.1(e)(2) must be revised in order to (1) address changes to definitions and cross-references being made in the new Part 613; and (2) account for changes made to the corresponding federal regulation, 40 CFR Part 279.

**Substance of final rule:** The New York State Department of Environmental Conservation (Department) has repealed 6 NYCRR Parts 612 through 614 and replaced them with a new 6 NYCRR Part 613, which regulates the handling and storage of petroleum in underground and aboveground storage tank systems.

To conform to changes in Part 613, corresponding changes to definitions and cross-references were also made to the Standards for the Management of Used Oil, established at 6 NYCRR Subpart 374-2. Amendments to Subpart 374-2 also include corrections, clarifications, and updates to add certain federal provisions. The revisions include federally driven corrections or clarifications, and updates to testing requirements to make it easier and more cost-effective for the regulated community to comply with certain sampling and analysis requirements. Changes were also made 6 NYCRR section 370.1(e)(2) to update references to federal regulations.

The Express Terms are summarized below.

#### Subpart 613-1: General Provisions

Subpart 613-1 contains provisions covering the purpose of the rule, applicability, definitions, recordkeeping requirements, and standards incorporated by reference. This subpart also contains provisions concerning access to records and facilities, preemption and approval of local laws or ordinances, variances, registration, and severability.

#### Subpart 613-2: UST Systems Subject to Both Subtitle I and Title 10

Subpart 613-2 addresses underground storage tank (UST) systems that are subject to State regulation pursuant to Title 10 of Environmental Conservation Law Article 17, sections 17-1001 through 1017, entitled "Control of the Bulk Storage of Petroleum" (Title 10), and federal regulation pursuant to Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 USC sections 6991 through 6991m, entitled "Regulation of Underground Storage Tanks" (Subtitle I). This subpart harmonizes the State's UST system requirements with the federal requirements found in 40 Code of Federal Regulations (CFR) Part 280, entitled "Technical Standards and Corrective Action for Owners and Operators of Underground Storage Tanks." This subpart contains requirements concerning: design, construction, and installation; general operating practices; inspection and leak detection; spill reporting, investigation, and confirmation; tank system closure; and operator training.

#### Subpart 613-3: UST Systems Subject Only to Title 10

Subpart 613-3 addresses UST systems that are only subject to Title 10. The structure of this subpart reflects that of Subpart 613-2 and contains similar requirements. This subpart consolidates the UST system requirements from existing 6 NYCRR Parts 612 through 614, but it does not include requirements from 40 CFR Part 280. The only structural difference between Subparts 613-3 and 613-2 is that 613-3 does not contain requirements for operator training.

#### Subpart 613-4: AST Systems

Subpart 613-4 addresses aboveground storage tank (AST) systems. Like Subpart 613-3, it has a structure that reflects Subpart 613-2. This subpart consolidates the AST system requirements from existing 6 NYCRR Parts 612 through 614. The substantive provisions are markedly different from Subparts 613-2 and 613-3 because the technologies and practices applicable to AST systems are different from those applicable to UST systems. This Subpart contains requirements concerning: design, construction, and installation; general operating practices; inspection and leak detection; spill reporting, investigation, and confirmation; and tank system closure.

#### Subpart 613-5: Delivery Prohibition

Subpart 613-5 contains the requirements concerning delivery prohibition. The provisions of this subpart establish the circumstances and process for imposing a delivery prohibition; required notifications; and the process for termination of a delivery prohibition.

#### Subpart 613-6: Release Response and Corrective Action

This subpart contains requirements concerning initial spill response, initial spill abatement measures; site check; initial site characterization; free product removal; investigations for soil and groundwater cleanup; corrective action plans; and public participation.

#### Section 370.1(e)(2): Reference to the Code of Federal Regulations

Section 370.1(e)(2) lists standards incorporated by reference. Revisions were made to update references to 40 CFR Parts 112, 279, 280 and 761 for the purposes of Subparts 360-14 and 374-2.

#### Subpart 374-2: Standards for the Management of Used Oil

Subpart 374-2 was amended to (1) implement amendments to Title 10, which expressly subjects used oil tanks to PBS; (2) revise definitions based

upon and cross-references pertaining to revisions in the proposed Part 613; and (3) incorporate amendments to 40 CFR Part 279, entitled, "Standards for the Management of Used Oil," promulgated between July 30, 2003 and July 14, 2006. Revisions to adopt significant federal amendments are provided below.

Clarifications and corrections were made to adopt EPA's July 30, 2003 rule (68 FR 44659-44665) with respect to mixtures of used oil and polychlorinated biphenyls (PCBs) and their applicability to the federal Toxic Substances Control Act and its implementing regulations, 40 CFR 761. The regulation of mixtures of used oil and hazardous waste from conditionally exempt small quantity generator hazardous waste are also clarified. Changes were also made to the recordkeeping requirements for used oil marketers.

Testing and monitoring requirements are amended, in order to allow more flexibility when conducting RCRA related sampling & analysis by providing appropriate analytical methods for RCRA applications. These changes were made to conform with EPA's June 14, 2005 rule as amended on August 1, 2005 (70 FR 34548-34592, and 70 FR 44150-44151). Corrections to the used oil regulations, including spelling, printing omissions, typographical errors, and incorrect cross-references were made to conform with EPA's July 14, 2006 rule (71 FR 40254-40280).

In addition, typographical errors and inconsistencies between State and federal regulations have been corrected, along with some modifications to areas where the State is different from federal requirements. These changes are summarized below.

Provisions were added to the used oil regulations, pertaining to used oil acceptance requirements for "service establishments" and "retail establishments." Part 613, which is independently applicable to many used oil tanks, contains a provision that a tank that does not meet certain minimal standards may be "tagged," which means that delivery of used oil into the tank would be prohibited. Subpart 374-2 was amended to clarify that if the used oil tank at a service or retail establishment is tagged, then the owner or operator must provide alternate container or tank storage to receive used oil from household do-it-yourselfers. Such temporary storage must be designed and operated in compliance with all applicable used oil storage requirements.

Most of the Department's used oil regulations are contained within 6 NYCRR Subparts 374-2 and 360-14. Part 613 includes registration and management standards for PBS tanks that are also applicable to used oil tanks.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 374-2.2, 374-2.3, 374-2.5—374-2.8, 613-1.2—613-1.10, 613-2.1—613-2.6, 613-3.1—613-3.5, 613-4.1—613-4.5, 613-5.1, 613-5.2, 613-5.4, 613-6.2—613-6.8.

**Text of rule and any required statements and analyses may be obtained from:** Russ Brauksieck, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7020, (518) 402-9553, email: derweb@dec.ny.gov

**Additional matter required by statute:** Negative Declaration, Coastal Assessment Form, and Short Environmental Assessment Form have been completed for this rule making.

### Summary of Revised Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY

##### Petroleum Bulk Storage

The State law authority that empowers the Department of Environmental Conservation (Department) to regulate the storage, handling, and cleanup of petroleum is found in Article 12 of the Navigation Law (NL), sections 170 through 197 (Article 12) and Title 10 of Environmental Conservation Law (ECL) Article 17, sections 17-1001 through 17-1017 (Title 10). The Department is authorized to adopt regulations to implement the provisions of the ECL and the NL under ECL sections 3-0301(2)(a) and (m) and NL section 191, respectively. ECL Articles 3 and 17 provide authority regarding access to facilities, premises, and records. The Department's existing rules with respect to petroleum bulk storage (PBS) are found at 6 NYCRR Parts 612 through 614.

Under Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 USC sections 6991 through 6991m (Subtitle I), the U.S. Environmental Protection Agency (EPA) is authorized to regulate PBS underground storage tanks (USTs). EPA's implementing rule is found at 40 Code of Federal Regulations (CFR) Part 280.

##### Used Oil Management

Article 3, Title 3; Article 17, Title 10; Article 23, Title 23; Article 27, Titles 7 and 9; Article 70; and Article 71, Titles 27 and 35 of the ECL authorize the proposed changes to 6 NYCRR Part 370 and Subpart 374-2. The Department is authorized to promulgate regulations and standards applicable to the generation, storage, transportation, treatment and disposal of hazardous waste, as necessary to protect public health and the environment. Pursuant to ECL section 27-0900, these regulations and standards must be at least as stringent as those established by EPA under RCRA, Subtitle C (42 USC sections 6921 through 6939e).

## 2. LEGISLATIVE OBJECTIVES

### Petroleum Bulk Storage

The legislative objectives inherent in the statutory authority are the safe storage and handling of petroleum to minimize the threats to public health and the environment that come from the release of petroleum to the environment. The repeal of the existing rules and the adoption of proposed Part 613 would meet these legislative objectives and reflect statutory changes that were made to Title 10 in 2008 (see Ch. 334, L. 2008), which allow for State consistency with new federal requirements enacted as revisions to RCRA Subtitle I during 2005.

### Used Oil Management

ECL Articles 3, 23 and 27 authorize the Department to promote resource recovery and preserve and enhance the State's air, water and land resources. Article 23 authorizes the Department to implement regulations governing used oil collectors, re-refiners and retention facilities, in conformance with ECL Article 27. Article 27 requires the promulgation of regulations governing the operation of solid waste management and hazardous waste management facilities. Pursuant to ECL section 27-0900, the hazardous waste management regulations must be at least as broad and as stringent as those established by EPA under RCRA.

## 3. NEEDS AND BENEFITS

### Petroleum Bulk Storage

The adoption of this proposed rule would ensure that the Department continues to receive grant funds which are vital to implementation and enforcement of the State's PBS program.

Many regulated entities with UST systems should find it easier and less expensive to comply with State regulatory requirements because they would be more consistent with federal regulatory requirements. The Department anticipates that this would result in increased compliance.

Some important definitions are added or clarified in the proposed rule, including: "UST system," (essentially equivalent to 40 CFR Part 280); classes of operators; various forms of tank capacity; "facility;" "farm" (same as "farm tank" in 40 CFR Part 280); "petroleum" (incorporates federal concept of a complex blend of hydrocarbons); and "petroleum mixture."

Under proposed Subpart 613-2, operators and tank system owners must designate operators for every UST system or group of UST systems. There are three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components to the operator training program: training, assessment of knowledge, and verification. Under proposed section 613-2.5, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The Department will develop a test to allow operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of UST systems.

The new requirements of proposed Subpart 613-5 would allow the Department to prohibit deliveries of petroleum to tank systems that are in significant non-compliance with the proposed rule.

### Used Oil Management

Most of the Department's used oil regulations are contained in 6 NYCRR Subparts 374-2 and 360-14. Proposed Part 613 includes standards for PBS tank systems that are applicable to tanks storing used oil.

The provisions of section 370.1(e)(2) and Subpart 374-2 are revised to address changes to definitions and cross-references related to proposed Part 613. In addition, revisions are proposed to account for changes to 40 CFR Part 279.

The proposed rule incorporates into State regulations revisions made to federal regulations between July 30, 2003 and April 13, 2012.

## 4. COSTS

### Petroleum Bulk Storage

There would be costs incurred by facilities subject to the operator training requirements of proposed section 613-2.5. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of tank systems that are not regulated under 40 CFR Part 280 are exempt from this requirement. The Department will develop tests for Class A and B operators and training materials, for which there will be no charge. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the relevant underground tank system is significantly out of compliance.

The proposed rule would eliminate or reduce costs incurred by certain facilities under existing rules, due to: (1) elimination of the requirement to perform inventory monitoring for tank systems which store motor fuel or kerosene that will not be sold; (2) introduction of a uniform records retention schedule with three time periods (three years, five years, or the life of the facility) depending upon the record type; and (3) elimination of

periodic tank testing for UST systems subject to regulation under 40 CFR Part 280.

The Department would incur costs to develop and administer the operator training and delivery prohibition. Approximately \$5,000 would be needed to procure tags and associated materials to implement the delivery prohibition requirements. The amount of staff time needed to accomplish these tasks cannot be determined until the implementation details have been finalized. This will be accomplished while the rule making process is being completed. The Department would continue to partially cover its personal and non-personal costs through registration application fees. The proposed rule does not impose any costs on state agencies or local governments.

### Used Oil Management

These proposed amendments would not result in any additional costs to the regulated community. Actual requirements for used oil handlers based upon the revised definitions would remain the same. EPA's cost analyses of these regulatory amendments noted no added expenses to the regulated community (68 FR 44663 – 44665, 70 FR 34552 -34553, 71 FR 40257).

Implementation of the proposed revisions to the used oil regulations would not result in additional costs to the Department, because they do not create new regulatory programs, expand existing regulatory programs, or increase the universe of the regulated community.

Conformance with these amendments would not impose additional costs on other State agencies or local governments.

## 5. LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements would be imposed on local governments.

## 6. PAPERWORK

The proposed rules contain no substantive changes to existing reporting and record keeping requirements. Facilities would be required to retain records of operator training once the requirement for training goes into effect.

## 7. DUPLICATION

### Petroleum Bulk Storage

One of the main goals of this proposed rule is to reduce duplication. The proposed rule represents a harmonization of existing State PBS and federal UST program requirements which use inconsistent terminology.

### Used Oil Management

The proposed amendments would not result in a duplication of State regulations. Changes to cross-references and definitions would better align the used oil regulations with the State PBS regulations, by correcting cross-references to the PBS regulations and reducing conflicting requirements. By adopting the recent federal regulations, New York would not only retain authorization, but also reduce duplicative State and federal regulation of used oil in the State.

## 8. ALTERNATIVES

### Petroleum Bulk Storage

The Department considered three alternatives when developing proposed Part 613: (1) no action, (2) a single-phase revision of all PBS regulatory requirements, and (3) a two-phase revision.

The Department declines to take no action because: (1) existing rules should, with respect to new tank systems, be updated to reflect the state of the art technologies and practices for the installation and operation of facilities; (2) existing rules do not adhere to the 2008 revisions to Title 10; (3) the rule making should increase compliance because many facilities with UST systems would find it easier and less expensive to comply with State and federal regulatory requirements that are more consistent and (4) the rule making would ensure the Department does not lose crucial federal funding.

The Department's second alternative was to propose a rule that includes more stringent requirements, including a requirement that all existing facilities (Category 1 and Category 2 tank systems in proposed rule) be upgraded to new tank system standards or be closed. The Department declined to pursue this alternative for a number of reasons, including the high likelihood that the Department will be obligated to undertake a second rule making to incorporate the revisions found in the newly revised federal regulations.

### Used Oil Management

For the federal changes which increase stringency, amending Subpart 374-2 is the only viable alternative available for assuring that the Department's regulations remain at least as stringent as the federal rules. The no-action alternative would result in the State's loss of authorization to administer the used oil program in lieu of EPA's implementation of the federal program. If this were to occur, the regulated community would need to satisfy two sets of regulations (i.e., federal and pre-existing State) and the Department would suffer a loss of federal grant monies.

## 9. FEDERAL STANDARDS

### Petroleum Bulk Storage

The proposed rule might be viewed as exceeding the requirements of 40 CFR Part 280 because it incorporates technology and operating standards

that were only proposed as compliance options in the then proposed federal rule making. However, because the Part 280 compliance options incorporated into proposed Part 613 are actually widely-followed industry standards for new tank systems, the Department believes these standards do not exceed minimum federal standards.

#### Used Oil Management

The proposed changes would increase consistency between state and federal regulations and between the State's PBS and used oil regulations.

#### 10. COMPLIANCE SCHEDULE

##### Petroleum Bulk Storage

Operators of certain UST systems would need to complete operator training and testing requirements within one year of the effective date of the rule. With regard to all other requirements, the regulated community would be required to comply upon adoption of the proposed rule.

#### Used Oil Management

The regulated community would be required to comply upon adoption of the proposed rule.

### Revised Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE

The proposed rules would apply statewide in all 62 counties of New York State (State). Proposed Part 613 represents a consolidation of existing State and federal requirements. None of the revisions to the proposed rules include any substantive changes to existing requirements concerning petroleum bulk storage (PBS) or used oil.

The New York State Department of Environmental Conservation (Department) does not collect data with respect to the number of the persons employed by the owner or operator of any subject facility. The Department does not presently collect data on the industrial classification of a registered facility. The Department does not have data on the corporate structures that may exist for a particular facility owner or operator which may have a bearing on determining how many persons are employed by the owner or operator. The Department only collects information regarding the name, address, and contact information for the owner and operator of each registered facility. Due to this lack of data, the Department is unable to make an estimate of how many small businesses comply with the existing PBS rules (6 NYCRR Parts 612 through 614) or would be required to comply with proposed Part 613.

The most common types of subject facilities are apartment/office buildings, retail gasoline sales, vehicle repair shops, schools, trucking or fleet operations, and municipalities. There are approximately 38,500 registered facilities in the Department's PBS database. The Department believes that the great majority of the owners and operators of these facilities would likely be properly categorized as small businesses.

The Department does collect data on whether registered facilities are owned by local governments. There are approximately 4,435 PBS facilities identified as registered by local governments. The Department believes that the types of facilities registered by local governments tend to be vehicle fleet fueling locations for municipal vehicle pools and school district transportation departments.

#### 2. COMPLIANCE REQUIREMENTS

The proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities.

#### 3. PROFESSIONAL SERVICES

No new or additional professional services are likely to be needed by facilities owned by small businesses or local governments to comply with the proposed rules.

#### 4. COMPLIANCE COSTS

Under proposed Part 613, operators and tank system owners must designate operators for every underground storage tank (UST) system or group of UST systems that is subject to the requirements of Subpart 613-2. There would be three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components of the operator training program: training, assessment of knowledge, and verification. Under proposed section 613-2.5, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The New York State Department of Environmental Conservation will develop training materials and an examination to allow for operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of UST systems. It is anticipated that the exam would primarily be administered online. The Department recognizes that online testing may not be a viable option for some operators and therefore proposes to provide in-person exam options.

There would be costs incurred by facilities subject to the operator training requirements of proposed section 613-2.5. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of heat-

ing oil tank systems (and other tank systems that are not regulated under 40 CFR Part 280) are exempt from this requirement. Self-study can be conducted at no cost and training courses are optional. The Department will develop tests for Class A and B operators. The Department will also develop training materials and make them publicly available. There will be no charge for the training materials or for an operator to take the test. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the relevant UST system is significantly out of compliance.

The proposed rule would eliminate or reduce costs that are incurred under the existing rules by certain facilities. These cost reductions are attributable to the following features of the proposed rule: (1) the elimination of the requirement to perform inventory monitoring for tank systems which store motor fuel or kerosene that will not be sold; (2) the introduction of a uniform records retention schedule with three time periods (three years, five years, or the life of the facility) depending upon the record type; and (3) the elimination of periodic tank testing for UST systems that were upgraded in accordance with 40 CFR Part 280.

Small businesses and local governments would not incur any additional costs, either initial capital costs or annual compliance costs, to comply with the changes to section 370.1(e)(2) or Subpart 374-2 affecting used oil management. Some changes would make the State regulations consistent with federal regulations.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities. Implementation of the proposed rules would be economically and technologically feasible for small businesses and local governments.

#### 6. MINIMIZING ADVERSE IMPACT

Because proposed Part 613 represents a harmonization of existing State and federal requirements involving PBS, the Department does not believe that the proposed rule would have an adverse economic impact on small businesses or local governments. Since changes to section 370.1(e)(2) or Subpart 374-2 pertaining to used oil management would make State regulations consistent with federal regulations, this proposed rule would also not have an adverse economic impact on small businesses or local governments.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department continues to provide statewide outreach to regulated parties and interested persons, including small businesses and local governments. In 2011, 2012, and 2013, the Department made presentations to various petroleum associations (for example, Empire State Petroleum Association, New York State Conference of Mayors and Municipal Officials (NYCOM), and New York State Automobile Dealers Association) at conference venues. The Department also continues to post relevant information on its website to assist the owners and operators of subject facilities with understanding and implementing the requirements of the PBS Program. And, the Department maintains listservs to which persons may subscribe so that they can receive information about new developments regarding the PBS, hazardous waste and used oil management programs.

Pursuant to ECL section 17-1013, a State Petroleum Bulk Storage Advisory Council (Council) was created within the Department to advise the Department on the proposal, preparation, and revision of the regulations written to implement necessary requirements for PBS facilities. Included in the Council's membership are small business owners and local governments (through NYCOM). Council members have professional training or experience to analyze and interpret content of the PBS regulations. As drafts of proposed Part 613 were prepared, the Department shared the drafts with the Council and convened meetings or conference calls to discuss the Council's comments and answer any questions.

The Department has an ongoing education program for vehicle maintenance shops subject to the requirements of Subpart 374-2. As part of this program, workshops are conducted with trade associations throughout the State upon request. In addition, the Department has a guidance manual available that explains the regulatory requirements for vehicle maintenance shops and an accompanying self-audit checklist. The Department also maintains information on its website.

#### 8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

State Administrative Procedure Act (SAPA) section 202-b(1-a) provides as follows:

In developing a rule for which a regulatory flexibility analysis is required and which involves the establishment or modification of a violation or of penalties associated with a violation, the agency shall: (a) include a cure period or other opportunity for ameliorative action, the successful completion of which will prevent the imposition of penalties on the party or parties subject to enforcement; or (b) include in the regulatory flex-

ibility analysis an explanation of why no such cure period was included in the rule.

Proposed Subpart 613-5 would provide for the possible imposition of a delivery prohibition on any tank system for which the Department finds a Tier 1 or Tier 2 condition exists. The statutory basis for imposition of a delivery prohibition is found in ECL section 17-1007(4) as amended during 2008. The Department considers a delivery prohibition to be a penalty within the meaning of SAPA section 202-b(1-a).

The delivery prohibition would only be imposed without prior notice and opportunity for hearing when the Department finds that a Tier 1 condition exists with respect to a tank system. Tier 1 conditions would be regulatory violations that constitute imminent and serious threats to public health and the environment. Tier 1 conditions would include: (1) a tank system is known to be releasing petroleum, and (2) a UST system covered under section 613-2.1(a), 613-3.1(a)(2), or 613-3.1(a)(4) lacks infrastructure or equipment needed to meet secondary containment, spill and overflow prevention, corrosion protection, or leak detection requirements. The severity of the threat generally posed by Tier 1 conditions militates against the provision of any cure period that would allow the threat to continue.

The designation of a tank system that is releasing petroleum as a Tier 1 condition is supported by the existing prohibition on the operation of any leaking tank system. ECL section 17-1007(3) (enacted during 1983) provides that the operation of any leaking tank system and associated equipment is unlawful and the contents of any leaking tank system must be promptly removed. To allow for the continued operation of a tank system that is releasing petroleum during a cure period would be in direct contravention of ECL section 17-1007(3).

With respect to the other Tier 1 conditions involving equipment deficiencies at a UST system, the violations are generally of a kind that is not quickly ameliorated. The absence of required equipment, such as corrosion protection, usually requires substantial installation work that involves the excavation of soil around the UST system.

When the Department finds that a Tier 2 condition exists, imposition of a delivery prohibition would not occur until after a cure period occurs. The cure period that follows a Department finding of a Tier 2 condition would last either ten or 30 days depending on the circumstances. See section 613-5.1(b)(4).

There is some similarity between the circumstances described as a Tier 1 condition at section 613-5.1(a)(3)(ii) (regarding tank systems covered under sections 613-2.1(a), 613-3.1(a)(2), or 613-3.1(a)(4)) and the Tier 2 condition described at section 613-5.1(b)(4)(iii) (regarding tank systems covered under sections 613-3.1(a)(1) or 613-3.1(a)(3)). Both circumstances include the lack of essential infrastructure or equipment needed to meet secondary containment, spill and overflow prevention, corrosion protection, and leak detection requirements for UST systems. However, the Department determined that only the circumstances described at section 613-5.1(a)(3)(ii) warrant the allowance of a cure period before the delivery prohibition is imposed. The reason for the different treatment of USTs under these provisions is due to the different characteristics of the facilities being covered. The facilities subject to section 613-5.1(b)(4)(iii) are generally critical to public health and safety. These facilities include heating oil used for on-premises consumption (most often apartment buildings) and emergency generators at nuclear power plants. If these facilities were invariably ordered to cease operating while equipment is put in place, apartment dwellers may lose all heat during the winter or nuclear facilities could lose essential backup power capacity.

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

##### **1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS**

For purposes of this Rural Area Flexibility Analysis, "rural area" means those portions of the state so defined by Executive Law section 481(7). State Administrative Procedure Act section 102(10). Under Executive Law section 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of two hundred thousand or greater population, "rural areas" means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein." There are 44 counties in New York State (State) that have populations of less than 200,000 people and 71 towns in non-rural counties where the population densities are less than 150 people per square mile. The proposed rules would apply statewide so they would apply to all rural areas of the State.

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

The proposed rule contains no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities. The proposed rule would not impose requirements on facilities located in rural areas in a manner different from those imposed on facilities in non-rural areas. No different or additional professional services

would likely be needed by facilities in rural areas by virtue of their rural location.

##### **3. COSTS**

Under proposed Part 613, operators and tank system owners must designate operators for every underground storage tank (UST) system or group of UST systems that is subject to the requirements of Subpart 613-2. There would be three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components of the operator training program: training, assessment of knowledge, and verification. Under proposed section 613-2.5, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The New York State Department of Environmental Conservation (Department) will develop training materials and an examination to allow for operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of UST systems. It is anticipated that the exam would primarily be administered online. The Department recognizes that online testing may not be a viable option for some operators and therefore proposes to provide in-person exam options.

There would be costs incurred by facilities subject to the operator training requirements of proposed section 613-2.5. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of heating oil tank systems (and other tank systems that are not regulated under 40 CFR Part 280) are exempt from this requirement. Self-study can be conducted at no cost and training courses are optional. The Department will develop tests for Class A and B operators. The Department will also develop training materials and make them publicly available. There will be no charge for the training materials or for an operator to take the test. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the relevant UST system is significantly out of compliance.

The proposed rule would eliminate or reduce costs that are incurred under the existing rules by certain facilities. These cost reductions are attributable to the following features of the proposed rule: (1) the elimination of the requirement to perform inventory monitoring for tank systems which store motor fuel or kerosene that will not be sold; (2) the introduction of a uniform records retention schedule with three time periods (three years, five years, or the life of the facility) depending upon the record type; and (3) the elimination of periodic tank testing for UST systems that were upgraded in accordance with 40 CFR Part 280.

The proposed rules would not impose costs on facilities in rural areas that are different or additional to those incurred by facilities in non-rural areas. There would be no likely variation in costs incurred by public and private entities in rural areas.

##### **4. MINIMIZING ADVERSE IMPACT**

Since this rule making is a harmonization of existing State and federal requirements, the Department believes that the proposed rules would not cause an adverse impact on any rural area.

##### **5. RURAL AREA PARTICIPATION**

The Department continues to provide statewide outreach to regulated communities and interested parties, including those in rural areas of the State. In 2011, 2012 and 2013, the Department made presentations to various petroleum associations (for example, Empire State Petroleum Association, New York State Conference of Mayors and Municipal Officials, and New York State Automobile Dealers Association) at conference venues. The Department also continues to post relevant information on its website to assist the owners and operators of subject facilities, including those located in rural areas, with understanding and implementing the requirements of the Petroleum Bulk Storage (PBS), hazardous waste and used oil management programs. And, the Department maintains listservs to which persons may subscribe so that they can receive information about new developments regarding the PBS, hazardous waste and used oil management programs.

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

Changes made to the Express Terms published with the Notice of Adoption do not require revisions to the Job Impact Exemption Statement that was previously published in the August 6, 2014 issue of the State Register.

##### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

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

###### **Introduction**

This summary reflects the responses of the New York State Department

of Environmental Conservation (DEC) to the main comments submitted by the public regarding the newly adopted Part 613 (the petroleum bulk storage (PBS) rule) and revisions to Subpart 374-2 and section 370.1(e)(2) (the used oil regulations). This rule making was proposed on August 6, 2014 and included an extended 90-day comment period that ended on November 4, 2014. A statewide webinar with nearly 500 participants was held on August 26, 2014 to explain the proposed rules and answer questions from the public. Six public information meetings/hearings were held across the state to further explain the proposed rules and receive comments. Approximately 221 comments were received on the PBS regulations and one comment on used oil.

Main Themes (where lists of issues are provided, the summary of DEC responses is in brackets)

Applicability/Definitions (section 613-1.2, 1.3; e.g., comment 4.1.2): Many comments were received asking for clarifications or interpretations of the various definitions in section 613-1.3. Examples include the definition of “operational tank system” [DEC clarified that lubricating oil system reservoirs are also operational tanks]; the status of trailer-mounted tanks serving emergency generators [non-stationary/mobile tanks are not regulated]; the status of tank systems storing asphaltic emulsions [regulated]; whether tank systems covered with “materials” (e.g., earth, concrete) are underground storage tank (UST) systems [if they cannot be inspected for condition/leaks or are not otherwise explicitly excluded from the definition, they are USTs]; whether airport hydrant systems are UST systems [generally not]; and whether an AST system that has been out of service for more than 12 months must be permanently closed [not if there are other tank systems in-service at the facility].

Unannounced Inspections (section 613-1.4; e.g., comment 4.1.29): Several commenters expressed their opinion that all DEC facility compliance inspections should be preannounced so that facility representatives can be prepared and inspections can focus more on compliance assistance rather than strict enforcement. Although the great majority of DEC’s inspections are preannounced, some are unannounced. Concern was raised that the regulatory language is inconsistent with the law. The response explained that the text of Part 613 represents no change in DEC’s inspection authority. In addition, DEC revised the proposed version of Part 613 to more closely conform to the statutory language regarding the provision of reasonable notice of an inspection. Reasonable notice does not necessarily require that an inspection be announced days in advance. Reasonable notice may consist of going to the facility and asking the operator for permission to inspect the facility. There is nothing unreasonable about unannounced inspections. Inspections that are not announced in advance allow the opportunity for inspectors to see how the facility is usually operated and limit the facility’s ability to hide deficiencies in equipment and operations.

Registration of Facilities (section 613-1.9; e.g., comment 4.1.13): Several questions were asked about how to interpret the “new” definition of “facility” (changed under the law in 2008 and implemented through Part 613) for the purposes of registering a facility. The owner of the property where the tanks are located (or its authorized representative) is required to register a facility. However, at a single facility there sometimes are multiple property owners, multiple tank owners, and the tank systems may be used for different purposes. Therefore, it is not always clear who should register the individual tank systems and when it is appropriate to have multiple independent facilities located on a single property. The response explained that DEC recognizes that there are situations involving multiple tank owners who are operationally independent with tank systems that are co-located on a single property. An example is when multiple independent telecommunication companies have emergency power generation systems with fuel tanks on a single property. In certain limited situations, DEC may allow more than one registration for a site. DEC will take into account the property and tank ownership issues, whether the operators are independent from each other, the feasibility of having all tanks listed under one registration, and whether tank systems are being used for a “common purpose” when deciding whether multiple tank systems on a single property should be registered as one or more facilities. When there is a single tank operator with multiple tank owners, the facility registration must include all tanks that are under the control of the tank operator.

Technical Standards for Tank System Design, Construction, and Installation (section 613-1.10; e.g., comment 4.3.2): Several commenters requested that additional standards for the design, construction, and installation of tank systems be included in the regulation. DEC explained that the inclusion of additional standards will be considered in the second phase of rulemaking that is to begin after Part 613 is promulgated.

As-Built Drawings of Tank Systems (section 613-2.1; e.g., comment 4.2.6): Part 613 requires that when an UST tank system is installed, the owner must keep and provide to DEC upon request a drawing showing the location of the tank(s) and piping and details about the size and various components of the tank system. This information is needed to verify that the facility has the proper equipment and that if a leak occurs, the draw-

ings and details can be used to expedite an investigation and remediation of the problem. Owners of older systems submitted comments expressing concern that the original as-built information was either not provided to the owner or is no longer available and that it will be very expensive to create new documents. DEC responded that an accurate diagram showing the approximate (not surveyed) locations of the tank systems is sufficient.

Operator Training (section 613-2.5; e.g., comment 4.2.26): Several commenters requested details about how the operator training program will work. When Part 613 goes into effect, tank system operators will have one year to become trained on topics specified in section 613-2.5 and to pass an exam approved by DEC, or obtain a credential issued by another state with a program acceptable to DEC. Anticipating these comments, DEC released a proposed program policy (DER-40, “Operator Training”) which was made available for public comment at the same time as Part 613 was proposed. In addition, since the release of the proposed regulations and policy, DEC has developed and made available to the public a draft operator training manual (“Tank IQ”) which addresses all of the topics required by Part 613, and has developed an online exam which will be used to determine which operators are competent to be authorized to operate tank systems.

An extensive pilot program to test the online exam was completed in April, 2015. Over 200 volunteers from the regulated community took the pilot exam in 13 proctored locations across the state. The pilot exam included effectively all of the questions that will be used in the live/formal exam (over 300 questions; the live exam will have between 50-85 questions depending upon operator class). With the assistance of an expert in giving competency exams (psychometric expert), the results of the pilot exam were evaluated, adjustments were made, and difficulty ratings were assigned to all questions. The results of a survey regarding the exam and the guidance material provided positive feedback and good suggestions for fine tuning the guidance and exam. DEC believes that the provision of the guidance, the program policy, and the experience from the pilot exam substantially address the issues raised in the public comments. There was a comment that DEC should provide more than one year for operators to pass the exam but DEC maintains that one year is sufficient.

Secondary Containment for AST Systems (section 613-4.1; e.g., comment 4.4.6): Several comments were received expressing concern about a proposed revision that clarifies when smaller ASTs require secondary containment. The existing and proposed regulations require that ASTs with a design capacity of more than 10,000 gallons must have secondary containment and that smaller ASTs require secondary containment if a release from the smaller AST would threaten nearby waters of the state or sensitive resources. The existing regulation required secondary containment for smaller ASTs if a release from the tank “could reasonably be expected to discharge petroleum to the waters of the state.” Since any discharge could theoretically result in an impact to the “waters of the state,” DEC issued guidance in 1990 (TOGS 4.1.10) that limited which ASTs need secondary containment. These limitations were reaffirmed in 2011 when DEC issued DER-25, “Petroleum Bulk Storage (PBS) Inspection Handbook.” Commenters were concerned that incorporating the guidance into Part 613 gives it more weight and that DEC inspectors will be requiring many more tanks to be provided with secondary containment. DEC’s response explained that the approach to AST secondary containment requirements in Part 613 represents no change from how the existing requirements are implemented through the existing regulation and supplemental guidance. Part 613 clarifies that smaller ASTs “in close proximity to sensitive receptors [are] required to either have secondary containment . . . or utilize a design/technology such that a release is not reasonably expected to occur” (section 613-4.1(b)(1)(v)(b)).

Delivery Prohibition (Subpart 613-5; e.g., comment 4.5.1): Several comments were submitted expressing concern about the process DEC will use when it is necessary to prohibit the delivery of petroleum to a tank system because the system is either leaking, may be leaking, or the equipment/procedures are not in place to determine if the system is leaking. Most of the concerns relate to the time needed to resolve the issue and remove the delivery prohibition tag on the fill pipe of the tank system. DEC’s response explained that Part 613 includes many features designed to ensure that prohibitions are not indiscriminately applied, an opportunity for a hearing is automatically provided, and that the process is completed expeditiously. There was a comment that utilities should be exempt from the process because a disruption of service would threaten public health and safety. DEC explained that it has the authority to terminate the prohibition on its own initiative. If the situation calls for imposing a delivery prohibition, DEC’s opinion is that it is reasonable for the violator to fix or replace the tank system or equipment within 180 days or to come into compliance with the terms of a consent order that includes an appropriate schedule and any needed remedial measures. If warranted, DEC could seek a summary abatement order, negating the need for a delivery prohibition. The law (ECL section 17-1007(3)) forbids the operation of tank systems that are leaking petroleum. There are no exceptions to this mandate.

## NOTICE OF ADOPTION

**Chemical Bulk Storage (CBS)****I.D. No.** ENV-31-14-00007-A**Filing No.** 783**Filing Date:** 2015-09-11**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:** Repeal of Parts 595, 596 and 597; addition of new Parts 596 and 597; and amendment of Parts 598 and 599 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 17-0301, 17-0303, 17-0501, 17-1743, 37-0101 through 37-0107 and 40-0101 through 40-0121

**Subject:** Chemical Bulk Storage (CBS).

**Purpose:** To amend existing CBS rules to harmonize State regulations with EPA Federal rule (40 CFR 280).

**Substance of final rule:** The New York State Department of Environmental Conservation (Department) has amended its existing rules that establish: methods and lists for identifying hazardous substances, requirements for reporting and remediation of releases of hazardous substances, requirements concerning sales of hazardous substances, and requirements for the handling and storage of hazardous substances, commonly known as the chemical bulk storage (CBS) program. The previous rules were found at 6 NYCRR Parts 595 through 599 and have been revised as described below.

Existing Part 595

Existing Part 595, Releases of Hazardous Substances, has been repealed.

Existing Part 596

Existing Part 596, Hazardous Substance Bulk Storage Regulations, has been repealed.

New Part 596

A new Part 596, Hazardous Substance Bulk Storage Facility Registration, has been adopted. The express terms are summarized as follows:

Section 596.1: General

Section 596.1 contains provisions covering the purpose of the rule, applicability, definitions, severability, access to records and tank systems, confidentiality, and enforcement.

Section 596.2: Registration of Facilities

Section 596.2 contains provisions covering the registration process for tanks. It describes the requirements of the application forms. It describes the requirements for transfer of ownership. The following requirements are also described: registration of new facilities, change of substance stored, newly installed tanks, registration certificate, and identification numbers on tanks.

Section 596.3: Registration Fees for Facilities

Section 596.3 describes fees required for registration, re-registration or renewal. It states that no fee would be required for notifications of newly installed tanks.

Section 596.4: Sale of Hazardous Substances

Section 596.4 contains the requirements for the distribution of hazardous substances including the contents of technical guidance and recommended practices. It also requires the manufacturer or distributor to file an up-to-date copy of its technical guidance and recommended practices with the department. This Part also prohibits the delivery to unregistered tanks.

Existing Part 597

Existing Part 597, List of Hazardous Substances, has been repealed.

New Part 597

A new Part 597, Hazardous Substances Identification, Release Prohibition, and Release Reporting, has been adopted. The express terms are summarized as follows:

Section 597.1: General

Section 597.1 contains a description of purpose of the rule, definitions, severability, and references. The purpose statement of Part 597 now explicitly includes the prohibition of releases, release reporting, and a requirement to remediate releases (provisions moved from previous version of Parts 595 and 596).

Section 597.2: Criteria for Identifying a Hazardous Substance or Acutely Hazardous Substance

Section 597.2 describes the six criteria for identifying a hazardous substance and four criteria for identifying an acutely hazardous substance.

Section 597.3: List of Hazardous Substances

In order to be consistent with changes to 40 Code of Federal Regulations Part 302 made since Part 597 was initially promulgated, 19 sub-

stances have been added (36 names added including synonyms) and four substances have been deleted (three names deleted) from the two tables listing hazardous substances in Part 597.

Section 597.4: Releases of Hazardous Substances

Section 597.4 includes a release reporting section that was largely drawn from the existing Part 595. New language was added that indicates a release would be reportable when a release of a reportable quantity occurs within any 2-hour period.

Revised Part 598

Part 598, Handling and Storage of Hazardous Substances, has been amended. Various terms, such as "tank" and "tank system," have been changed to conform with the definitions in the new Part 596. New sections addressing operator training and delivery prohibition were added. The existing requirements concerning release reporting, spill response, investigation, and corrective action, found in the previous version of Parts 595 and 596, were moved to this amended Part. Public participation provisions have also been added.

Revised Part 599

Part 599, currently titled Standards for New or Modified Hazardous Substance Storage Facilities, has been given the new title Standards for New Hazardous Substance Tank Systems. Minor changes were made to this Part so it conforms to the terminology used in the other Parts of these newly adopted rules for the CBS program.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 596.1(c)(11), (58), 596.2(d)(1), 597.4(b)(1), (3)(iii), 598.1(j), 598.3, 598.9(1), (2), 598.12(b)(1), (c)(3), (d)-(f), 598.13(a), (1)(iii)(a), (2)(ii), (iv)(a), (c), (b)(1), (d)(1)(ii)(a), (iii)(a), (c), 598.14(a)(4)(iv), (b)(1), (ii), (2), (c)(2), (f)(1), (4), 599.1(h), 599.3(a)(1)(v), 599.4(b)(3), 599.6(e)(1), (2), 599.8(e) and 599.17(b)(iii).

**Text of rule and any required statements and analyses may be obtained from:** Russ Brauksieck, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7020, (518) 402-9553, email: derweb@dec.ny.gov

**Additional matter required by statute:** Negative Declaration, Coastal Assessment Form, and Short Environmental Assessment Form have been completed for this rule making.

**Summary of Revised Regulatory Impact Statement****1. STATUTORY AUTHORITY**

The State law authority that empowers the Department of Environmental Conservation (Department) to regulate the storage and handling of hazardous substances is found in Title 1 of Article 37 of the Environmental Conservation Law (ECL), sections 37-0101 through 37-0111, entitled "Substances Hazardous to the Environment" (Article 37), and ECL Article 40, sections 40-0101 through 40-0121, entitled "Hazardous Substances Bulk Storage Act" (Article 40). The Department is authorized to adopt regulations to implement the provisions of the ECL under ECL sections 3-0301(2)(a) and (m). ECL Articles 3 and 17 provide authority regarding access to facilities, premises, and records. The Department's existing rules with respect to chemical bulk storage (CBS) are found at 6 NYCRR Parts 595 through 599.

Under Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 USC sections 6991 through 6991m (Subtitle I), the U.S. Environmental Protection Agency (EPA) is authorized to regulate CBS underground storage tanks (USTs). The EPA implementing rule is found at 40 Code of Federal Regulations (CFR) Part 280.

**2. LEGISLATIVE OBJECTIVES**

The legislative objectives inherent in the statutory authority are the safe storage and handling of hazardous substances to minimize the threats to public health and the environment that come from their release to the environment. The repeal and replacement of, or revisions to, the existing rules to be accomplished through the proposed rules would meet these legislative objectives and reflect the statutory changes that were made to Articles 37 and 40 in 2008 (see Ch. 334, L. 2008). Adoption of the proposed rules would ensure that the environmental and public health protections afforded by the existing Parts 595 through 599 and 40 CFR Part 280 are continued and enhanced. The 2008 statutory changes were made principally in order to allow State consistency with new federal requirements enacted as revisions to RCRA Subtitle I during 2005.

**3. NEEDS AND BENEFITS**

The adoption of these proposed rules would ensure that the Department continues to receive grant funds which are vital to implementation and enforcement of the State's CBS program.

Many regulated entities with underground tank systems should find it easier and less expensive to comply with State regulatory requirements because they would be more consistent with federal regulatory requirements. The Department anticipates that this would result in increased compliance.

Some definitions are added or clarified in the proposed rule. The defini-

tion of “underground tank system” under the proposed rule would be essentially equivalent to the definition of “underground storage tank” that is found in 40 CFR Part 280. Different classes of operators are defined for the purposes of operator training. The definition of “tank system” is essentially substituted for the terms “tank” and “storage tank system.” The definitions of “underground tank system” and “aboveground tank system” make usage of these terms consistent with the operation of 40 CFR Part 280. The definition of “tank system” includes exclusionary text that currently is found in the “applicability” section of existing Part 596 (section 596.1(b)(3)). The term “farm” would be added to clarify one of the exemptions and would be consistent with the same term in 6 NYCRR Part 613. The terms “stationary tank” and non-stationary tank” are replaced by the terms “tank system,” “stationary device,” and “container.” In order to be consistent with 40 CFR Part 280 and ECL Articles 37 and 40, the definitions of “hazardous substance” found in the existing Parts 596 and 597 would be revised and clarified. The definition of “hazardous substance mixture” is added to address the issue of petroleum additives (that is, petroleum mixed with hazardous substances) and to clarify the threshold at which the proposed rules would not be applicable.

Pursuant to ECL section 37-0103(2)(c), the Department is required to update the Part 597 tables to include all substances defined as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC sections 9601 through 9675, as it may be amended from time to time. EPA maintains its CERCLA list of hazardous substances at 40 CFR Part 302. In order to be consistent with changes to 40 CFR Part 302 made since Part 597 was last promulgated, 19 substances would be added (36 names added including synonyms) and four substances would be deleted (three names deleted) from the two tables listing hazardous substances in Part 597.

Under the proposed Part 598, operators and tank system owners must designate operators for every underground tank system or group of underground tank systems. There are three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components to the operator training program: training, assessment of knowledge, and verification. Under proposed section 598.12, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The Department will develop a test to allow for operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of underground tank systems.

The new requirements of proposed section 598.13 would allow the Department to prohibit deliveries of hazardous substances to tank systems that are in significant non-compliance with the proposed rule.

The requirements concerning release reporting, and spill response, investigation, and corrective action, found in existing Parts 595 and 596, would be moved to proposed Part 598. Public participation provisions would be added to Part 598.

#### 4. COSTS

There would be costs incurred by facilities subject to the operator training requirements of proposed section 598.12. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of tank systems that are not regulated under 40 CFR Part 280 are exempt from this requirement. The Department will develop tests for Class A and B operators and training materials, for which there will be no charge. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the relevant underground tank system is significantly out of compliance.

The Department would incur costs to develop and administer the operator training and delivery prohibition requirements. Approximately \$5,000 will be needed to procure tags and associated materials to implement the delivery prohibition requirements. The amount of staff time needed to accomplish these tasks cannot be determined until the implementation details have been finalized. This will be accomplished while the rule making process is being completed. The Department would continue to partially cover its personal and non-personal service costs through registration application fees. The proposed rules would not impose any additional costs on state agencies or local governments that own or operate facilities.

#### 5. LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements not already created by statute would be imposed on local governments.

#### 6. PAPERWORK

The proposed rule contains no substantive changes to existing reporting and record keeping requirements. Facilities would be required to retain records of operator training once the requirement for training goes into effect.

#### 7. DUPLICATION

One of the main goals of these proposed rules is to reduce duplication. The proposed rules represent a harmonization of existing State CBS and federal UST program requirements which use inconsistent terminology.

#### 8. ALTERNATIVES

The Department considered three alternatives when developing the proposed Parts 596-599: (1) no action, (2) a single-phase revision of all regulatory requirements that affect CBS including a new structure, and (3) a two-phase revision.

The Department declines to take no action for four interrelated reasons. First, the tables that list hazardous substances must be updated to reflect the changes to the listing of hazardous substances found in 40 CFR Part 302. Second, the existing rules do not adhere to the 2008 revisions to Article 40, including the implementation of the major changes to RCRA Subtitle I enacted during 2005. The major changes were the new requirements for operator training and the authority to prohibit the delivery of hazardous substances to facilities that are in significant non-compliance with the requirements of the CBS program. Third, compliance by facilities having underground tank systems should increase by taking the proposed action because the Department anticipates that these facilities would find it easier and less expensive if they have only one regulatory program to follow. Fourth, under the no-action alternative, the Department would lose crucial federal funding that supports implementation and enforcement of its CBS program.

The Department’s second alternative was to propose a rule that would adopt the structure of 40 CFR Part 280 and include more stringent requirements, such as what EPA included in their proposed revision to 40 CFR Part 280. For two reasons, the Department declined to pursue the second alternative and instead chose to make changes to its CBS program through two separate rule makings, of which this rule making constitutes the first phase. The reasons are: (1) the high likelihood that the Department will be obligated to undertake a second rule making to incorporate the revisions found in the newly revised federal regulations, and (2) the amount of time required for staff to modify the structure of the State regulations to mirror the structure of 40 CFR Part 280.

#### 9. FEDERAL STANDARDS

No federal standards will be exceeded by promulgating the proposed rules.

#### 10. COMPLIANCE SCHEDULE

Operators of underground tanks would need to complete operator training and testing requirements within one year of the effective date of the rule. With regard to all other requirements, the regulated community would be required to comply upon adoption of the proposed rules.

#### *Revised Regulatory Flexibility Analysis*

##### 1. EFFECT OF RULE

The proposed rules would apply statewide in all 62 counties of New York State (State). The proposed rules represent a consolidation of existing State and federal requirements and therefore do not include any substantive changes to existing requirements concerning chemical bulk storage (CBS) or the identification of hazardous substances.

The New York State Department of Environmental Conservation (Department) does not collect data with respect to the number of the persons employed by the owner or operator of any subject facility or on the industrial classification of a registered facility. The Department does not have data on the corporate structures that may exist for a particular facility owner or operator which may have a bearing on determining how many persons are employed by the owner or operator. The Department only collects information regarding the name, address, and contact information for the owner and operator of each registered facility. Due to this lack of data, the Department is unable to make an estimate of how many small businesses comply with the existing CBS rules (6 NYCRR Parts 595 through 599) or would be required to comply with the proposed rules.

The most common types of subject facilities are municipal facilities, manufacturing facilities and utilities. There are over 1,400 registered facilities in the Department’s CBS database. The Department believes that the great majority of the owners and operators of these facilities would likely be properly categorized as small businesses.

The Department does collect data on whether registered facilities are owned by local governments. Local governments have registered over 580 facilities. The Department believes that the types of facilities registered by local governments tend to be water and wastewater treatment facilities.

##### 2. COMPLIANCE REQUIREMENTS

The proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities.

##### 3. PROFESSIONAL SERVICES

No new or additional professional services would likely be needed by facilities owned by small businesses or local governments to comply with the proposed rules.

##### 4. COMPLIANCE COSTS

Under proposed section 598.12, operators and tank system owners must designate operators for every underground tank system or group of underground tank systems. There would be three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components to the operator training program: training, assessment of knowledge, and verification. Under proposed section 598.12, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The Department will develop training materials and an examination to allow operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of underground tank systems. It is anticipated that the exam would primarily be administered online. The Department recognizes that online testing may not be a viable option for some operators and therefore proposes to provide in-person exam options.

There would be costs incurred by facilities subject to the operator training requirements of proposed section 598.12. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of tank systems that are not regulated under 40 CFR Part 280 are exempt from this requirement. Self-study can be conducted at no cost and training courses are optional. The Department will develop tests for Class A and B operators. The Department will also develop training materials and make them publicly available. There will be no charge for the training materials or for an operator to take the test. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the underground tank system is significantly out of compliance.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities. Implementation of the proposed rules would be economically and technologically feasible for small businesses and local governments.

#### 6. MINIMIZING ADVERSE IMPACT

Because the proposed rules represent a consolidation of existing State and federal requirements involving CBS and hazardous substance identification, the Department does not believe that the proposed rules would have an adverse economic impact on small businesses or local governments.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department provides statewide outreach to persons who will be subject to the proposed rules, including small businesses and local government, by posting relevant information on the Department's website. The website provides these persons with information regarding implementation of the existing rules for the CBS program, and provides copies of the proposed rules and explanatory material. The Department also maintains a listserv to which persons may subscribe so that they can receive information about new developments regarding the CBS program.

#### 8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

State Administrative Procedure Act (SAPA) section 202-b(1-a) provides as follows:

In developing a rule for which a regulatory flexibility analysis is required and which involves the establishment or modification of a violation or of penalties associated with a violation, the agency shall: (a) include a cure period or other opportunity for ameliorative action, the successful completion of which will prevent the imposition of penalties on the party or parties subject to enforcement; or (b) include in the regulatory flexibility analysis an explanation of why no such cure period was included in the rule.

Proposed section 598.13 would provide for the possible imposition of a delivery prohibition on any tank system for which the Department finds a Tier 1 or Tier 2 condition exists. The statutory basis for imposition of a delivery prohibition is found in Environmental Conservation Law (ECL) section 40-0111(2) as amended during 2008. The Department considers a delivery prohibition to be a penalty within the meaning of SAPA section 202-b(1-a).

The delivery prohibition would only be imposed without prior notice and opportunity for hearing when the Department finds that a Tier 1 condition exists with respect to a tank system. Tier 1 conditions would be regulatory violations that constitute imminent and serious threats to public health and the environment. Tier 1 conditions would include: (1) a tank system is known to be releasing a hazardous substance, and (2) an underground tank system lacks infrastructure or equipment needed to meet secondary containment, spill and overfill prevention, corrosion protection, or leak

detection requirements. The severity of the threat generally posed by Tier 1 conditions militates against the provision of any cure period that would allow the threat to continue.

The designation of a tank system that is releasing hazardous substances as a Tier 1 condition is supported by the existing prohibition on the operation of any leaking tank system. ECL section 40-0111(2) (since it was originally enacted during 1986) provides that the operation of any leaking tank system and associated equipment is unlawful and the contents of any leaking tank system must be promptly removed. To allow for the continued operation of a tank system that is releasing hazardous substance during a cure period would be in direct contravention of ECL section 40-0111(2).

With respect to the other Tier 1 conditions involving equipment deficiencies at an underground system, the violations are generally of a kind that is not quickly ameliorated. The absence of required equipment, such as corrosion protection, usually requires substantial installation work that involves the excavation of soil around the underground tank system.

When the Department finds that a Tier 2 condition exists, imposition of a delivery prohibition would not occur until after a cure period occurs. The cure period that follows a Department finding of a Tier 2 condition would last either ten or 30 days depending on the circumstances. See proposed section 598.13(a)(2)(iv).

#### Revised Rural Area Flexibility Analysis

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS

For purposes of this Rural Area Flexibility Analysis, "rural area" means those portions of the state so defined by Executive Law section 481(7). State Administrative Procedure Act section 102(10). Under Executive Law section 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of two hundred thousand or greater population, "rural areas" means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein." There are 44 counties in New York State (State) that have populations of less than 200,000 people and 71 towns in non-rural counties where the population densities are less than 150 people per square mile. The proposed rules would apply statewide so they would apply to all rural areas of the State.

##### 2. REPORTING, RECORDKEEPING, OTHER COMPLIANCE REQUIREMENTS, AND NEED FOR PROFESSIONAL SERVICES

The proposed rules contain no substantive changes to requirements that would be imposed on subject facilities under existing statutory and regulatory authorities. The proposed rules would not impose requirements on facilities located in rural areas in a manner different from those imposed on facilities in non-rural areas. No different or additional professional services would likely be needed by facilities in rural areas by virtue of their rural location.

##### 3. COSTS

Under proposed section 598.12, operators and tank system owners must designate operators for every underground tank system or group of underground tank systems. There would be three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components to the operator training program: training, assessment of knowledge, and verification. Under proposed section 598.12, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The New York State Department of Environmental Conservation (Department) will develop training materials and an examination to allow operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of underground tank systems. It is anticipated that the exam would primarily be administered online. The Department recognizes that online testing may not be a viable option for some operators and therefore proposes to provide in-person exam options.

There would be costs incurred by facilities subject to the operator training requirements of proposed section 598.12. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of tank systems that are not regulated under 40 CFR Part 280 are exempt from this requirement. Self-study can be conducted at no cost and training courses are optional. The Department will develop tests for Class A and B operators. The Department will also develop training materials and make them publicly available. There would be no charge for the training materials or for an operator to take the test. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the underground tank system is significantly out of compliance.

The proposed rules would not impose costs on facilities in rural areas that are different or additional to those incurred by facilities in non-rural areas. There would be no likely variation in costs incurred by public and private entities in rural areas.

#### 4. MINIMIZING ADVERSE IMPACT

Since this rule making is a consolidation of existing requirements, the Department believes that the proposed rules would not cause an adverse impact on any rural area.

#### 5. RURAL AREA PARTICIPATION

The Department provides statewide outreach to persons who will be subject to the proposed rules, including persons residing or working in rural areas of the State, by posting relevant information on the Department's website. The website provides these persons with information regarding implementation of the existing rules for the Chemical Bulk Storage (CBS) program and copies of the proposed rules and explanatory material. The Department also maintains a listserv to which persons may subscribe so that they can receive information about new developments regarding the CBS program.

#### Revised Job Impact Statement

Changes made to the Express Terms published with the Notice of Adoption do not require revisions to the Job Impact Exemption Statement that was previously published in the August 6, 2014 issue of the State Register.

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

Below are the responses to the comments submitted by the regulated community to the New York State Department of Environmental Conservation (DEC) regarding the proposed revisions to the Chemical Bulk Storage (CBS) regulations. This rule making was proposed on August 6, 2014 and included an extended 90-day comment period that ended on November 4, 2014. A statewide webinar with nearly 500 participants was held on August 26, 2014 to explain the proposed rules and answer questions. Six public information meetings/hearings were held across the State in September and October 2014 to further explain the proposed rules and receive comments.

##### Comments on § 596

Comment 1: We support the Agency's definition change from non-stationary tank to container.

Response 1: Comment noted.

##### Comment 2: Notice of Inspections.

Although raised in the previous comments on the preliminary draft regulations, the Commenter would like to reiterate that DEC's practice of conducting unannounced inspections as a matter of right is anti-productive. The Commenter respectfully requests that DEC reconsider this determination and provide 72-hour advance notice for inspections, in proposed section 596.1(e) to allow the appropriate staff to be on hand to assist in providing access to tank systems with minimal disruption to business operations.

Alternatively, the Commenter requests that if DEC is unwilling to include any such restriction in the regulations, DEC clarify in its regulatory guidance that 72-hour advance notice will be provided except in emergency cases.

Response 2: DEC considers the text of section 596.1(e) to represent no change in DEC's inspection authority or practice. Section 596.1(e) is consistent with the provisions drawn from the former section 596.1(e). Although the great majority of DEC's inspections are preannounced, some are unannounced. The statute (ECL section 40-0109(1)) provides that DEC, at reasonable times, may enter and inspect a facility and examine its records. DEC needs to be able to determine the actual state of compliance of any facility absent a notification period during which conditions could be changed. Absent an emergency situation, DEC staff does not intend to seek entry to a facility outside of normal business hours.

Comment 3: Subdivision 596.2(c) requires a registration to be renewed every two years. Please consider changing the renewal cycle to five years to be consistent with other DEC programs.

Response 3: The registration cycle is set by statute (ECL section 40-0107(1)) to be every two years so DEC cannot make this change.

Comment 4: Subdivision 596.2(j) requires that the design and working capacity of each tank in a tank system be labeled on each tank; however, 599.3(a) and 599.17 indicate that the storage capacity and working capacity should be marked at the tank fillport/gauge. Is this difference in the labeling requirements at tank and fillport/gauge intentional?

Response 4: The difference was not intentional. DEC has modified sections 599.3(a) and 599.17 to require labeling showing the design and working capacities of the tank.

##### Comments on § 597

Comment 5: We would like to see 597.4(b)(3)(iii) eliminated from the list of requirements to not report a spill of a reportable quantity to second-

ary containment. This item requires the spill to be cleaned up within two hours of discovery. This time frame is not attainable for most spills in the Chemical Bulk Storage program. In most cases, once a material is spilled to containment it becomes undesirable to use in the process. If outside resources had to be called to pump out the material from the containment or the material needed to be transferred to another tank, it may not be able to be accomplished within two hours. Another example is that if the material had to be drained to the sewer, this needs to be regulated and not disposed of all at once. This may also take longer than two hours. If this item cannot be eliminated altogether, we ask the time frame be increased to 24 hours.

Response 5: If a significant spill occurs and will not be cleaned up in two hours, facility staff will be required to report the spill. It is not necessary to clean up the spill within two hours, just report it. The purpose of this section is to say that minor spills that are not released to the environment and are cleaned up quickly do not need to be reported.

Comment 6: The proposed CBS regulations do not clarify reporting requirements for continuous releases associated with HVAC units. Clarification is necessary given the confusing state of current continuous release reporting requirements.

Response 6: The text of paragraph 597.4(b)(4) was drawn from, and is consistent with, the text of former paragraph 595.3(a)(5). DEC does not understand what part of the reporting requirement could be different or causing confusion.

##### Comments on § 598

Comment 7: We are a small operation in North Tonawanda with one registered AST - a 1000 gallon sodium hydroxide (NaOH) tank (operational). We've never had any spills and are compliant with the current regs. How will any of these changes affect our plant, if at all? Additional training? New or different registration?

Response 7: Since this rule making is aimed at achieving consistency between State and federal rules rather than making substantive changes, if a facility is in compliance with the previous rules, it will be in compliance with the revised rules.

Comment 8: PROPOSED 6 NYCRR Part 598 - There is no reference to Underwriters Laboratories (UL) Standards although Underwriters Laboratories Canada (ULC) is listed. Add the following UL Standards for the United States:

(j) References. Citations used in this Part refer to the publications listed [below] {in this subdivision}. These publications are available for inspection at the Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7020. Copies may be purchased directly from the publisher at the address shown.

{(22) UL 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," December 1996 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(23) UL 142, "Standard for Steel Aboveground Tanks for Flammable and Combustible Liquids," December 2006 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(24) UL 971, "Standard for Nonmetallic Underground Piping for Flammable Liquids," February 2006 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(25) UL 971A, "Metallic Underground Fuel Pipe," October 2006 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(26) UL 1746, "Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks," January 2007 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

Response 8: DEC will consider mandating compliance with more recent industry standards as part of a future rule making.

##### Comment 9: 6 NYCRR 598-13 Delivery Prohibition

Commenter is concerned that the provisions of proposed 598-13 dealing with delivery prohibition could create a significant hardship for tank operators if enforcement actions are not properly applied. Commenter operates very complex, yet extremely reliable electric, gas and steam systems for its customers. The ability to operate tank systems is a key component in maintaining reliability. The Company recommends that additional guidance documents be issued to NYSDEC field inspectors to clarify the tagging process and related procedures to be used before a tank system is "red-tagged." The process to remove the tag could take days, possibly compromising the ability of the Company to operate important systems associated with reliable service.

Furthermore, with respect to termination for delivery prohibition, we urge that compliance submission review and tag removal be performed within a shorter timeframe.

Response 9: DEC will issue appropriate guidance to inspectors regarding the process of imposing delivery prohibitions. With respect to the removal of tags, DEC intends to act as expeditiously as possible and any tag must be removed within two business days after a decision by DEC that all Tier 1 and Tier 2 conditions at the facility have been resolved.

##### Comments on § 599

Comment 10: SECTION 599.3. New underground tanks (d)  
Add Steel Tank Institute/Steel Plate Fabricators Association (STVSPF A) sti-P3, "Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks," revised January 2013: It is an important national consensus specification that is not listed.

Response 10: DEC will consider mandating compliance with more recent industry standards as part of a future rule making.

Comment 11: SECTION 599.3. New underground tanks (c)  
There is no reference to Underwriters Laboratories (UL) Standards although Underwriters Laboratories Canada (ULC) is listed. Add the following UL Standards for the United States:

(3) All new underground tanks must meet the criteria of this subdivision and must be designed, constructed and installed or certified by a qualified engineer or technician in accordance with one of the following:

(i) ULC Standard S603;  
(ii) ASTM D4021-92 (see [subdivision] 598.1 {} of this section); or  
(iii) any other consensus code, practice or standard developed by a nationally recognized association or independent testing laboratory which meet the specifications of this subdivision.

{(iv) UL 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," December 1996 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(v) UL 1746, "Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks," January 2007 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

Response 11: DEC will consider mandating compliance with more recent industry standards as part of a future rule making.

Comment 12: SECTION 599.3. New underground tanks (d)

Add polyurethane, a more accepted coating for external protection of steel underground tanks. This newer corrosion protection technology meets or exceeds all current Underwriters Laboratories (UL) 1746 underground-protected steel storage tank standards.

Response 12: DEC will consider mandating compliance with more recent industry standards as part of a future rule making.

Comment 13: SECTION 599.4. Secondary containment for underground tanks (b)

Add liquid outlets as additional penetrations.

{iii} {} there must be no penetrations of any kind through the outer wall into the tank, except {liquid outlets}, top entry manholes and fittings required for filling the tank, venting the tank, or monitoring the tank;

Response 13: DEC has modified the language to clarify that fittings are used for filling and emptying the tank.

Comment 14: SECTION 599.4. Secondary containment for underground tanks (b)

The interstice of the tank does not normally contain an inert gas or liquid as it is open to the tanks electronic leak detection probe. Change the sentence to read as follows:

[v] {} the outer wall must be capable of containing an inert gas or liquid at a pressure greater than the maximum internal pressure of the inner wall.

Response 14: DEC declines to make the suggested revision because the tanks are required to be intentionally designed to contain an inert gas or liquid at a pressure greater than the maximum internal pressure of the inner wall.

Comment 15: SECTION 599.8. New aboveground tanks (b)  
There is no reference to Underwriters Laboratories (UL) Standards although Underwriters Laboratories Canada (ULC) is listed. Add the following UL Standards for the United States:

(2) All new aboveground [storage] tanks must be designed, constructed and installed or certified by a qualified engineer or technician in accordance with one of the following:

(i) API 650;  
(ii) API 620;  
(iii) CAN4-S601-M84;  
(iv) CAN4-S630-M84;  
(v) ASTM D4097-88;  
(vi) ASTM D3299-88, (see {section} 598.1 {} of this Title); or  
(vii) a comparable consensus code, standard or practice developed by a nationally recognized association or independent testing laboratory which meet the standards of this section.

{(viii) UL 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," December 1996 edition, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

{(ix) UL 2085 - Protected Aboveground Tanks for Flammable and Combustible Liquids, Underwriters Laboratories (UL), 333 Pfingsten Road, Northbrook, IL 60062-2096.}

Response 15: DEC will consider mandating compliance with more recent industry standards as part of a future rule making.

Comment 16: SECTION 599.8. New aboveground tanks (d)

Add polyurethane, a more accepted coating for external protection of steel aboveground tanks.

Response 16: DEC has determined that polyurethane does not need to be included in this listing as the regulations allow for the use of other suitable dielectric materials.

## New York State Gaming Commission

### NOTICE OF ADOPTION

#### Definitions of Terms Used in Proposed Part 5301 and Proposed Parts 5303 Through 5307

**I.D. No.** SGC-29-15-00012-A

**Filing No.** 784

**Filing Date:** 2015-09-11

**Effective Date:** 2015-09-30

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

**Action taken:** Repeal of Part 5300 and addition of new Part 5300 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19) and 1307(1)

**Subject:** Definitions of terms used in proposed Part 5301 and proposed Parts 5303 through 5307.

**Purpose:** To define terms applicable to proposed Part 5301 and proposed Parts 5303 through 5307.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00012-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, 6th floor Schenectady, NY 12305, (518) 388-3407, email: gamingrules@gaming.ny.gov

#### Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Process for and Form of Gaming Facility License Application

**I.D. No.** SGC-29-15-00013-A

**Filing No.** 785

**Filing Date:** 2015-09-11

**Effective Date:** 2015-09-30

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

**Action taken:** Addition of Part 5301 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1305(2), 1306(1), 1307(2), 1311(1), 1312(2), 1313(1), 1315(3), 1316(8), 1317(1) and 1318(1)

**Subject:** Process for and form of gaming facility license application.

**Purpose:** To govern the gaming facility license application, the process for determining suitability and award of a license.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00013-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, 6th floor Schenectady, NY 12305, (518) 388-3407, email: gamingrules@gaming.ny.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Minority- and Women-Owned Business and Workforce Diversity Plan Requirements for Gaming Facility Licensees**

**I.D. No.** SGC-29-15-00014-A

**Filing No.** 786

**Filing Date:** 2015-09-11

**Effective Date:** 2015-09-30

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

**Action taken:** Addition of Parts 5311-5312 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1307(1), 1316(10), 1320(3)(d) and (f)

**Subject:** Minority- and women-owned business and workforce diversity plan requirements for gaming facility licensees.

**Purpose:** To ensure gaming facility licensees construct and operate their projects in a manner that assures diversity of opportunity.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00014-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, 6th floor Schenectady, NY 12305, (518) 388-3407, email: gamingrules@gaming.ny.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Licensing and Registration of Gaming Facility Employees and Vendors**

**I.D. No.** SGC-29-15-00015-A

**Filing No.** 794

**Filing Date:** 2015-09-15

**Effective Date:** 2015-09-30

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

**Action taken:** Addition of Parts 5303-5307 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1307(1), 1307(2), 1322, 1323, 1324, 1325, 1326 and 1327

**Subject:** Licensing and registration of gaming facility employees and vendors.

**Purpose:** To govern the licensing and registration of gaming facility employees and vendors.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00015-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, 6th Floor, Schenectady, NY 12305, (518) 388-3407, email: gamingrules@gaming.ny.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The Gaming Commission received comments from one entity, the Association of Gaming Equipment Manufacturers, in regard to this proposed

rulemaking. The Commission has considered each of the comments received and decided that no changes were appropriate at this time. In particular:

1. Proposed Rule 5303.3. The commenter seeks clarification as to whether a domestic or foreign agency would be allowed to take fingerprints under proposed rule 5303.3. The Commission believes that proposed rule 5303.3 is sufficiently clear that only the Commission, or representatives approved by the Commission, may undertake fingerprinting.

2. Proposed Rule 5303.4. The commenter suggests that the photograph required under proposed rule 5303.4 be taken within 12 months, rather than six months, of the date of the individual's application. The Commission believes that a sufficiently recent photograph is prudent and consistent with Commission practice in other licensing contexts.

3. Proposed Rule 5303.6. The commenter seeks clarification that the eligibility to work standards, as required under proposed rule 5303.6, do not apply to employees of a foreign holding company of a vendor. The Commission interprets the proposed rule 5303.6 to apply to employment positions performed in the United States. If experience suggests that further clarification is appropriate, the Commission may consider an amendment to the rule.

4. Proposed Rule 5303.7. The commenter questions the necessity of the requirement of a handwriting exemplar. The Commission believes that it is appropriate to retain discretion to require an applicant to file a handwriting exemplar. The commenter further requests clarification of "all required surety" under proposed rule 5303.7(e). The Commission may consider a clarifying or modifying amendment to such rule in a subsequent rulemaking.

5. Proposed Rule 5303.9. The commenter suggests that the requirement under proposed rule 5303.9(a)(1) for an applicant's information, documentation and assurances to "remain current" is too onerous. The Commission believes that the rule as drafted is prudent, but may consider clarifying or modifying such rule in a subsequent rulemaking. The commenter further questions the necessity under proposed rule 5303.9(b) for the Commission to grant permission to file an amendment to an application. The Commission believes that the rule as drafted is prudent, but may consider clarifying or modifying such rule in a subsequent rulemaking.

6. Proposed Rule 5303.12. The commenter requests that vendor applicants and licensees be notified when a license is granted under proposed rule 5303.12. The Commission believes that proposed rule 5303.12 as drafted, permits the Commission to notify the applicant or the applicable gaming facility licensee and thus is sufficient.

7. Proposed Rule 5307.1. The commenter suggests that casino vendors should not be required, under proposed rule 5307.1, to obtain a license when they are already licensed or registered as a video lottery gaming agent. The Commission disagrees, because the standards for licensure in video lottery gaming and commercial casino gaming differ. The commenter urges that casino vendors be permitted to transact business in advance of licensure for an initial period of six months, rather than, under proposed rule 5307.1(a), solely for the transaction for which such permission is requested. The Commission disagrees and believes that it is prudent to limit temporary authority to transact business prior to licensure as strictly as possible, in order to maintain the importance of appropriate scrutiny of license applicants.

8. Proposed Rule 5307.5. The commenter urges that not all owners, managers, supervisory personnel and employees of vendors who provide services to the gaming area should be licensed as key employees under proposed rule 5307.5(b). The Commission disagrees and believes that Racing, Pari-Mutuel Wagering and Breeding Law section 1326(4) requires such licensing scrutiny.

9. Proposed rule 5307.6. The commenter questions the scope of proposed rule 5307.6(a). Proposed rule 5307.6(a) applies to temporary service providers performing isolated services for one business day or less and does not apply to vendor enterprises or ancillary casino vendors who are required to be licensed.

**NOTICE OF ADOPTION****New York Lottery Draw Game Rules, Including Rules Implementing Changes to Powerball Lottery Game**

**I.D. No.** SGC-29-15-00026-A

**Filing No.** 792

**Filing Date:** 2015-09-14

**Effective Date:** 2015-09-30

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

**Action taken:** Amendment of sections 5004.9, 5007.2, 5007.13, 5007.15, 5007.16, 5009.2 and 5010.2 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, section 104; Tax Law, sections 1601, 1604, 1612 and 1617

**Subject:** New York Lottery draw game rules, including rules implementing changes to Powerball lottery game.

**Purpose:** Implement nationwide changes to Powerball multi-state lottery game; make "Quick Pick" definition consistent for all draw games.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SGC-29-15-00026-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, NY 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

#### Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The agency received no public comment.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Thoroughbred Restricted Time Periods for Various Drugs

I.D. No. SGC-39-15-00005-P

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

**Proposed Action:** Amendment of section 4043.2(a) and (e) of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104 (1, 19) and 122

**Subject:** Thoroughbred restricted time periods for various drugs.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing.

**Text of proposed rule:** Section 4043.2 of 9 NYCRR would be amended as follows:

§ 4043.2. Restricted use of drugs, [medication] *medications* and other substances.

Drugs and medications are permitted to be used only in accordance with the following provisions.

(a) The following substances are permitted to be used at any time up to race time:

(1) topical applications (such as antiseptics, ointments, salves, [DMSO,] leg rubs, leg paints and liniments) which may contain antibiotics but do not contain benzocaine, *DMSO*, steroids or other drugs;

\*\*\*

(e) The following substances are permitted to be administered by any means until 48 hours before the scheduled post time of the race in which the horse is to compete:

\*\*\*

(14) the following nonsteroidal anti-inflammatory drugs (NSAID[’s]): [Phenylbutazone (e.g., Butazolidin)] *diclofenac*, [F]lunixin (e.g., Banamine), *ketoprofen* (e.g., *Orudis*), meclofenamic acid (e.g., Arquel), naproxen (e.g., Naprosyn, Equiproxen), [Ketoprofen (e.g., *Orudis*)] and *phenylbutazone* (e.g., *Butazolidin*).

\*\*\*

(20) *dimethyl sulfoxide* (i.e., *DMSO*).

**Text of proposed rule and any required statements and analyses may be obtained from:** Kristen Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

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

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

#### Regulatory Impact Statement

1. Statutory authority: The New York State Gaming Commission ("Commission") is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law Sections 103(2), 104 (1, 19) and 122. Under Section 103(2), the Commission is responsible to supervise, regulate, and administer all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commis-

sion to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Section 122 continues previous rules and regulations of the legacy New York State Racing and Wagering Board, subject to the authority of the Commission to modify or abrogate such rules and regulations.

2. Legislative objectives: To enable the Commission to protect the integrity of pari-mutuel horse races and the health and safety of thoroughbred horses and human participants in pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: This rulemaking is necessary to adjust the Commission's restricted time period governing the administration of the drugs dimethyl sulfoxide (i.e., *DMSO*) and diclofenac, a non-steroidal anti-inflammatory drug ("NSAID"), to be consistent with regulatory thresholds for the drugs that have been adopted by the Commission.

The proposal would amend the restricted time period for *DMSO* to prohibit the administration of *DMSO* within 48 hours of a race. Currently, in 9 NYCRR, topical administration of *DMSO* is permitted at any time under Section 4043.2(a)(1) and other administrations of *DMSO* are not permitted until one week before a horse's next race under the restrictions of Section 4043.2(h). The Commission has adopted a regulatory threshold on race day for *DMSO* that is consistent with an administration of *DMSO* at least 48 hours before a horse's next race and reflects a determination that administrations of *DMSO* are permissible within one week of racing, provided that no administration occurs within the 48 hours before a horse's next race. The proposed amendment would add *DMSO* to the list, in subdivision (e) of Section 4043.2, of drugs that may be administered until 48 hours before racing. A 48-hour restricted time period for *DMSO* will also provide an assurance to thoroughbred horsepersons that compliance would protect them from violation of such threshold.

The proposal would also amend subdivision (e) Section 4043.2 to include the diclofenac to the list of permissible NSAIDs that appears at paragraph 14. This change will make the restricted time period for diclofenac, which currently is regulated for one week before racing pursuant to subdivision (h) of Section 4043.2, consistent with the regulatory threshold that the Commission has adopted for diclofenac. A 48-hour restricted time period will provide an assurance to thoroughbred horsepersons that compliance would protect them from violation of such threshold.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: There are no new or additional costs imposed by this rule upon regulated persons. The rule merely revises an existing rule in regard to allowable time of administration of various medications.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: There are no costs imposed upon the Commission, the State, or local government. The rule will be implemented using the Commission's existing regulatory and medication testing program. There will be no costs to local governments because they do not regulate pari-mutuel racing activities.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Commission has determined that no costs will be imposed based upon the fact that the rule does not create any new mandatory duty or obligation, utilizes an existing regulatory framework and medication testing program, and merely modifies a medication rule.

5. Local government mandates: None. The New York State Gaming Commission is the only governmental entity authorized to regulate pari-mutuel racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: None.

8. Alternatives: This rule amendment is to assure horsepersons that the Commission's restricted time periods are consistent with the separately proposed national regulatory laboratory thresholds for these equine drugs that have been recommended by the RMTc and the ARCI. No other alternatives were considered.

9. Federal standards: None.

10. Compliance schedule: Regulated persons will be able to achieve compliance with the rule upon publication of a Notice of Adoption in the New York State Register.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rulemaking proposal.

This proposed amendments merely adjust the restricted time periods after the treatment of a thoroughbred race horse with diclofenac or dimethyl sulfoxide (i.e., *DMSO*) to most closely approximate the period after administration of such drugs that should be accorded before a horseperson races a thoroughbred horse, given the recent adoption of the national regulatory laboratory thresholds for such drugs. The rule is entirely limited to equine drug standards and testing, and merely modifies the restriction

on administration of an approved drug for race horses. This rulemaking will not have a positive or negative impact on jobs. These amendments do not impact upon State Administrative Procedure Act § 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above.

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

#### Reimbursement of Awards for Capital Improvement Projects at Video Lottery Gaming (“VLG”) Facilities

I.D. No. SGC-39-15-00006-P

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

**Proposed Action:** Amendment of sections 5100.2(a)(2), 5122.1, 5122.3, 5122.4; and addition of section 5122.5 to Title 9 NYCRR.

**Statutory authority:** Tax Law, sections 1601 and 1617-a; Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2) and 104(1,19)

**Subject:** Reimbursement of awards for capital improvement projects at video lottery gaming (“VLG”) facilities.

**Purpose:** Clarify when VLG agent must reimburse State upon divestment of a capital improvement for which capital award was received.

**Text of proposed rule:** Pursuant to the authority granted by Section 104 of the Racing, Pari-Mutuel Wagering and Breeding Law and Section 1604, clause (H) of subparagraph (ii) of paragraph 1 of subdivision (b) of section 1612 and subdivisions a and c of Section 1617-a of the Tax Law, the New York State Gaming Commission hereby proposes this amendment of subdivision (a) of Section 5001.2 and Sections 5122.1, 5122.3 and 5122.4, and the addition of a new Section 5122.5, of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to read as follows:

§ 5100.2. Definitions.

(a) Unless the context indicates otherwise, the following definitions are applicable throughout this subchapter.

\*\*\*

(2) *The act means article 34 of the Tax Law, commonly known and cited as the “New York State Lottery for Education Law.”*

[NOTE: paragraphs (2) through (125) would be renumbered as (3) through (126).]

§ 5122.1. Video lottery gaming agent receipt of capital awards.

(a) [In accordance with the act, there] *A vendor capital award for which a video lottery agent shall be eligible pursuant to Tax Law section 1612(b)(1)(ii)(H) shall be made available [to each video lottery gaming agent] from the daily video lottery gaming revenue generated at [each] such video lottery gaming agent’s facility [a capital award] to be used exclusively for [capital project investments to improve the facilities of the vendor track that promote or encourage increased attendance at the video lottery gaming facility, including, but not limited to, hotels, other lodging facilities, entertainment facilities, retail facilities, dining facilities, events arenas, parking garages and other improvements that enhance the facility amenities; provided that such capital investments shall be approved by the commission and that such agent demonstrates that such capital expenditures will increase patronage at such agent’s facilities and increase the amount of revenue generated to support State education programs] the purposes set forth in Tax Law section 1612(b)(1)(ii)(H). Tax Law section 1612(b)(1)(ii)(H) sets forth co-investment requirements of such agents. The amount of any vendor’s capital award that is not used during any one-year period may be carried over into subsequent years only as permitted by Tax Law section 1612(b)(1)(ii)(H).*

(b) Except as provided in the act, each agent shall be required to co-invest an amount of capital expenditure equal to such agent’s cumulative vendor’s capital awards. The amount of any vendor’s capital award that is not used during any one-year period may be carried over into subsequent years ending before April 1, 2013. In the event that a vendor track’s capital expenditures, approved by the commission prior to April 1, 2013 and completed prior to April 1, 2015, exceed the vendor track’s cumulative capital award during the five-year period ending April 1, 2013, the vendor track shall continue to receive the annual capital award after April 1, 2013 until such approved capital expenditures are paid to the vendor track subject to any required co-investment.]

(c) Any agent that has received a vendor’s capital award, choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement, in accordance with

generally accepted accounting principles, shall reimburse the State in amounts equal to the total of any such awards.]

(d) Any capital award not approved for a capital expenditure at a video lottery gaming facility by April 1, 2013 shall be deposited in the State lottery fund for education aid.]

(e) (b) All such capital [improvement] *improvements* and expenditures shall be subject to the overall supervision of the commission.

\*\*\*

§ 5122.3. Capital improvement plan.

(a) Each agent eligible for capital award funds shall prepare *annually* a capital improvement plan for the video lottery gaming facility. The capital improvement plan shall provide sufficient detail to describe anticipated capital projects for which the agent will seek reimbursement from the capital award. Such capital improvement plan shall be submitted electronically to the commission for review, and may be amended by the agent from time to time as planned capital projects are modified.

(b) Each capital improvement plan, without limitation, shall briefly describe, in narrative form, the capital improvement projects the video gaming facility plans to commence [during the five-year period ending April 1, 2013, that are to be completed prior to April 1, 2015] *over the next five years.*

(c) Capital improvements plans shall be due to the commission [on a date prescribed by the commission] *no later than July 1 of each year.* The failure to submit any capital improvement plan when due to the commission shall be a violation of the agent’s license, the act and these regulations.

§ 5122.4. Capital improvement plan implementation and award reimbursement.

\*\*\*

(b) Payment from capital award funds shall [only] be approved by the commission *only* for capital project construction or improvements commenced on or after April 1, 2008, or the portion of a project completed after April 1, 2008 for projects, or phases of projects, commenced before April 1, 2008.

(c) Not later than [15] *60* days from receipt of a capital project request for approval, the commission shall review the request and provide the commission’s approval or denial of the project. Each project shall qualify as an approved use of the capital award if it meets the following guidelines:

(1) The capital project includes the addition of tangible, permanent assets in the form of land, buildings, or equipment; or the project includes the restoration of such existing assets.

(2) Project assets purchased or restored, are to be used in the operation of video gaming and are expected to have a useful life of two years or more, providing a reasonable benefit throughout the assets useful life.

(3) The capital expenditure is of significant value, consistent with standard accounting policies for the recording of capital assets.

(4) The capital project will increase patronage at the video gaming facility and increase the amount of revenue generated to support education aid.

(5) The capital project will be completed prior to [April 1, 2015] *the applicable date set forth Tax Law section 1612(b)(1)(ii)(H).*

\*\*\*

(l) (l) In the event any [expense reports] *reimbursement requests* are deemed insufficient at the sole discretion of the commission, the commission may require an agent to provide the following information:

(1) a full and complete reconciliation of the capital improvement expenses and associated costs incurred; and

(2) an accounting for the cash spending related to the capital improvement funds.

\*\*\*

§ 5122.5. *Reimbursement of capital award to State upon divestiture.*

(a) *Divestiture of a capital improvement. A video lottery gaming agent shall be deemed to have chosen to divest a capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H), when such video lottery gaming agent voluntarily*

(1) *sells, alienates, transfers, relinquishes possession of or otherwise disposes;*

(2) *destroys or otherwise wastes; or*

(3) *removes from use for the benefit of video lottery gaming;*

*a capital improvement that had been purchased or created with funds in whole or in part from a vendor’s capital award. Notwithstanding anything else in this subdivision, a video lottery gaming agent shall not be deemed to have chosen to divest a capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H), if the commission determines in writing that such action was taken with the prior approval of the commission and was taken with the intent to increase patronage at such video lottery gaming agent’s facility and increase the amount of revenue generated to support State education programs.*

(b) *Sale or transfer to affiliated entity. A video lottery gaming agent transferring a capital improvement to an affiliated entity that will become, in the place of such video lottery gaming agent, the video lottery agent at*

such location may request in writing that the commission not deem such video lottery agent to have chosen to divest such capital improvement, within the meaning of Tax Law section 1612(b)(1)(ii)(H). The commission may grant such a request in its discretion.

(c) *Notice of removal from service of a capital asset.* A video lottery gaming agent shall notify the commission in writing in each instance that an asset acquired in whole or in part with capital award funds is removed from service for any reason, either temporarily or permanently. Such notice shall be given as soon as practicable, but in no event more than 15 days after such asset has been removed from service.

(d) *Time for reimbursement.* When a video lottery gaming agent chooses to divest a capital improvement prior to the full depreciation of such capital improvement in accordance with generally accepted accounting principles and such capital improvement had been funded in whole or in part by a vendor's capital award, the reimbursement to the State required by Tax Law section 1612(b)(1)(ii)(H) shall be made according to such schedule as the commission may determine in its discretion and announce in writing to such video lottery gaming agent. The commission shall schedule such payment to be made no later than 90 days from the date such video lottery gaming agent notifies the commission of the divestiture.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kristen Buckley, New York State Gaming Commission, One Broadway Center, P.O. Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.ny.gov

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

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

#### **Regulatory Impact Statement**

1. **Statutory authority:** The New York State Gaming Commission ("Commission") is authorized to promulgate this rule by Tax Law Sections 1601 and 1617-a, and by Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 103(2) and 104(1, 19). Tax Law Section 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively to aid to education. Tax Law Section 1617-a authorizes the licensing of Video Lottery Gaming ("VLG") at certain racetracks in the State of New York. Racing Law Section 103(2) provides that the Commission is responsible to operate and administer the state lottery for education, as prescribed by Article 34 of the Tax Law. Racing Law Section 104(1) provides the Commission with general jurisdiction over all gaming activities within the State and over any person, corporation or association engaged in such activities. Section 104(19) of such law authorizes the Commission to promulgate any rules it deems necessary to carry out its responsibilities.

2. **Legislative objectives:** To provide clarification regarding the circumstances that may require a video lottery agent to reimburse the State upon divestment of a capital improvement for which the video lottery agent had received funding pursuant to Tax Law Section 1612(b)(1)(ii)(H). This rulemaking supports the mandate of establishing a state lottery, the net proceeds of which are to be applied exclusively for the purpose of providing aid to pupils with special educational needs and pupils with handicapping conditions, and supplemental aid to all school children.

3. **Needs and benefits:** The proposed rulemaking would amend the Commission's regulations related to the capital award program established by Tax Law Section 1612(b)(1)(ii)(H), which allows eligible video lottery agents to receive a capital award from the State to be used for qualifying capital improvements to video lottery facilities that may promote or increase attendance and the amount of revenue generated to support state education programs. If a video lottery agent receives a capital award from the State in connection with a capital improvement made to the video lottery agent's facility, the law provides that a video lottery agent "choosing to divest the capital improvement toward which the award was applied, prior to the full depreciation of the capital improvement in accordance with generally accepted accounting principles, shall reimburse the state in amounts equal to the total of any such awards."

Several video lottery agents have requested guidance on the Commission's interpretation of divestment of a video gaming capital award and how the reimbursement requirement might be applied in various circumstances. The proposed rule would describe what constitutes divestment of a capital asset within the meaning of the statute and would give the Commission discretion to approve in writing an action in regard to a capital asset that otherwise would require reimbursement of a capital award. Under the proposal, if such action is taken with the intent to increase patronage at such video lottery gaming agent's facility and increase the amount of revenue generated to support State education programs, or occurred in a transfer of assets to an affiliate and remained in service of the video lottery program, reimbursement would not be required. The new Rule 5122.5 would also require notice of when a capital asset is removed from service and permit the Commission to establish a

schedule of no more than 90 days for reimbursement, when reimbursement is required.

The proposal would also require the annual submission of a facility's capital improvement plan, supply a needed definition in the video lottery regulations, eliminate language in Rule 5122.1 that duplicates statute or is obsolete, increase from 15 to 60 days the time within which Commission review of a capital project is required and make several technical changes.

#### 4. Costs:

a. **Costs to regulated parties for the implementation and continuing compliance with the rule:** No additional costs to video lottery agents are anticipated. The proposal will prevent a video lottery agent from being penalized for replacing, enhancing or repurposing a capital award-subsidized improvement before full depreciation if the video lottery agent determines such action may increase facility patronage or is necessary to avert a decrease in facility attendance.

b. **Costs to the agency, the State, and local governments for the implementation and continuation of the rule:** No additional operating costs are anticipated. The proposal would remove any disincentive for making necessary changes to capital award-subsidized improvements at video lottery facilities, which may be necessary to prevent a decline in attendance and resulting revenue earned for education.

c. **Sources of cost evaluations:** The Commission evaluated the impact of the new rule with input from video lottery agents.

5. **Local government mandates:** The proposed amendment does not impose any new programs, services, duties or responsibilities upon any country, city, town, village school district, fire district or other special district.

6. **Paperwork:** There are no changes in paperwork requirements.

7. **Duplication:** There are no relevant State programs or regulations that duplicate, overlap or conflict with the proposed amendment.

8. **Alternatives:** The Commission considered making no changes to its regulations regarding the capital awards program. However, the Commission determined that uniform guidance on the application and interpretation of the Tax Law provision would be useful to regulated video lottery agents.

9. **Federal standards:** The proposed amendment does not exceed any minimum standards imposed by the federal government.

10. **Compliance schedule:** The proposal will not impact daily operation of video lottery gaming in a significant manner, and divestment of capital award-subsidized improvements does not happen often. The Commission is confident that its agents will continue to promptly comply with the Commission's instructions involving the capital awards program.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rule making because it will have no adverse effect on small businesses, local governments, rural areas, or jobs.

The proposed rulemaking would provide clarification regarding the circumstances that may require a video lottery agent to reimburse the State upon divestment of a capital improvement for which the video lottery agent had received a capital award funding. This rulemaking will not result in significant technological changes. The proposed amendment does not impose any new programs, services, duties or responsibilities upon any country, city, town, village school district, fire district or other special district. No local government activity is involved. The proposal will prevent a video lottery agent from being penalized for replacing, enhancing or repurposing a capital award-subsidized improvement if the video lottery agent determines such action may increase facility patronage or is necessary to avert a decrease in facility attendance. There will be no new reporting, record keeping or other compliance requirements on small businesses or local governments or rural areas. The proposed amendments will not adversely affect employment opportunities or jobs.

Based on the foregoing, no regulatory flexibility analysis for small businesses and local governments, rural area flexibility analysis, or a job impact statement is required for this proposed rule making.

## Department of Health

### EMERGENCY RULE MAKING

#### Standards for Adult Homes and Adult Care Facilities Standards for Enriched Housing

**I.D. No.** HLT-39-15-00003-E

**Filing No.** 781

**Filing Date:** 2015-09-11

**Effective Date:** 2015-09-11

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

**Action taken:** Amendment of Parts 487 and 488 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20, (3)(d), 34, (3)(f), 131-o, 460, 460-a—460-g, 461 and 461-a—461-h

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

**Specific reasons underlying the finding of necessity:** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs (“Justice Center”), in order to coordinate and improve the State’s ability to protect those persons having various physical, developmental, or mental disabilities and who are receiving services from various facilities or provider agencies. The Department must promulgate regulations, as a “state oversight agency” of some of the covered facilities, in order to assure proper coordination with the efforts of the Justice Center Chapter 501 which took effect on June 30, 2013, and the Justice Center becomes operational.

Among the facilities covered by Chapter 501 are adult homes and enriched housing programs having a capacity of eighty or more beds, and in which at least 25% (twenty-five percent) of the residents are persons with serious mental illness as defined by section 1.03(52) of the mental hygiene law, but not including an adult home which is authorized to operate 55% (fifty-five percent) or more of its total licensed capacity of beds as assisted living program beds. Given the effective date of Chapter 501, these implementing regulations must be promulgated on an emergency basis in order to assure the necessary protections for vulnerable persons at such adult homes and enriched housing programs for an additional period likely extending several months. Absent emergency promulgation, such persons would be denied initial coordinated protections for several additional months, creating an unacceptable risk to residents. Promulgating these regulations on an emergency basis will provide such protection, while still providing a full opportunity for comment and input as part of a formal rulemaking process which will be implemented subsequently, as required by the State Administrative Procedures Act. The Department is authorized to promulgate these rules pursuant to Sections 20, 34, 131-o, 460, 460-a—460-g, 461, 461-a—461-h of the Social Services Law; and L. 1997, ch.436; and and L. 2012, ch. 501.

**Subject:** Standards for Adult Homes and Adult Care Facilities Standards for Enriched Housing.

**Purpose:** Revisions to Parts 487 & 488 in regards to the establishment of the Justice Center for Protection of People with Special Needs.

**Substance of emergency rule:** The Department proposes to amend 18 NYCRR Parts 487 and 488 to address the creation of the Justice Center for the Protection of Persons with Special Needs (Justice Center) pursuant to Chapter 501 of the Laws of 2012, and to conform the Department’s regulations to requirements added or modified as a result of that Chapter Law. Specifically, the amendments:

- add definitions specific to facilities subject to the Justice Center of “abuse,” “mistreatment,” “neglect,” “misappropriation of property,” “reasonable cause,” “reportable incident,” “Justice Center,” “significant incident,” “custodian,” “facility subject to the Justice Center,” “psychological abuse,” “Department,” and “unlawful use or administration of a controlled substance” at sections 487.2 (d)(1)-(13) and 488.2 (c)(1)-13;
- amend sections 487.5 and 488.5 to add occurrences which would constitute a reportable incident to the list of occurrences which residents should not experience, and to require the operator of certain facilities to conspicuously post the telephone number of the Justice Center incident reporting hotline;
- amend sections 487.7 and 488.7 to clarify a facility’s obligations regarding what incidents must be investigated, how they must be investigated and who must investigate them;

- amend sections 487.7 and 488.7 to replace outdated references to the State Commission on Quality of Care for the Mentally Disabled with references to the Justice Center;
- amend sections 487.7 and 488.7 to add a requirement addressing when reports must be provided to the Justice Center, and requiring such reports to conform to the requirements of the Justice Center;
- amend sections 487.9 and 488.9 to add a requirement for staff training in the identification of reportable incidents and facility reporting procedures, and to add a requirement for certain facilities regarding the provision of a code of conduct to employees, volunteers, and others providing services at the facility who could be expected to have resident contact;
- amend sections 487.9 and 488.9 to add a requirement that certain facilities consult the Justice Center’s staff exclusion list with regard to prospective employees, volunteers, and others, and that when such person is not on the staff exclusion list, that such facilities also consult the State Central Registry, with regard to such persons. The facility must maintain documentation of such consultation. The amendments also address the hiring consequences associated with the outcome of those consultations;
- amend sections 487.9 and 488.9 to specifically include investigation of reportable incidents to the administrative obligations of facilities, and to the duties of a case manager;
- amend sections 487.9 and 488.9 to require the operator of a facility to designate an additional employee to be a designated reporter;
- amend sections 487.10 and 488.10 to add a new requirement that certain facilities provide certain information to the Justice Center, and make certain information public, at the request of the Justice Center, and to allow sharing of information between the Department and the Justice Center;
- add new sections 487.14 and 488.13 to address reporting of certain incidents; and
- add new sections 487.15 and 488.14 to address the investigation of reportable incidents involving facilities subject to the Justice Center.

**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 December 9, 2015.

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

#### Summary of Regulatory Impact Statement

The Department believes that the proposed regulatory amendments enhance the health and safety of those served by adult homes and enriched housing programs.

Adult homes and enriched housing programs subject to the Justice Center will be required to consult the Justice Center’s register of substantiated category one cases of abuse or neglect as established pursuant to section 495 of the Social Services Law prior to hiring certain employees, and where the person is not on that list, the facility will also be required to check the Office of Children and Family Services’ Statewide Central Registry of Child Abuse and Maltreatment. The facility could not hire a person on the Justice Center’s list, but would have the discretion to hire a person who was only on Office of Children and Family Services’ list. Reporting and investigation obligations for all facilities would be expanded to cover “reportable incidents” which, are slightly more inclusive than what is covered by current reporting and investigation obligations. The amendments also add specific provisions addressing reporting and investigation procedures, to require the posting the telephone number of the Justice Center’s reporting hotline, and to require the case manager to be capable of reporting and investigating incidents. Those amendments should not require any significant change in current practice or impose anything beyond nominal additional expense to facilities. Requirements imposed on facilities generally are limited to an obligation to train staff in the identification and reporting of reportable incidents. With regard to facilities subject to the Justice Center, that obligation, as well as the others imposed by the regulations, are required by virtue of Chapter 501 of the Laws of 2012. The costs imposed by the amendments are expected to be minimal. In many cases, particularly with regard to the investigation requirements, the amendments generally reflect existing practice, so should neither impose any significant new costs or require any significant change in practice.

#### Regulatory Flexibility Analysis

##### Effect of Rule:

This rule imposes some new obligations and administrative costs on regulated parties (adult homes and enriched housing programs). Some of the changes to Sections 487 and 488 apply to all adult home and enriched housing facilities; other only apply to those adult homes and enriched housing facilities which fall under the purview of the Justice Center. None of the requirements imposed by the amendments would impose different,

or unique, burdens on small businesses or local governments; the requirements apply equally statewide. The costs and obligations associated with the amendments are fully described in the "Costs to Regulated Parties" section of the Regulatory Impact Statement.

Most of the five-hundred twenty-two (522) certified adult homes in New York State, including the forty-seven (47) which fall under the purview of the Justice Center, are operated by small businesses as defined in Section 102 of the State Administrative Procedure Act. Those entities would be subject to all of the above additional requirements.

Of the six (6) facilities operated by local governments, two (2) are scheduled to close within the next year. Of the four (4) remaining homes, none fall within the scope of the Justice Department required reporting facilities. Accordingly, the only additional cost imposed on those four (4) homes would be those nominal costs associated with obligations applicable to all adult homes and enriched housing facilities, as described in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

#### Compliance Requirements:

As the facilities operated by local governments are not among those within the purview of the Justice Center for the Protection of Persons with Special Needs (Justice Center), the only impact upon facilities operated by local governments will be those resulting from obligations applicable to all adult homes and enriched housing facilities, as described in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

The four (4) affected facilities run by local governments will experience minimal additional regulatory burdens in complying with the amendment's requirements, as functions related to Justice Center activities will not cause a need for additional staff or equipment.

Those facilities which constitute small businesses would be subject to additional requirements, as they include facilities both subject to, and not subject to, the purview of the Justice Center. The scope of the impact upon any given facility depends on whether it falls within the Justice Center's purview. Such obligations and impacts are fully described in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement. The amendments are not expected to create a need for any additional staff or equipment for those facilities.

The Department expects that regulated parties will be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

#### Professional Services:

No need for additional professional services is anticipated. Existing professional staff are expected to be able to assume any increase in workload resulting from the additional requirements.

#### Compliance Costs:

This rule imposes limited new administrative costs on regulated parties (adult homes and enriched housing programs), as described in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement. The changes to Sections 487 and 488 add additional administrative responsibilities for those adult home and enriched housing facilities within the Justice Center's jurisdiction. None of the requirements imposed by the amendments would impose different, or unique, burdens on small businesses or local governments; the requirements apply equally statewide.

#### Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses and local governments affected by this amendment. The infrastructure for contacting the Justice Center, and establishing an Incident Review Committee, are already in place.

#### Minimizing Adverse Impact:

Department efforts to consider minimizing the impact of the amendments, and its consideration of alternatives to the amendments, are discussed in the "Alternatives" section of the Regulatory Impact Statement.

These amendments will not have an adverse impact on the ability of small businesses or local governments to comply with Department requirements, as full compliance would require minimal enhancements to present hiring and follow-up practices.

Consideration was given to including a cure period to afford adult home and enriched housing programs an opportunity to correct violations associated with this rule; however, this option was rejected because it is believed that lessening the Department's ability to enforce the regulations for violations could expose this already vulnerable population to greater risk to their health and safety.

#### Small Business and Local Government Participation:

The Department will notify all New York State certified ACFs by a Dear Administrator Letter (DAL) informing them of this Justice Center expansion of the protection of vulnerable people. Regulated parties that are small businesses and local governments are expected to be prepared to participate in required Justice Center activities on the effective date of this amendment because the staff and infrastructure needed for performance of these are already in place.

### *Rural Area Flexibility Analysis*

#### Types and Estimated Number of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Of the forty-seven (47) current facilities that will fall under the purview of the Justice Center for the Protection of People with Special Needs (Justice Center), six (6) are located in rural counties, as follows: Allegany County, Cayuga County, Greene County, Genesee County, Monroe County and Rensselaer County. Of the 522 adult homes and enriched housing programs statewide, including those not under the purview of the Justice Center, 160 are in rural areas.

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

#### Reporting and Recordkeeping:

Reporting, recordkeeping and other compliance requirements are addressed in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement. None of the requirements imposed by the amendments would impose different, or unique, burdens on rural areas; the requirements apply equally statewide.

#### Other Compliance Requirements:

Compliance requirements are discussed in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement. None of the requirements imposed by the amendments would impose different, or unique, burdens on rural areas; the requirements apply equally statewide.

#### Professional Services:

There are no additional professional services required to comply with the proposed amendments.

#### Costs:

#### Cost to Regulated Parties:

Compliance requirements and associated costs are discussed in the "Costs to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement. None of the requirements imposed by the amendments would impose different, or unique, burdens on rural areas; the requirements apply equally statewide.

#### Economic and Technological Feasibility:

There are no changes requiring the use of technology. The proposal is believed to be economically feasible for impacted parties. The amendments impose additional reporting and investigation requirements that will use existing staff that already have similar job responsibilities. There are no requirements that that involve capital improvements.

#### Minimizing Adverse Impact:

Department efforts to consider minimizing the impact of the amendments, and its consideration of alternatives to the amendments, are discussed in the "Alternatives" section of the Regulatory Impact Statement.

#### Rural Area Participation:

Of the forty-seven (47) current facilities that will fall under the purview of the Justice Center, six (6) are located in rural counties, as follows: Allegany County, Cayuga County, Greene County, Genesee County, Monroe County and Rensselaer County. The Department will notify all New York State-certified adult care facilities (ACFs) by a Dear Administrator Letter (DAL) informing them of this expansion of requirements to protect people with special needs. Regulated parties in rural areas are expected to be able to participate in requirements of the Justice Center on the effective date of this amendment.

### *Job Impact Statement*

No Job Impact Statement is required pursuant to Section 201-a (2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, because it does not result in an increase or decrease in current staffing level requirements. Tasks associated with reporting new incidents types, reporting to the Justice Center for the Protection of People with Special Needs (Justice Center), as opposed to the Commission on the Quality of Care and Advocacy for People with Disabilities, making public certain information as directed by the Justice Center and assisting with the investigation of new reportable incidents are expected to be completed by existing facility staff. Similarly, the need for a medical examination of the patient in the course of investigating reportable incidents is similarly not appreciably different from the current practice of obtaining such examination under such circumstances. Accordingly, the amendments should not have any appreciable effect on employment as compared to current requirements.

## NOTICE OF ADOPTION

## Medical Records Access Review Committees (MRARCs)

I.D. No. HLT-39-14-00018-A

Filing No. 795

Filing Date: 2015-09-15

Effective Date: 2015-09-30

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

**Action taken:** Amendment of Subpart 50-3 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 18(4)

**Subject:** Medical Records Access Review Committees (MRARCs).

**Purpose:** To designate rather than appoint MRARCs to hear appeals from the denial of access to patient information.

**Text or summary was published** in the October 1, 2014 issue of the Register, I.D. No. HLT-39-14-00018-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Certificate of Need (CON) Requirements

I.D. No. HLT-41-14-00002-A

Filing No. 796

Filing Date: 2015-09-15

Effective Date: 2015-09-30

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

**Action taken:** Amendment of section 710.1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2802

**Subject:** Certificate of Need (CON) Requirements.

**Purpose:** Simplify CON review requirements for projects involving nonclinical infrastructure, equipment replacement and repair and maintenance.

**Text or summary was published** in the October 15, 2014 issue of the Register, I.D. No. HLT-41-14-00002-P.

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

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

**Assessment of Public Comment**

In commenting on the proposed rules, the Healthcare Association of New York State (HANYs) states that the proposed 710.1(c)(5)(ii)(d) is contrary to statute in its retention of limited review for the installation, replacement or modification of heating, ventilation and air conditioning systems and for other infrastructure projects that involve the modification or alteration of clinical space. It is HANYs' position that the reference in PHL 2801 section 1-a to "non-clinical infrastructure," which includes heating, ventilation and air conditioning (HVAC), plumbing, electrical and other systems, exempts such projects from approval by the State, regardless of the area of the hospital involved.

The Department agrees that PHL 2801 section 1-a exempts non-clinical infrastructure projects from CON review regardless of the area of the hospital involved, except when such projects also involve changes to actual clinical space, services or equipment. Accordingly, the proposed language of 710.1(c)(5)(ii)(d) retains the requirement for limited review of the installation, modification or replacement of HVAC, plumbing, electrical, water supply and fire protection systems "that involve modification or alteration of clinical space, services or equipment" (emphasis added). Projects for the modification or alteration of such spaces, services or equipment, even to accommodate infrastructure changes, cannot be deemed nonclinical, involving as they do areas, devices and services that have a direct impact on patient care. The Department therefore disagrees with HANYs' suggestion that the proposed 710.1(c)(5)(ii)(d) be modified.

The Department wishes to emphasize that infrastructure projects that involve clinical areas but which do not propose to modify or alter clinical space, services or equipment would be exempt from review and subject only to submission of a notice under the proposed rules, as intended by PHL 2801 section 1-a. For example, a hospital's proposed installation of a new HVAC system for the entire facility would obviously affect operating rooms, outpatient clinics and patient rooms, as well as the hospital's nonclinical areas. However, unless the project involved the modification or alteration of clinical space, services or equipment, it would be considered nonclinical and would require only the submission of a notice, as provided for in PHL 2801 section 1-a. We note that the Department has already received notices for several such projects, some from facilities of considerable size, and has imposed no review requirements on these undertakings.

The Department also received comments on the proposed rules from Mid-Hudson Medical Group, P.C. Although as a professional corporation, physicians in this organization are not subject to Article 28 of the Public Health Law, they wrote in support of the proposed rules on behalf of those among their membership who have affiliated ambulatory surgery centers, which are subject to Article 28 requirements, stating that the replacement of a CON requirement with a notice requirement would permit operators of Article 28 facilities to implement needed projects more quickly.

PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED

## Women Infants and Children (WIC) Program Vendor Applicant Enrollment Criteria

I.D. No. HLT-39-15-00015-P

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

**Proposed Action:** Amendment of sections 60-1.1 and 60-1.13 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2500

**Subject:** Women Infants and Children (WIC) Program Vendor Applicant Enrollment Criteria.

**Purpose:** To align NYS WIC Program operations with current federal requirements by amending the existing vendor enrollment criteria.

**Text of proposed rule:** Pursuant to the authority vested in the Commissioner of Health by section 2500 of the Public Health Law, 42 United States Code section 1771 et seq. and Part 246 of Title 7 of the Code of Federal Regulations, sections 60-1.1 and 60-1.13 of the Official Compilation of Title 10 of the Codes, Rules and Regulations of the State of New York ("NYCRR") are amended to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 60-1.1 is amended as follows: subdivision (k) is amended to read as follows; new subdivisions (q) and (r) are added; and existing subdivisions (q) and (r) are renumbered as subdivisions (s) and (t).

(k) Food vendor means [any establishment which accepts WIC food instruments whether contracted to do so or not] *a sole proprietorship, partnership, cooperative association, corporation or other business entity that operates a retail food delivery system.*

(q) *Vendor management agency means a Local Agency that is authorized by the Department to provide ongoing vendor management activities for a specific geographic service area.*

(r) *Vendor peer group means a classification of authorized vendors into groups based on common characteristics or criteria that affect food prices, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels.*

[[q] s] WIC food vendor means a food vendor which has a contract in effect with a [local] *vendor management* agency to supply supplemental foods to persons receiving benefits under the WIC program.

[[r] t] WIC program means the Special Supplemental Food Program for Women, Infants, and Children authorized by the Federal Child Nutrition Act of 1966, as amended.

Subdivision (a) of Section 60-1.13 is amended to read as follows:

(a) [Any] *Only food [store] vendors* (excluding pharmacies) [which applies] *with current and valid Supplemental Nutrition Assistance Program (SNAP) authorization may apply* for participation in the WIC program [shall be enrolled via a State Health Department approved one-year expirable contract] and may be approved if all of the following criteria are met. [If all the criteria are not met, the vendor may not be enrolled.] *Any food vendor that is approved based on these criteria will be required to enter into contract with a Vendor Management Agency.*

[(1) Current and valid food stamp authorization.

(2)(i) The vendor/participant ratio in the ZIP code area of the applicant vendor is more than 75 participants per vendor, or

(ii) There is a participating WIC vendor within a 10-block or 1/2 mile walking distance of the applicant vendor who redeems more than \$3,000 in WIC checks per month, or]

(1)(i) *The applicant food vendor's physical location is within a ZIP code area that the Department has identified as an area with insufficient participant access. Insufficient participant access areas will be identified by the Department as a ZIP code area in which the ratio of eligible WIC individuals per authorized WIC food vendor cash register exceeds two hundred and fifty to one. On no less than an annual basis, the Department shall make public the list of ZIP codes where vendor applications will be accepted; or*

(ii) *The applicant food vendor's physical location is within a ZIP code area where there is a demonstrated, documented cultural need (e.g., Kosher) or the Department has determined that the number of food vendors needs to be greater due to geographic access issues; or*

(iii) The applicant food vendor had annual total sales in the previous calendar year of more than [three] five million dollars in New York State.

(2) *The Department may consider a history of adverse actions, as defined in Section 60-1.1, or abuse of any other government sponsored program when deciding whether to authorize applications.*

(3) [If the applicant vendor has assumed ownership of a store that had been participating in the WIC program within 60 days from the date the application is made, the criteria set forth in paragraph (2) of this subdivision will not apply unless the store under the previous owner redeemed fewer than 25 checks per month.] *The applicant vendor must be a business or corporation as defined in subdivision (k) of Section 60-1.1 in New York State that has been operating for no less than twelve (12) consecutive months immediately preceding the application. The Department shall not authorize a vendor application if it has determined that a store has been sold by its previous owner in an attempt to circumvent a WIC sanction, by using methods that may include, but are not limited to, background checks and review of the Store Tracking and Redemption Subsystem (STARS) database. The Department shall not accept an application from a vendor that has withdrawn an application or has been non-renewed within the previous twelve months.*

(4) The applicant food vendor shall stock WIC-acceptable foods, as determined by the New York State Department of Health, in the minimum quantities prescribed in the vendor application document at the time of enrollment.

(5) Applicant food vendor's prices shall be reasonable as compared to [other vendors contracted with the local agency] *the vendor peer group to which the applicant vendor will be assigned.* Reasonable shall be defined by calculating the applicant food vendor's average selling price of [their] the most commonly prescribed formula check type for an infant and the two most commonly prescribed check types containing multiple foods for a woman or child. [The prices that are used for these calculations should reflect the vendor's average prices for each type of item.] Calculations should not be made based solely on the highest priced item. The cost of the checks [should] *must* be within 10 percent of the [project] average for these check types *as compared to other food vendors in the vendor peer group to which the applicant is assigned.* [identified on the last project summary by vendor report. The project summary by vendor report identifies the project average for each check type by calculating the cost of each check type redeemed during the reporting month by vendors contracted with the applicant's local agency.]

Subdivision (b) of section 60-1.13 is amended to read as follows:

(b) Any pharmacy [which applies] *may apply* for participation in the WIC program [shall be enrolled] if all the following criteria are met. Any [vendor] pharmacy [who meets these] *that is approved based on the following criteria* [should be enrolled via a State Health Department approved one-year expirable contract] *will be required to enter into contract with the vendor management agency.*

(1) There are no other pharmacies participating in the WIC program within a [1/2] one mile [walking distance] *radius* of applicant pharmacy.

(2) The applicant pharmacy shall stock formula in the minimum quantities prescribed in the vendor application document at the time of enrollment.

(3) The applicant agrees to order and stock special formulas as requested by the [local] *vendor management agency.*

(4) The applicant's prices for formula are reasonable. Reasonable shall be defined by *calculating the applicant pharmacy's average selling price of the most commonly prescribed formula check type for an infant* [calculating the applicant vendor's selling price of an ITA check (eight 13-ounce cans iron-fortified concentrated formula)]. The total cost [should] *must* be within 10 percent of the [project] average for this check type *for the vendor peer group to which the applicant pharmacy will be assigned.*

Subdivision (d) of Section 60-1.13 is amended to read as follows:

(d) The [local] *vendor management agency* [shall have the option of not] *may not contract[ing]* with any vendor who has been previously disqualified from the WIC program or who has *a history of adverse actions, as defined in Section 60-1.1 (i.e., civil money penalties, suspension, or denial of participation in the WIC Program) or who has abused [the WIC program or] any other government sponsored program.*

Subdivisions (e) through (g) of Section 60-1.13 are deleted.

(e) If there are no other available participating vendors within three miles of the applicant vendor or there is a demonstrated, documented cultural need (e.g., Kosher), the local agency may, within its discretion, admit the applicant vendor into the program without first meeting the criteria set forth in paragraphs (a) (1), (2), (3) and (5) or subdivision (b) or (c) of this section.

(f) A local agency does not have to consider a vendor's reapplication for participation in the WIC program if the vendor was denied within the past year.

(g) When requested by the State or local agency, the applicant vendor has attended pre-contract training.]

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

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

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

#### Regulatory Impact Statement

Statutory Authority:

The federal Child Nutrition Act of 1966 (42 USC Section 1771 et seq.) established the Women, Infants, and Children (WIC) Program. Section 246.3(b) of Title 7 of the Code of Federal Regulations delegates responsibility for the effective and efficient administration of the WIC program to the State agency and 7 CFR section 246.12(g)(3) requires the State agency to establish enrollment criteria for WIC authorized vendors. Section 60-1.13 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York establishes WIC Vendor Applicant Enrollment Criteria. Section 60-1.1 of Title 10 establishes definition of program terms. In addition, Section 2500 of Title 1 of Article 25 of the Public Health Law authorizes the Commissioner of Health to act in an advisory and supervisory capacity in matters pertaining to maternal and child health.

Legislative Objective:

The intent of Section 2500 of Title 1 of Article 25 of the Public Health Law is to authorize the Commissioner of Health to act in a supervisory capacity related to services bearing on the health of mothers and children for which funds are or shall hereafter be made available. Establishing regulations to ensure that WIC vendors meet specific criteria is consistent with the legislative objective.

Needs and Benefits:

The WIC Program was established as a result of the Child Nutrition Act of 1966. WIC is not an entitlement program, but rather a federal grant program under which the U.S. Department of Agriculture (USDA) provides funds to states and other entities to administer the components of this supplemental food program. The WIC Program provides nutrition assessment, health education, referral to medical services, and supplemental nutritional foods to eligible women, infants and children up to five years of age.

The current NYS WIC Vendor Applicant Enrollment Criteria was instituted prior to 1990 and has not been updated to reflect significant program and administrative changes. The proposed rule is needed to align NYS WIC Program operations with current federal requirements by amending the existing vendor enrollment criteria. This will allow a more streamlined approach to administering the NYS WIC program and ensuring access to benefits for NYS WIC participants.

NYS WIC presently serves approximately 500,000 participants each month. Services are provided through 93 local agencies that operate 500 service sites throughout the State. Approximately 70% of the NYS WIC participant caseload and local agencies are located in the New York City Metropolitan Area Region. The current annual NYS WIC funding level is \$580 million for food benefits and local agency program administration.

New York State has approximately 4,100 retail vendors authorized to accept WIC checks statewide. Approximately 3,200 vendors (78%) are located in the NYC Metropolitan Area Region, with the remaining 900 vendors located throughout the rest of the State. Within the NYC Metropolitan Area Region, an estimated 70% of the 3,200 vendors are categorized as small (1-2 cash registers), less than 1% are stand-alone pharmacy vendors, and the remaining vendors are categorized as large chain retail vendors (3 or more cash registers). There are five Vendor Management Agencies across the State that are directly responsible for oversight of the WIC authorized vendors. Vendor Management Agencies authorize and

monitor WIC food vendors by ensuring that WIC approved foods and infant formula are adequately stocked and priced in accordance with program requirements. Vendor Management Agencies also provide training to retail vendors and conduct periodic site inspections.

The USDA has encouraged states to limit vendor authorizations and to strengthen selection criteria and accountability. The proposed rule will address USDA's recommendations in this regard.

The proposed rule allows the Department to tighten the peer group structure so that peer groups contain smaller, more homogeneous groupings of vendors, applying current vendor selection criteria each time a vendor applies for reauthorization, and perhaps most importantly, updates New York's current participant access criteria.

Limiting the number of vendors makes vendor oversight more manageable for Vendor Management Agencies. It also ensures adequate redemptions for enrolled vendors, thereby removing the incentive to increase volume through unapproved or fraudulent means. Also, since WIC vendors are required to stock specific foods in specific quantities, selling higher volume of those foods is more efficient than stocking only minimum required amounts.

The existing vendor ratio of 75 participants to 1 vendor (75:1) currently established in regulation is no longer an effective benchmark for determining the appropriate number of WIC vendors to authorize. Based on the existing criteria, every vendor application is accepted for consideration, the only exception being those received from two ZIP codes in the State.

The proposed rule will result in the processing of vendor applications only when limited participant access (i.e., availability of cash registers to eligible WIC participants, documented, demonstrated cultural needs, etc.) is identified in a specific ZIP code.

Finally, the proposed rule will conform State regulation to federal regulations related to the vendor selection criteria which includes, but is not limited to, the authorization to set a vendor limiting criteria (7 CFR § 246.12(g)(2)), the use of business integrity (7 CFR § 246.12(g)(3)(ii)), competitive prices (7 CFR § 246.12(G)(4)) and implementing effective peer groups (7 CFR § 246.1(g)(4)(ii)) to evaluate vendor authorization to participate in New York State's WIC program.

**COSTS:**

Costs for the Implementation of, and Continuing Compliance with this Regulation to the Regulated Entity:

The proposed rule will not impact the existing WIC vendor population until reauthorization is required. WIC vendors apply for reauthorization every three years and will be subject to review at that time. The value of federally-funded WIC benefits that are issued and redeemed is not expected to decrease as a result of these changes. As a result of these changes, individual retailers who are not currently authorized to participate in NYS WIC or who are required to submit a new application will be subject to the revised enrollment criteria, including consideration as to whether the zip code in which they operate has sufficient numbers of WIC vendors and sufficient types of vendors to meet access needs, including special and cultural needs.

**Costs to State and Local Government:**

There will not be an impact on State or local governments as the value of federally-funded WIC benefits that are issued and redeemed is expected to remain constant.

**Costs to the Department of Health:**

The proposed rule will not result in additional costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

The proposed amendment does not impose any additional paperwork requirements for regulated entities.

**Duplication:**

Title 7 of the Code of Federal Regulations, section 246.12(g)(2), allows the state agency to establish criteria to limit the number of retail vendors authorized to participate in the WIC program, providing that any limiting criteria is applied consistently throughout the State. The proposed rule is in compliance with federal requirements.

**Alternatives:**

No viable alternatives are available that can be applied consistently across the State to protect the integrity of the WIC program while still ensuring participant access.

**Federal Standards:**

The proposed regulations do not exceed any minimum federal standards.

**Compliance Schedule:**

The proposed amendments are to be effective upon publication of a Notice of Adoption in the New York State Register.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The proposed rule will not immediately impact the approximately 4,100

retail vendors currently authorized to accept WIC checks. Approximately 50% of currently authorized WIC vendors are 1 or 2 cash register stores. WIC vendors apply for reauthorization every three years and will be subject review at that time.

The value of federally-funded WIC benefits that are issued and redeemed is not expected to decrease. Individual retailers who are not currently authorized to participate in NYS WIC or who are required to submit new applications may not be authorized to participate in the NYS WIC program if the zip code in which they operate has sufficient numbers of WIC vendors and sufficient types of vendors to meet access needs, including special and cultural needs.

This rule will have no direct effect on Local Governments.

**Compliance Requirements:**

This regulation does not impose any new reporting, recordkeeping or other compliance requirements on regulated entities or local governments.

**Professional Services:**

No new professional services are required as a result of this regulation.

**Compliance Costs:**

The value of federally-funded WIC benefits that are issued and redeemed is not expected to decrease as a result of these changes.

**Economic and Technological Feasibility:**

This amendment does not affect operational requirements for any of the approximately 4,100 retail vendors currently enrolled in the NYS WIC Program. Therefore, there should be no technological difficulties associated with compliance with the proposed regulation for small businesses.

This rule will have no direct effect on Local Governments.

**Minimizing Adverse Impact:**

This rule will have no adverse impact on currently enrolled NYS WIC vendors until reauthorization review is required. WIC vendors apply for reauthorization every three years. The proposed rule includes provisions that will allow vendor enrollment if established criteria are met. The proposed rule is needed to update NYS WIC Program regulations to meet federal requirements.

**Small Business and Local Government Participation:**

The Department will provide notification of the rule change to affected stakeholders and will engage in discussion with WIC local agencies and vendor management agencies, as well as with relevant association trade groups such as the National Supermarket Association and the Food Industry Alliance of New York State. Stakeholders, including small businesses and local governments, will also have the opportunity to participate through the public comment period as part of the regulatory process.

**Rural Area Flexibility Analysis**

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, recordkeeping or other compliance requirements on facilities in rural areas. The Department expects that there will be no changes to existing reporting or recordkeeping requirements and no additional compliance requirements on facilities.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulation, that there will not be a substantial adverse impact on jobs or employment opportunities.

---



---

## Higher Education Services Corporation

---



---

### NOTICE OF ADOPTION

**Adjustments to Income**

**I.D. No.** ESC-30-15-00001-A

**Filing No.** 793

**Filing Date:** 2015-09-15

**Effective Date:** 2015-09-30

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

**Action taken:** Amendment of section 2202.3(d) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 653, 655, 661 and 663

**Subject:** Adjustments to income.

**Purpose:** To clarify that adjustments to income apply to other family members attending post-secondary institutions outside NYS.

**Text or summary was published** in the July 29, 2015 issue of the Register, I.D. No. ESC-30-15-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, New York State Higher Education Services Corporation, 99 Washington Avenue, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

#### **Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

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

The agency received no public comment.

## Office of Mental Health

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

#### **Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management**

**I.D. No.** OMH-39-15-00002-EP

**Filing No.** 780

**Filing Date:** 2015-09-11

**Effective Date:** 2015-09-11

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

**Proposed Action:** Repeal of Part 524; addition of new Part 524; and amendment of Parts 501 and 550 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07, 7.09 and 31.04

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

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012, the Governor signed the Protection of People with Special Needs Act (PPSNA). This new law created the Justice Center for the Protection of People with Special Needs (Justice Center) and established many new protections for vulnerable persons, including a new system for incident management in services operated or licensed by OMH and new requirements for more comprehensive and coordinated pre-employment background checks.

The amendment of OMH regulations is necessary to implement many of the provisions contained in the PPSNA.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals with mental illness who receive services in the OMH system. If OMH did not promulgate regulations on an emergency basis, many of the protections established by the PPSNA vital to the health, safety and welfare of individuals with mental illness would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from inconsistent requirements. For example, the emergency regulations change the categories of incidents to conform to the categories established by the PPSNA. Without the promulgation of these amendments, agencies would be required to report incidents based on one set of definitions to the Justice Center and incidents based on a different set of definitions to OMH. Requirements for the management of incidents would also be inconsistent. Especially concerning regulatory requirements related to incident management and pre-employment background checks, it is crucial that OMH regulations be changed to support the new requirements in the PPSNA so that this initiative is implemented in a coordinated fashion.

For all of the reasons outlined above, this rule is being adopted on an Emergency basis until such time as it has been formally adopted through the SAPA rule promulgation process. A Notice of Proposed Rule Making has been filed simultaneously with this Emergency Adoption.

**Subject:** Implementation of the Protection of People with Special Needs Act and reforms to incident management.

**Purpose:** To enhance protections for people with mental illness served in the OMH system.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.omh.ny.gov](http://www.omh.ny.gov)):** The regulations are intended to conform regulations of the Office of Mental Health (OMH) to Chapter 501 of the Laws of 2012 (Protection of People with Special Needs Act or PPSNA). The primary changes include:

- 14 NYCRR Part 501 is amended by adding a new Subdivision (a) to Section 501.5, "Obsolete or Outdated References," that replaces any reference throughout OMH regulations to the Commission on Quality of Care and Advocacy for Persons with Disabilities with a reference to the Justice Center for the Protection of People with Special Needs.

- 14 NYCRR Part 524 (Incident Management) has been repealed and revised to incorporate categories of "reportable incidents" as established by the PPSNA and includes enhanced provisions regarding incident investigations. The amendments make changes related to definitions, reporting, investigation, notification and committee review of events and situations that occur in providers of mental health services licensed or operated by OMH. It is OMH's expectation that implementation of these amendments will enhance safeguards for persons with mental illness, which, in turn, will allow individuals to focus on their recovery. The amendments also require distribution of the Code of Conduct, developed by the Justice Center, to all employees. Providers must maintain signed documentation from such employees, indicating that they have received, and understand, the Code.

- Revisions to 14 NYCRR Part 550 are intended to facilitate and implement the consolidation of the criminal background check function in the Justice Center, and to make other conforming changes to the criminal background check function established by the PPSNA.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 9, 2015.

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

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

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

#### **Regulatory Impact Statement**

1. Statutory Authority: Chapter 501 of the Laws of 2012, i.e., "The Protection of People with Special Needs Act," establishes Article 20 of the Executive Law, Article 11 of the Social Services Law, and makes a number of amendments in other statutes, including the Mental Hygiene Law.

Section 7.07 of the Mental Hygiene Law, charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, that such care, treatment, and rehabilitation are of high quality and effectiveness, and that the personal and civil rights of persons with mental illness receiving care and treatment are adequately protected.

Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

2. Legislative Objectives: These regulatory amendments further the legislative objectives embodied in the Protection of People with Special Needs Act, as well as Sections 7.07, 7.09, and 31.04 of the Mental Hygiene Law. The amendments incorporate a number of reforms to regulations of the Office of Mental Health (OMH) in order to increase protections and improve the quality of services provided to persons receiving services from mental health providers operated or licensed by OMH.

3. Needs and Benefits: The amendments include new and modified requirements for incident management programs, codified at 14 NYCRR Part 524, and also add and revise provisions of Parts 501 and 550 to implement Chapter 501 of the Laws of 2012. Known as "The Protection of People with Special Needs Act," this new law requires the establishment of comprehensive protections for vulnerable persons, including persons with mental illness, against abuse, neglect and other harmful conduct.

The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems. The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. In collaboration with OMH, the Justice Center is also charged with

developing and delivering appropriate training for caregivers, their supervisors and investigators. Additionally, the Justice Center is responsible for conducting criminal background checks for applicants, including those who will be working in the OMH system.

Chapter 501 of the Laws of 2012 also created a Vulnerable Persons' Central Register (VPCR). This register contains the names of custodians found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All custodians found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Custodians having committed egregious or repeated acts of abuse or neglect are prohibited from future employment in providing services for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Job applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

Pursuant to Chapter 501 of the Laws of 2012, the Justice Center is charged with recommending policies and procedures to OMH for the protection of persons with mental illness. This effort involves the development of requirements and guidelines in areas including, but not limited to, incident management, rights of people receiving services, criminal background checks, and training of custodians. In accordance with Chapter 501, these requirements and guidelines must be reflected, wherever appropriate, in OMH's regulations. Consequently, the amendments incorporate the requirements in regulations and guidelines developed by the Justice Center.

The amendments make changes to OMH's incident management process to strengthen the process and to provide further protection to people receiving services from harm and abuse. For example, the amendments make changes related to definitions, reporting, investigation, notification, and committee review of events and situations that occur in providers of mental health services licensed or operated by OMH. It is OMH's expectation that implementation of the amendments will enhance safeguards for persons with mental illness, which will in turn allow individuals to focus on their recovery.

#### 4. Costs:

(a) Costs to the Agency and to the State and its local governments: OMH will not incur significant additional costs as a provider of services. While the regulations impose some new requirements on providers, OMH expects that it will comply with the new requirements with no additional staff. There may be minimal one-time costs associated with notification and training of staff.

Chapter 501 created the Justice Center, which assumes some designated functions previously performed by OMH. The Justice Center manages the criminal background check process and conducts some investigations that had previously been conducted by OMH. OMH experienced savings associated with the reduction in staff performing these functions; however, because the staff shifted to the Justice Center, the net effect is cost neutral.

Any costs or savings will have no impact on Medicaid rates, prices or fees. Therefore, there is no impact on New York State in its role paying for Medicaid services.

There are no costs to local governments as there are no changes to Medicaid reimbursement.

(b) Costs to private regulated parties: It is difficult to estimate the cost impact on private regulated parties; however, OMH expects that costs to providers will be minimal. OMH already required the reporting and investigation of incidents. The implementation of these reforms in general will not result in costs. There may also be additional costs associated with the need for medical examinations in cases of alleged physical abuse or clinical assessments needed to substantiate a finding of psychological abuse. Again, OMH is not able to estimate these cost impacts. There are no costs associated with a check of the Staff Exclusion List. Other amendments made in the rule making merely clarify existing requirements or interpretive guidance, or can be implemented without cost to the provider.

OMH anticipates that generally any potential costs incurred will be mitigated by savings that the provider will realize from the improvements to the incident management process. OMH expects that in the long term, the amendments will ultimately reduce incidents and abuse in its system and increase efficiency and quality in the reporting, investigation, notification, and review of such events. OMH is not able to quantify the minor potential costs or the savings that might be realized by the promulgation of these amendments.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The new regulations require additional paperwork to be completed by providers. Examples of additional paperwork are found in new requirements pertaining to reporting reportable incidents to the Justice Center and making additional notifications. However, the Justice Center will likely predominantly utilize electronic format for incident reporting.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with mental illness. In some instances, the regulations reiterate current requirements in New York State law.

8. Alternatives: These regulations are required by statute, and thus no alternatives to their promulgation were available to consider.

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

10. Compliance Schedule: As this proposal is being filed as a Notice of Emergency Adoption/Proposed Rule Making, the regulations are effective immediately upon filing. This will ensure compliance with Chapter 501 of the Laws of 2012. OMH shall continue to develop and transmit implementation guidance to regulated parties to assist them with compliance.

#### *Regulatory Flexibility Analysis*

1. Effect of rule: OMH has determined, through its Bureau of Inspection and Certification, that approximately 732 agencies provide services which are certified or licensed by OMH. OMH is unable to estimate the portion of these providers that may be considered to be small businesses (under 100 employees).

However, the amendments have been reviewed by OMH in light of their impact on small businesses. The regulations make revisions to OMH's requirements for incident management which will necessitate some changes in compliance activities and may result in additional costs and savings to providers, including small business providers. However, OMH is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, these changes are required by statute and OMH considers that the improvements in protections for people served in the OMH system will help safeguard individuals from harm and abuse; thus, the benefits more than outweigh any potential negative impact on providers.

2. Compliance requirements: The regulations add several new requirements with which providers must comply. Amendments associated with the implementation of Chapter 501 include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries; however, OMH anticipates that providers are already obtaining examinations of physical injuries. While Chapter 501 also establishes an obligation to obtain a clinical assessment to substantiate a charge of psychological abuse, it is not immediately clear who will be responsible for obtaining, and paying for, that assessment.

Current OMH regulations require reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate some changes and reforms, the basic requirements are conceptually unchanged. OMH, therefore, expects that additional compliance activities (except as noted above) will be minimal. There is no associated cost with checking the Staff Exclusion List. The cost to check the Statewide Register of Child Abuse and Maltreatment is \$25 per check; providers serving children are already incurring this cost. However, this would represent a new cost for providers who previously did not request such checks, though this cost could be passed by the provider to the applicant.

Providers subject to these regulations were already responsible for complying with incident management regulations. The regulations enhance some of these requirements, e.g., providers must comply with the new requirement to complete investigations within a 45-day timeframe. Providers must also comply with new requirements to enhance the independence of investigators and incident review committees. However, OMH expects that additional compliance activities associated with these enhanced requirements will be minimal.

3. Professional services: There may be additional professional services required for small business providers as a result of these amendments. The definition of psychological abuse references a need to determine specific impacts on an individual receiving services by means of a clinical assessment, but it is not immediately clear at what stage in the process that assessment must be maintained or who is responsible for obtaining and paying for it. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There may be modest costs for small business providers associated with these amendments. There may be nominal costs for providers to comply with the expanded notification requirements, but OMH is unable to determine the cost impact. Furthermore, providers may experience savings if the Justice Center or OMH assumes responsibility for investigations that were previously conducted by provider staff. In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for providers as well as benefits to the wellbeing of individuals receiving services.

5. Economic and technological feasibility: The amendments may impose the use of new technological processes on small business providers. Providers were already reporting incidents and abuse in NIMRS. Since the

passage of Chapter 501, the Justice Center developed the Vulnerable Persons' Central Register, which has succeeded NIMRS. That technology continues to be used. Because Chapter 501 requires providers to report reportable incidents to the Justice Center in the manner specified by the Justice Center, it is conceivable that further technology requirements could be imposed if that is the manner specified by the Justice Center. However, this is not a direct impact caused by the regulations.

6. Minimizing adverse impact: The amendments may result in an adverse economic impact for small business providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OMH expects that compliance with these new regulations will result in savings in the long term and there may be some short term savings as a result of the conduct of investigations by the Justice Center.

OMH has reviewed the regulations to determine if there were any viable approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. However, because these regulations are required by statute, none were readily identified.

7. Small business and local government participation: Chapter 501 of the Laws of 2012 was originally a Governor's Program Bill which received extensive media attention. Providers have been operating under previous emergency regulations since its effective date and have had the opportunity to provide feedback on implementation of those regulations with OMH during that time. Furthermore, in accordance with statutory requirements, the rule was presented to the Behavioral Health Services Advisory Council for review and recommendations.

8. (IF APPLICABLE) For rules that either establish or modify a violation or penalties associated with a violation: The amendments include a penalty for violating the regulations of a fine not to exceed \$1,000 per day or \$15,000 per violation in accordance with section 31.16 of the Mental Hygiene Law and/or may suspend, revoke, or limit an operating certificate or take any other appropriate action, in accordance with applicable law and regulations. However, due process is available to a provider via 14 NYCRR Part 503.

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

1. Types and estimated number of rural areas: OMH services are provided in every county in New York State. Forty-three counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The amendments have been reviewed by OMH in light of their impact on rural areas. The regulations make revisions and in some cases enhance OMH's current requirements for incident management programs, which will necessitate some changes in compliance activities and result in additional costs and savings to providers, including those in rural areas. However, OMH is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, OMH considers that the improvements in protections for people served in the OMH system will help safeguard individuals from harm and abuse and that the benefits more than outweigh any potential negative impacts on all providers.

The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Compliance requirements: The regulations add some new requirements with which providers must comply. Amendments associated with the implementation of Chapter 501 include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries, and there is a requirement that, for a finding of psychological abuse to be substantiated, a clinical assessment is needed in order to demonstrate the impact of the conduct on the individual receiving services.

Current OMH regulations require reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate some changes, the basic requirements are conceptually unchanged. OMH therefore expects that additional compliance activities associated with these changes will be minimal. However, there will be additional compliance activities associated with checking the Staff Exclusion List.

Providers must comply with the new requirement to complete investigations within a 45-day timeframe. Providers must also comply with new requirements to enhance the independence of investigators and incident review committees. However, OMH expects that additional compliance

activities will be minimal since providers are already required to comply with existing incident management program requirements; these revisions primarily enhance current requirements.

3. Professional services: There may be additional professional services required for rural providers as a result of these amendments. The amendments will not add to the professional service needs of rural providers.

4. Costs: There may be modest costs for rural providers associated with the amendments. There also may be nominal costs for rural providers to comply with the expanded notification requirements. However, all providers may experience savings if the Justice Center or OMH assumes responsibility for investigations that were previously conducted by provider staff.

In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for both urban and rural area providers as well as benefits to the wellbeing of individuals receiving services.

5. Minimizing adverse impact: The amendments may result in an adverse economic impact for rural providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OMH expects that compliance with these enhanced regulations will result in savings in the long term and there may be some short-term savings as a result of the conduct of investigations by the Justice Center.

OMH has reviewed the regulations to determine if there were any viable approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act; none were readily identified. However, OMH did not consider the exemption of rural area providers from the amendments or the establishment of differing compliance or reporting requirements, since OMH considers compliance with the amendments to be crucial for the health, safety, and welfare of the individuals served by rural area providers.

6. Rural area participation: Chapter 501 of the Laws of 2012 was originally a Governor's Program Bill which received extensive media attention. Providers have had the opportunity to become familiar with its provisions since it was made available on various government websites last June. Furthermore, in accordance with statutory requirements, the rule was presented to the Behavioral Health Services Advisory Council for review and recommendations.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because OMH does not anticipate a substantial adverse impact on jobs and employment opportunities.

The amendments incorporate a number of reforms to improve the quality and consistency of incident management activities throughout the OMH system. However, it is not anticipated that these reforms will negatively impact jobs or employment opportunities. The amendments that impose new requirements on providers, such as additional reporting requirements and the timeframe for completion of investigations, will not result in an adverse impact on jobs. OMH anticipates that there will be no effect on jobs as agencies will utilize current staff to perform the required compliance activities.

Chapter 501 of the Laws of 2012 and these implementing regulations will also mean that some functions that had been performed by OMH staff will instead be performed by the staff of the Justice Center. OMH expects that the volume of incidents and occurrences investigated will be roughly similar. To the extent that the Justice Center performs investigations, oversees the management of reportable incidents, and manages requests for criminal history record checks, the result is expected to be neutral in that positions lost by OMH will be gained by the Justice Center.

It is therefore apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

---



---

## **Public Service Commission**

---



---

### **PROPOSED RULE MAKING HEARING(S) SCHEDULED**

#### **Major Gas Revenue Increase**

**I.D. No.** PSC-39-15-00010-P

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

**Proposed Action:** The Commission is considering a proposal filed by St. Lawrence Gas Company, Inc. to make various changes in the rates,

charges, rules and regulations contained in its Schedule for Gas Service, P.S.C. No. 3 — Gas.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Major gas revenue increase.

**Purpose:** To consider an increase to its annual gas revenues by approximately \$1,228,000 or 2.96%.

**Public hearing(s) will be held at:** 10:30 a.m., Dec. 8, 2015 and continuing daily as needed at Department of Public Service, Agency Bldg. 3 – 3rd Fl. Hearing Rm., Albany, NY (Evidentiary Hearing)\*

\*Notification of the time and location of the hearing will be available at the DPS website ([www.dps.ny.gov](http://www.dps.ny.gov)) under Case 15-G-0382.

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

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

**Substance of proposed rule:** The Commission is considering a proposal filed by St. Lawrence Gas Company, Inc. (St. Lawrence) to increase gas revenues for the rate year ending May 31, 2017 by approximately \$1,228,000, which is a 2.96% increase in delivery revenues or about a \$48.55 or 3.32%, for residential customers using 1156 therms per month. St. Lawrence states the main drivers for the rate filing are increased costs incurred in the rate year, and receiving a reasonable rate of return on assets. The statutory suspension period for the proposed filing runs through November 25, 2015. The Commission may adopt, in whole or in part, modify or reject terms set forth in St. Lawrence’s proposal or other negotiated proposals.

**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:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [elaine.agresta@dps.ny.gov](mailto:elaine.agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(15-G-0382SP1)

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

**Minor Water Rate Filing**

**I.D. No.** PSC-39-15-00008-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 proposal filed by Windham Ridge Water Corp. to raise its rates by approximately \$15,059 or 24.8% and make other changes to its tariff schedule P.S.C. No. 1 — Water.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10)(a), (b), (f) and (3)

**Subject:** Minor water rate filing.

**Purpose:** To consider an increase in Windham Ridge Water Corp.’s annual water revenues by approximately \$15,059 or 24.8%.

**Substance of proposed rule:** The Commission is considering a proposal filed by Windham Ridge Water Corp. (Company) to increase its total annual revenues by approximately \$15,059 or 24.8% by applying a 26.3% increase to residential rates applicable to Townhouses and Detached Homes and by applying a 26.6% increase to the commercial rate for the single Community Center customer; no change to the \$3.00 per 1,000 gallon rate for all consumption is proposed. This rate increase is necessary due to increases in operating expenses since the current rates went into effect on October 29, 2007. The Company is also requesting approval to cancel its Escrow Account Statement No. 2 upon approval of the new rates, and also is requesting approval to modify the restoration of service

charges to be consistent with charges in the standard small water company tariff. The charge to restore service after discontinuance at the customer’s request, for non-payment, or for violation of rules, is proposed to increase from \$25.00 to \$50.00 during normal business hours (8:00 a.m. to 4:00 p.m., Monday through Friday), from \$40.00 to \$75.00 outside of normal business hours Monday through Friday, and from \$75.00 to \$100.00 on weekends or public holidays. In addition, the Company is proposing to modify the language in its standard tariff on Leaf 2 to require applications for water service that would be included in Proposed Leaves 13 and 14; as a result, the table of contents on Leaf 2 would also be updated to reflect the new leaves. The proposed minor rate filing has an effective date of January 1, 2016. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [elaine.agresta@dps.ny.gov](mailto:elaine.agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(15-W-0515SP1)

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

**Waiver of Niagara Mohawk Power Corporation’s Electric Tariff  
PSC No. 220, Rule 16.8.1**

**I.D. No.** PSC-39-15-00009-P

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

**Proposed Action:** The Commission is considering a petition for a waiver from Niagara Mohawk Power Corporation’s electric Tariff PSC No. 220, Rule 16.8.1 related to the five-year limit on refunds for utility line extension work in subdivisions.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Waiver of Niagara Mohawk Power Corporation’s electric Tariff PSC No. 220, Rule 16.8.1.

**Purpose:** To determine whether a five-year limit on deposit refunds for utility subdivision work should be extended via waiver.

**Substance of proposed rule:** On May 1, 2015, Dorothy Bedor submitted a letter petition seeking a waiver from a provision of the Niagara Mohawk Power Corporation d/b/a National Grid electric tariff, PSC No. 220 Tariff Rule 16, related to the establishment of a letter of credit for subdivision line extension work related to underground electric lines. In her letter petition, the petitioner states that she and her husband financed subdivision work in 2010 in the Village of Adams, Jefferson County, New York. During the construction, petitioner, pursuant to the National Grid Tariff, submitted a letter of credit and a deposit of approximately \$30,000 to cover trenching and utility work for gas and electric service lines. The deposit is refundable over a five-year period as the new subdivision’s buildings connect to National Grid’s utility service. The petitioner notes that one building has yet to be connected and the remaining non-refunded portion of \$3,986.58 becomes forfeited to the utility after five years pursuant to the Tariff provision. The petitioner seeks a waiver due to hardship that would extend the deposit and refund dates by at least three additional years so that the final subdivision lot may be connected for utility service. The Commission can approve, deny or modify, in whole or in part Dorothy Bedor’s petition, as well as any other related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [elaine.agresta@dps.ny.gov](mailto:elaine.agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(15-M-0272SP1)

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

**Joint Proposal Filed on September 9, 2015**

**I.D. No.** PSC-39-15-00011-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 of a proposal filed on 9/9/15, which would resolve Consolidated Edison Cases 09-M-0114 and 09-M-0243 regarding alleged imprudent construction contractor expenditures.

**Statutory authority:** Public Service Law, sections 2, 5, 65, 66, 79, 80, 107 and 113

**Subject:** Joint proposal filed on September 9, 2015.

**Purpose:** Resolution of Cases 09-M-0114 and 09-M-0243 regarding alleged imprudent contractor-related construction expenditures.

**Substance of proposed rule:** The Commission is considering whether to approve, modify, or reject, in whole or in part, a joint proposal (filed September 9, 2015) filed by Consolidated Edison Company of New York, Inc. (Con Edison), and signed by Con Edison, DPS Staff, the Utility Intervention Unit of the Department of State and the New York Energy Consumers Council, Inc., that would bring these proceedings to an end. The joint proposal would increase benefits to customers by approximately \$171 million. In January 2009, a U.S. Attorney investigation conducted by the U.S. Immigration and Customs Enforcement agents led to the arrests of several Con Edison construction manager employees for taking bribes and kickbacks from certain contractors. These employees were criminally charged with inflating field work and materials invoices as part of their schemes to defraud the company. Case 09-M-0114 was commenced by the Commission following the January 2009 arrests, to determine the prudence of actions by Con Edison. As part of this case, Con Edison was directed to investigate and report on, among other things, its internal controls, and methods and procedures with respect to contracting for capital projects and operations and maintenance work. In Case 09-M-0243, the Commission issued a request for proposals from consultants to conduct an investigative accounting audit of Con Edison's construction program for the period 2000-2009. As a result of that process, Charles River Associates was retained to conduct the investigation and estimated the ratepayer harm caused by fraudulent activities.

**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:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [elaine.agresta@dps.ny.gov](mailto:elaine.agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(09-M-0114SP2)

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

**Petition to Submeter Electricity**

**I.D. No.** PSC-39-15-00012-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the Petition filed by 47 East 34th Street (NY), L.P., to submeter electricity at 49 East 34th Street, New York, New York.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition to submeter electricity.

**Purpose:** To consider the request of 47 East 34th Street (NY), L.P., to submeter electricity at 49 East 34th Street New York, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the Petition filed by 47 East 34th Street (NY), L.P. to submeter Electricity at 49 East 34th Street, New York, New York, located in the Territory of Consolidated Edison Company of New York, Inc., and to take other actions necessary to address 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:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [Elaine.Agresta@dps.ny.gov](mailto:Elaine.Agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(15-E-0319SP1)

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

**Revisions to General Information Section 15 to Allow Recovery of Certain NYISO Tariff Charges Related to Transmission Projects**

**I.D. No.** PSC-39-15-00013-P

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

**Proposed Action:** The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. to make revisions to P.S.C. No. 3 — Electricity, General Information section No. 15 — Market Supply Charge to allow collection of certain charges imposed by the NYISO.

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

**Subject:** Revisions to General Information section 15 to allow recovery of certain NYISO tariff charges related to transmission projects.

**Purpose:** To consider revisions to General Information section No. 15 to allow for recovery of certain NYISO charges.

**Substance of proposed rule:** The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R or the Company) to make revisions to P.S.C. No. 3 — Electricity, General Information Section No. 15 — Market Supply Charge (MSC) to allow for recovery of certain New York Independent System Operator (NYISO) charges. O&R proposes to add components to the MSC to allow the Company to recover transmission charges billed by the NYISO related to Commission approved transmission projects and for transmission projects that may be approved in the future. These include NY Transco charges, transmission projects approved by the Commission in Case 12-E-0503 (Transmission Owner Transmission Solutions (TOTS) charges) and projects approved by the Commission in Case 13-E-0488 (AC Transmission). The proposed tariff changes also address how the charges would be billed (that is, on a per-kilowatt hour basis). The proposed amendments have an effective date of December 27, 2015. The Commission may grant, reject or modify, in whole or in part, the proposed tariff changes and may resolve related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [elaine.agresta@dps.ny.gov](mailto:elaine.agresta@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess,

Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(15-E-0519SP1)

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

**Revisions to General Rule No. 25.1 to Allow Recovery of Certain NYISO Tariff Charges Related to Transmission Projects**

**I.D. No.** PSC-39-15-00014-P

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

**Proposed Action:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. to make revisions to P.S.C. No. 10 — Electricity, General Rule No. 25.1 — Market Supply Charge to allow collection of certain charges imposed by the NYISO.

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

**Subject:** Revisions to General Rule No. 25.1 to allow recovery of certain NYISO tariff charges related to transmission projects.

**Purpose:** To consider revisions to General Rule No. 25.1 to allow for recovery of certain NYISO charges related to transmission projects.

**Substance of proposed rule:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) to make revisions to P.S.C. No. 10 — Electricity, General Rule No. 25.1 — Market Supply Charge (MSC) to allow for recovery of certain New York Independent System Operator (NYISO) charges. Con Edison proposes to add components to the MSC to allow the Company to recover transmission charges billed by the NYISO related to Commission approved transmission projects and for transmission projects that may be approved in the future. These include NY Transco charges, transmission projects approved by the Commission in Case 12-E-0503 (Transmission Owner Transmission Solutions (TOTS) charges) and projects approved by the Commission in Case 13-E-0488 (AC Transmission). The proposed tariff changes also address how the charges would be billed (that is, on a per-kilowatt hour basis). The proposed amendments have an effective date of December 27, 2015. The Commission may grant, reject or modify, in whole or in part, the proposed tariff changes and may resolve related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: elaine.agresta@dps.ny.gov

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

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

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

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

(15-E-0518SP1)

**State University of New York**

**NOTICE OF ADOPTION**

**State Basic Financial Assistance for Operating Expenses of Community Colleges Under the Program of SUNY and CUNY**

**I.D. No.** SUN-29-15-00004-A

**Filing No.** 791

**Filing Date:** 2015-09-14

**Effective Date:** 2015-09-30

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

**Action taken:** Amendment of section 602.8(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 355(1)(c) and 6304(1)(b); and L. 2015, ch. 53

**Subject:** State basic financial assistance for operating expenses of community colleges under the program of SUNY and CUNY.

**Purpose:** To modify limitations formula for basic State Financial assistance and conform to the Education Law and the 2015-16 Budget Bill.

**Text or summary was published** in the July 22, 2015 issue of the Register, I.D. No. SUN-29-15-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Lisa S. Campo, State University of New York, State University Plaza, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

**Assessment of Public Comment**

The agency received no public comment.

**Office of Temporary and Disability Assistance**

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

**Temporary Housing Placements**

**I.D. No.** TDA-39-15-00016-P

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

**Proposed Action:** Amendment of sections 352.8(b)(1) and 352.3(h); and addition of section 352.3(m) to Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(2), (3)(d), 34 and 131-v(4)

**Subject:** Temporary Housing Placements.

**Purpose:** Adjust the rate approval process for temporary housing placements and expand the scope of inspections for such placements.

**Text of proposed rule:** Paragraph (1) of subdivision (b) of section 352.8 of Title 18 NYCRR is amended to read as follows:

(1) An allowance for each recipient or family purchasing room and/or board to cover the cost of board, room rent and other expenses, except where such items and services are furnished by a legally responsible relative or a recipient of public assistance. This allowance, *including but not limited to rates set for entities governed by section 352.3(e) of this Part*, is subject to review and approval by the *Office of Temporary and Disability Assistance (the office) pursuant to a timetable established by the office* in accordance with paragraph (2) of this subdivision. For each recipient or family purchasing room and/or board from an individual, family or from a commercially operated boarding house, such allowance cannot exceed the sum of the statewide monthly grant and allowance, the statewide monthly home energy payments, the statewide monthly supplemental home energy payments and the local agency monthly shelter allowance schedule without children as contained in section 352.3(a)(1) of this Part.

Subdivision (h) of section 352.3 of Title 18 NYCRR is amended to read as follows:

(h) Inspection. Local social services districts which make hotel/motel referral must inspect at least once every six months the hotels/motels in which families are placed. In addition to verifying that the hotel/motel meets the requirements set forth in subdivision (g) of this section, the local district shall make appropriate inquiries to determine whether the hotel/motel is in compliance with all applicable State and local laws, regulations, codes and ordinances. Any violation found during the on-site inspection shall be reported to appropriate authorities. Further, each inspection shall at least review arrangements for hygiene, vermin control, security, furnishings, cleanliness and maintenance and shall include a review of any applicable documents pertaining to compliance with any local laws or codes. A written report shall be made of each such inspection and shall be maintained at the office of the local district together with such other information as the district may maintain concerning the families placed in the hotel/motel. *A copy of any such inspection report shall be provided to the Office of Temporary and Disability Assistance within thirty days of its completion.*

A new subdivision (m) is added to section 352.3 of Title 18 NYCRR to read as follows:

*(m) Inspection of Shelter Placements. Social services districts that make referrals for temporary emergency shelter for eligible homeless households to dwelling units, which will be paid for by public funds, that are not otherwise governed by section 460 of the Social Services Law, Parts 900 and 491 of this Title, or section 352.3(h) of this Part, shall submit for approval by the Office of Temporary and Disability Assistance health and safety standards for those units which comport with all applicable State and local laws, regulations, codes and ordinances. Additionally, social services districts shall be responsible for the inspection of such dwelling units at least once every 12 months to confirm that such standards are satisfied. A written report shall be made of each such inspection and shall be maintained at the office of the social services district together with such other information as the social services district may maintain concerning the households placed in the dwelling unit. A copy of any such inspection report shall be provided to the Office of Temporary and Disability Assistance within thirty days of its completion.*

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

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

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

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### **Regulatory Impact Statement**

##### **1. Statutory Authority:**

Social Services Law (SSL) § 20(2) provides, in part, that the Office of Temporary and Disability Assistance (OTDA) shall “supervise all social services work, as the same may be administered by any local unit of government and the social services officials thereof within the state, advise them in the performance of their official duties and regulate the financial assistance granted by the state in connection with said work.” Pursuant to SSL § 20(3)(d), OTDA is authorized to promulgate regulations and policies to fulfill its powers and duties under the SSL.

SSL § 34(3)(c) requires OTDA’s Commissioner to “take cognizance of the interests of health and welfare of the inhabitants of the state who lack or are threatened with the deprivation of the necessities of life and of all matters pertaining thereto.” Pursuant to SSL § 34(3)(f), OTDA’s Commissioner must establish regulations for the administration of public assistance and care within the State by the social services districts (SSDs) and by the State itself, in accordance with the law. In addition, pursuant to SSL § 34(3)(d), OTDA’s Commissioner must exercise general supervision over the work of all SSDs, and SSL § 34(3)(e) provides that OTDA’s Commissioner must enforce the SSL and the State regulations within the State and in the local governmental units.

SSL § 131-v(4), which governs temporary emergency shelters operated by a not-for-profit or charitable entity under contract with the SSD, requires the SSDs to submit for OTDA’s approval health and safety standards that such units must satisfy, and SSDs must inspect such units regularly to ensure that such standards are satisfied.

##### **2. Legislative Objectives:**

It is the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations, and policies to provide for the health, safety and general welfare of vulnerable families and individuals who are placed in temporary housing accommodations.

##### **3. Needs and Benefits:**

The State regulations at 18 NYCRR § 352.8(b) presently authorize SSDs to negotiate and establish rates for the provision of room and board, including temporary housing. Currently, room and board rates are set

without OTDA participation, and SSDs have wide flexibility in setting and adjusting these rates. The proposed amendments would adjust the rate setting process and authorize review and approval by OTDA of the room and board rates prior to their implementation by the SSDs. With this authority, OTDA would be able to help ensure that rates for temporary housing negotiated between SSDs and temporary housing providers are fair and affordable, and that they include services necessary to assist vulnerable families and individuals in their transitions out of homelessness. Such requirement for OTDA review and approval would facilitate reimbursements to SSDs that reflect the provision of services necessary to transitioning out of homelessness as required by law and regulation.

State regulations presently contain inspection requirements. For instance, 18 NYCRR § 352.3(h) requires SSDs that make hotel/motel referrals to inspect at least once every six months the hotels/motels in which families are placed. Additionally, pursuant to 18 NYCRR Parts 900 and 491, OTDA inspects certified temporary housing family shelters and shelters for adults, respectively. However, there is no existing requirement that uncertified shelters be inspected. The proposed amendments would require such inspections.

Specifically, the proposed amendments would require SSDs to be responsible for annual inspections of temporary housing placements, confirming that standards are satisfied, and to submit to OTDA reports of the inspections performed. This requirement would promote greater accountability by SSDs for the quality of the temporary housing that is utilized. It is anticipated that SSDs may utilize other county agencies or contractors to conduct the inspections, provided they follow regulatory standards. The proposed amendments would also require that the inspection reports for hotel/motels be provided to OTDA within thirty days of their completion.

##### **4. Costs:**

It is estimated that the cost to the State for implementation of these proposed amendments would be approximately \$1.49 million annually for personal and non-personal service expenses, excluding fringe benefits and indirect costs. This cost consists of the need for additional OTDA staffing both in the Center for Specialized Services (CSS) and in the Office of Budget, Finance, and Data Management (OBFDM). An additional 17 OTDA staff would be required, consisting of 16 CSS staff members to review inspection reports submitted by SSDs, provide on-site monitoring for some of the inspections, and directly inspect those sites that have deficiencies that could jeopardize the health and safety of the individuals and families in temporary housing placements, and one OBFDM staff member to support the additional review and reconciliation of the increased number of shelter budgets. In addition, CSS inspection staff would have to review documentation that deficiencies have been addressed, and make site visits to visually inspect the remediation and repairs when necessary. One of the additional staff members in CSS and the one in OBFDM would assist with reviewing the budgets of and per diem rates for the additional facilities that would be required to submit budgets and rates as the result of the proposed regulation. The proposed regulation would triple the amount of budgets reviewed by the two offices, which is why additional staff are required.

It is anticipated that the costs to the SSDs would be manageable as many counties already complete these types of inspections and would only need to add the step of submitting the reports to OTDA. Additionally, as many of the smaller, rural counties in the state rely primarily on hotels and motels for temporary housing assistance placements, the only additional requirement imposed by the proposed regulatory changes would be to provide the currently required hotel/motel inspection reports to OTDA. To the extent that some SSDs are not already performing the required inspections, those SSDs would incur additional local costs as a result of compliance.

The proposed amendments would have a minimal impact on temporary housing placements that are currently in compliance with existing health and safety standards. The regulatory amendments are merely attempting to identify violations under existing health and safety standards so that they can be remedied.

##### **5. Local Government Mandates:**

SSDs would need to comply with requirements concerning OTDA’s new rate approval process and ensure that additional inspections are conducted consistent with the proposed amendments.

##### **6. Paperwork:**

SSDs would need to exchange additional paperwork with OTDA to comply with the new rate approval process. In addition, there would be additional reporting requirements for SSDs that use temporary housing placements in uncertified shelters, including hotels and motels.

##### **7. Duplication:**

The proposed amendments would not duplicate, overlap or conflict with any existing State or federal regulations. OTDA has the statutory authority to establish a new rate approval process, and the regulatory amendments would expand the scope of inspections currently applied in State regulations to additional types of temporary housing.

## 8. Alternatives:

An alternative would be to leave the current 18 NYCRR § 352.8(b) intact. However, this alternative is not a viable option because the current regulation does not address all housing situations, nor does it confer upon OTDA overall oversight and authority over conditions and rates. The regulations as they are currently written do not mandate that the SSDs conduct inspections of the temporary housing placements that are not certified by OTDA. Without specific instruction to inspect and to submit subsequent inspection reports to OTDA, there is no way for OTDA to verify those shelters that fall outside of the jurisdiction of the Bureau of Shelter Services are meeting basic standards for habitability. Moreover, inaction would continue to jeopardize the health and safety of the vulnerable families and individuals who are placed in these facilities, by allowing existing infractions and violations to continue unaddressed and by failing to prevent future infractions and violations.

Another alternative would be for OTDA to directly inspect uncertified shelters. OTDA has not opted to pursue this alternative because: 1) it is the role of SSDs to find placement for homeless individuals and families and render payment for them; therefore, they are better able to identify and inspect local uncertified shelters; 2) inspection of shelters corresponds with the SSDs' responsibility to provide fraud prevention activities; 3) SSDs are able to make use of linkages with local code enforcement and health departments in performing such inspections; and 4) the proposed regulation is consistent with existing regulations requiring SSDs to inspect hotels and motels used for temporary housing.

## 9. Federal Standards:

The proposed amendments would not conflict with or exceed any minimum standards of the federal government.

## 10. Compliance Schedule:

The regulations would be effective immediately upon adoption. OTDA plans to release administrative guidance to the SSDs regarding the implementation of the proposed amendments. The SSDs would have an opportunity to contact OTDA with any concerns, questions or other issues. The administrative guidance would be posted to OTDA's internet site.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

Pursuant to the State Administrative Procedure Act § 102(8), a "small business," in part, is any business which is independently owned and operated and employs 100 or fewer individuals. This rule would apply to small businesses, including not-for-profit entities, which provide temporary housing. This rule also would apply to all 58 social services districts (SSDs) in the State.

## 2. Compliance requirement:

SSDs would need to be responsible for the required inspections of temporary housing placements conducted consistent with statutory and regulatory requirements. There would be additional reporting requirements for SSDs using hotel/motel and temporary housing placements. Additionally, SSDs would need to comply with budget development requirements concerning OTDA's rate approval process and report the rates for temporary housing to OTDA as required.

The regulatory amendments would have minimal impact on temporary housing placements that are currently in compliance with existing health and safety standards. The regulatory amendments merely attempt to correct violations under existing health and safety standards.

## 3. Professional services:

It is anticipated that the need for additional professional services would be limited. The regulatory amendments would not fundamentally alter the current responsibilities of the SSDs.

## 4. Compliance costs:

The regulatory amendments would require a small amount of local resources to complete additional inspections. At present, OTDA estimates that most counties in the state will not be affected or will be affected in a negligible way by the proposed regulation changes. OTDA estimates that approximately 8-10 counties will be required to inspect an additional 5-10 shelters each year requiring at most 37.5 hours of additional work over the course of the year. Even smaller is the number of counties that will be affected in a negligible way and will be asked to perform an addition 2-5 hours of work per year. The additional work would be performed by current SSD staff and would require a minimal amount of additional, non-technical training.

The SSDs would need to comply with budget development requirements concerning OTDA's rate approval process and ensure that additional inspections are conducted consistent with the proposed amendments.

As noted above, the regulatory amendments would have a minimal impact on temporary housing placements that are currently in compliance with existing health and safety standards. For those shelters that are not in compliance with the approved standards, OTDA would work with the SSDs to submit a Corrective Action Plan that would allow local districts to make repairs according to realistic economic and time constraints.

## 5. Economic and technological feasibility:

SSDs would have the economic and technological abilities to comply with the proposed amendments. The amendments would have a minimal impact on temporary housing placements that are currently in compliance with existing health and safety standards.

## 6. Minimizing adverse impact:

The regulatory amendments attempt to minimize any adverse economic impact on temporary housing placements and SSDs. The regulatory amendments would provide the SSDs flexibility as to how the inspections of temporary housing placements could be conducted. For instance, the SSDs may choose to conduct the inspections themselves, or they may enter contracts to have the inspections completed. The amendments would not provide exemptions, because this would not serve the purposes of helping to ensure that rates for temporary housing are fair and affordable and ensuring that annual inspections of temporary housing placements are completed.

## 7. Small business and local government participation:

At the New York Public Welfare Association (NYPWA) conference held in July 2015, OTDA generally informed SSD Commissioners of the need for the SSDs to conduct their own inspections of shelters. OTDA had a subsequent conference call, which was general in nature, with NYPWA leadership regarding the SSDs' inspections of hotels/motels pursuant to existing regulations and the possibility of SSD inspections of uncertified shelters. The focus of this conference call was to determine the best way to obtain district input, including the possibility of convening a committee of OTDA staff and interested SSD Commissioners. On September 10, 2015, OTDA had a second conference call with NYPWA leadership and a number of SSD Commissioners to outline the proposed regulatory amendments, to obtain SSD input regarding the proposed changes, and to answer questions raised by the SSDs. During the conference call, OTDA advised the participants that it plans to release administrative guidance to the SSDs regarding the implementation of the proposed amendments. The SSDs will have an opportunity to contact OTDA with any concerns, questions or other issues. The administrative guidance will be posted to OTDA's internet site.

It is anticipated that small businesses and SSDs will be dedicated to implementing the regulatory amendments and protecting the health, safety and general welfare of residents of temporary housing placements.

**Rural Area Flexibility Analysis**

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

The regulatory amendments would apply to the 44 rural social services districts (SSDs) and small businesses, including not-for-profit entities that provide temporary housing placements in those areas.

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

Rural SSDs would need to be responsible for the required inspections of temporary housing placements and that such inspections are conducted consistent with statutory and regulatory requirements. There would be additional reporting requirements for rural SSDs that use hotel/motel and temporary housing placements. However, as the majority of rural SSDs do not use emergency shelters, but instead make temporary housing placements in hotels/motels, they would be less impacted than urban districts by the addition of 18 NYCRR § 352.3(m).

Pursuant to the proposed amendments, rural SSDs would need to comply with new requirements concerning OTDA's rate approval process and report the rates for temporary emergency housing to OTDA as required.

It is anticipated that the need for additional professional services would be limited. The regulatory amendments would not fundamentally alter the responsibilities of the rural SSDs. In addition, the regulatory amendments would not add new health and safety standards to the State regulations; instead, they would require that all temporary housing placements, including those in rural areas, comply with existing requirements to provide safe housing in accordance with local health and safety standards and State regulations.

## 3. Costs:

The regulatory amendments will likely require some local resources. It is anticipated that the SSDs will have new reporting and budget development requirements. The regulatory amendments will have a minimal fiscal impact on temporary housing placements in rural areas that are currently in compliance with existing health and safety standards.

Rural SSDs primarily utilize hotels/motels for temporary housing assistance placements, which under current regulations are required to be inspected. The reporting costs are not expected to be significant.

## 4. Minimizing adverse impact:

The regulatory amendments attempt to minimize any adverse economic impact on temporary housing placements and SSDs in rural areas. The regulations should not provide exemptions, because this would not serve the purposes of ensuring the health and safety of all temporary housing residents and protecting these vulnerable residents from dangerous

conditions. As noted above, the fiscal impact of the regulatory amendments is anticipated to be insignificant in rural areas.

5. Rural area participation:

At the New York Public Welfare Association (NYPWA) conference held in July 2015, OTDA generally informed SSD Commissioners of the need for the SSDs to conduct their own inspections of shelters. The NYPWA conference included SSDs in rural areas. OTDA had a subsequent conference call, which was general in nature, with NYPWA leadership regarding the SSDs' inspections of hotels/motels pursuant to existing regulations and the possibility of SSD inspections of uncertified shelters. The focus of this conference call was to determine the best way to obtain district input, including the possibility of convening a committee of OTDA staff and interested SSD Commissioners. On September 10, 2015, OTDA had a second conference call with NYPWA leadership and a number of SSD Commissioners, including those from rural areas, to outline the proposed regulatory amendments, to obtain SSD input regarding the proposed changes, and to answer questions raised by the SSDs. During the conference call, OTDA advised the participants that it plans to release administrative guidance to the SSDs regarding the implementation of the proposed amendments. The SSDs will have an opportunity to contact OTDA with any concerns, questions or other issues. The administrative guidance will be posted to OTDA's internet site.

It is anticipated that small businesses and SSDs in rural areas will be dedicated to implementing the regulatory amendments and protecting the health, safety and general welfare of residents of temporary housing placements.

**Job Impact Statement**

A Job Impact Statement is not required for this rule. The purpose of the rule is to revise the current regulations to adjust the rate setting process for temporary housing placements by amending 18 NYCRR § 352.8(b), to require that hotel/motel inspection reports be submitted to the Office of Temporary and Disability Assistance by amending 18 NYCRR § 352.3(h), and to expand inspection requirements for certain placements by adding 18 NYCRR § 352.3(m). It is apparent from the nature and the purpose of the proposed amendments that they would not have a substantial adverse impact on jobs and employment opportunities in the private sector, in the social services districts (SSDs), or in the State. To the contrary, the proposed amendments would have a positive impact on jobs and employment opportunities, because additional persons may need to be hired.

Thus, the proposed amendments would not have any adverse impact on jobs and employment opportunities in New York State.