

State Aid: Radioactive Materials and Radiation Producing Equipment; Individual Water and Sewage Systems; Calculation

Effective date: 12/19/12

Pursuant to the authority vested in the Commissioner of Health by Article 6, Sections 602 and 619 of the Public Health Law, Part 40 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Paragraph (a) of Section 1.40 of Part 40 is amended to read as follows:

(a) [A State aid base grant shall be paid to municipalities providing all of the basic public health services as approved in the municipal health services plan in the amount of 25 cents per capita or \$ 250,000, whichever is greater, provided that this amount does not exceed the net cost of such basic services eligible for State aid after deduction of ineligible expense and earned revenue. Capitation] When calculating the State aid base grant in accordance with the Public Health Law, a municipality's population shall be based on local population data published annually by the Bureau of [Biostatistics] Biometrics and Health Statistics of the New York State Department of Health.

Paragraph (b) of Section 1.40 of Part 40 is repealed, and paragraphs (c) through (e) are renumbered accordingly.

Sections 40-2.200 and 40-2.201 are amended to read as follows:

40-2.200 Individual water and sewage systems; performance standard.

Residents of the municipality shall receive, upon request, technical assistance regarding the installation, maintenance and operation of individual water supplies and individual sewage systems.

40-2.201 Municipal public health services plan; requirements.

The plan shall include a program for providing technical assistance to property owners regarding the installation, maintenance and operation of individual water supplies and individual sewage systems. The plan shall include, at a minimum, provision of technical assistance regarding installation, maintenance and operation of individual water supplies and individual sewage systems.

New Sections 40-2.240, 40-2.241, 40-2.250, and 40-2.251 are added to read as follows:

40-2.240. Radioactive materials licensing and inspection program; performance standard.

The municipal public health services plan shall include a radioactive materials licensing and inspection program containing those provisions set forth in section 40-2.241 of this Subpart, if the Department has authorized the municipality to conduct such a program.

40-2.241. Radioactive materials licensing and inspection program; authorization.

The department shall authorize a municipality's radioactive materials licensing and inspection program if such program includes, at a minimum, provisions for:

- (a) regulating all facilities in the municipality's jurisdiction;
- (b) ensuring the technical quality of licensing actions by the municipality;
- (c) assessing licensee compliance with (i) the conditions of the license and (ii) Part 16 of the State Sanitary Code, or substitute licensure requirements approved by the Department pursuant to Section 16.1;
- (d) ensuring correction of violations; and
- (e) inspecting regulated facilities at a minimum frequency established by the department.

40-2.250. Radiation-producing equipment program; performance standard.

The municipal public health services plan shall include a radiation-producing equipment inspection program containing those provisions set forth in section 40-2.251 of this Subpart, if the department has certified such a program for the municipality.

40-2.251 Radiation-producing equipment program; authorization.

The department shall certify a municipality's radiation producing equipment inspection program if such program includes, at a minimum, provisions for:

- (a) inspecting all facilities and equipment in the municipality's jurisdiction; and
- (b) performing inspections and issuing reports consistent with Part 16 of the State Sanitary Code and, in particular, reporting as described in section 16.10.

Subpart 40-3 is repealed, in its entirety.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

Article 6 of the Public Health Law (PHL) provides statutory authority to provide State aid to municipalities for general public health work (GPHW). PHL §§ 602 and 619 authorize the Commissioner to adopt rules and regulations to effectuate the provisions of Article 6, including, but not limited to, the authority: to establish standards of performance for environmental health services delivered under the GPHW program; to establish reasonable costs; and for the monitoring and evaluation of the municipalities' expenditures and performance of GPHW.

### **Legislative Objectives:**

The goal of PHL Article 6 is the establishment of mechanisms and standards for the provision of State aid to municipalities for GPHW.

### **Needs and Benefits:**

Effective January 1, 2007, the Legislature amended PHL § 605 by changing the reimbursement algorithm for State aid. Effective July 1, 2011, the Legislature amended PHL § 605 to eliminate "optional services" as a category of services eligible for State aid. Services formerly designated as optional are still described in the Department's regulations at 10 NYCRR Subpart 40-3.

The proposed changes update the regulations to conform to the statutory provisions in two ways. First, the amendments contain technical changes, such as repealing defunct provisions in Subpart 40-3 and clarifying that the Bureau of Biometrics and Health Statistics is the proper unit for establishing population data for purposes of calculating State aid. Second, technical clarifications are made to provisions relating to State aid for individual water and sewage systems programs. When the Legislature eliminated optional programs, counties raised questions regarding State aid regulations pertaining to individual water supply and sewage systems. Up until that point, both basic and optional State aid programs existed with respect to individual water supply and sewage programs. *See* 10 NYCRR 40-2.200 and 40-2.201 (basic) and 10 NYCRR 40-3.50 *et seq.* (optional).

Additionally, the proposed changes clarify that the basic State aid program is intended to cover the installation, maintenance and operation of individual water supply and sewage programs. Historically, the majority of technical assistance needed for these systems pertains to operation and maintenance issues with aging individual water and sewage systems—not merely with initial installation. Indeed, aging individual water supply and individual sewage systems present the most significant public health hazard.

However, the current regulations at 40-2.200 and 40-2.201 only use the term “installation.” Counties were unsure whether, after the elimination of optional programs, basic State aid would continue to be available for technical assistance with the operation and maintenance, or whether State aid for these activities was being eliminated along with optional services. The proposed regulations seek to clarify this by explicitly

including technical assistance with operation and maintenance of individual water supply and sewage systems, consistent with the Department's practice.

Finally, the regulations include new substantive provisions relating to State aid for programs involving radioactive materials and radiation producing equipment.

Specifically, two formerly optional services are of such critical importance that the Department proposes to re-categorize them as "basic" public health services: regulation of radioactive materials and regulation of radiation producing equipment. Radioactive materials and radiation producing equipment present significant environmental health hazards to the public and, therefore, are eligible for State aid pursuant to PHL § 605(3)(b)(5). By making these services part of basic public health work, the Department will help counties defray the cost of protecting citizens from the environmental health effects of radioactive materials and radiation producing equipment.

The Department recognizes that not every county has the technical capability to regulate radioactive materials and radiation producing equipment. Counties without such technical capability should not be rendered ineligible for State aid as a result of their inability to perform all general public health work. Accordingly, the proposed amendments provide that a county's basic public health work includes regulation of radioactive materials and radiation producing equipment only if that county has the technical capability to do so, as authorized or certified by the Department.

Pursuant to a New York State agreement with the federal Nuclear Regulatory Commission (NRC), radioactive materials must be regulated throughout the State. Currently, the New York City Department of Health and Mental Hygiene (DOHMH) is the only municipality certified by the Department to regulate radioactive materials; the State provides this service in all other counties. DOHMH licenses and inspects approximately 350 radioactive material facilities in New York City. By protecting the public from the environmental health hazards from these radioactive materials, DOHMH provides a substantial benefit to the public health.

Additionally, pursuant to Part 16 of the State Sanitary Code, the Department has certified DOHMH and four additional counties (Suffolk, Westchester, Dutchess and Niagara) to inspect radiation producing equipment. DOHMH and these additional counties license and inspect nearly 10,000 radiation equipment facilities. Like the radioactive materials program, these municipalities offer a substantial public health benefit by protecting their citizens from the environmental health hazards potentially created by radiation producing equipment.

Failure to conduct timely inspections of any of these facilities could result in equipment failure or technician errors going unnoticed and uncorrected for longer periods of time, resulting in radiation overexposure during diagnostic or therapeutic procedures or misadministration of nuclear medicine for patients who require these life-saving health services. Inspection of facilities that use radioactive materials ensures appropriate

handling and minimizes exposure to workers, the public and the environment. A security check of high-risk radiation sources is also conducted during these inspections.

A series of New York Times articles published in 2011 indicated the public's concern over radiation medical events and malpractice has significantly increased. In addition, the March 2011 earthquake and related events in Japan further indicated that the public is highly concerned about radiation exposure. During the week of March 14, 2011, the Department's Bureau of Environmental Radiation Protection received approximately 40 calls every day from citizens with concerns about exposure. The public rightfully expects a robust regulatory program, which DOHMH and other counties currently provide, through their partnership with the Department.

Due to the public health threat presented by radiation, it is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

**Costs to Regulated Parties for the Implementation of, and Continuing Compliance with, the Rule:**

Because the regulated municipalities are already performing these programs, no increase in costs will be incurred. Rather, regulated municipalities that wish to continue these programs will save money by continuing to receive State aid. However, without this

regulatory change, municipalities that wish to continue these programs will see their costs increase substantially.

**Costs to the Agency, the State and Local Governments for the Implementation of the Rule:**

The municipalities that operate these programs and receive funding have indicated they would discontinue the programs if State aid is not provided. By encouraging counties to continue these programs, the Department will save money. As noted, pursuant to the State's agreement with the federal Nuclear Regulatory Commission, if DOHMH ceases to regulate radioactive materials, the State must do so. This will cost substantially more than the \$370,000 in State aid that was paid to New York City in 2009, which represents only 26 percent of DOHMH's total costs for regulating radioactive materials. Although the NRC could theoretically take over regulation of radioactive materials, the burden on local businesses to pay federal fees would be more than five (5) times higher than the costs imposed by the programs operated by the State and local governments. Similarly, as a matter of sound public policy, the Department would take over regulation of radiation producing equipment if municipalities cease to do so.

In 2009, the cost to the State to fund the municipalities that conduct these programs was approximately \$560,000. Specifically, New York City was reimbursed \$370,000 for its radioactive materials inspection and licensing program and \$119,000 for the radiation producing equipment program, for a total of \$489,000. Two other counties were reimbursed approximately \$71,000 for their radiation producing equipment programs. The remaining two counties recovered enough in fees in that year that the programs

exceeded their expenses and were therefore ineligible for State aid. These costs are not expected to change if the proposed regulations are adopted.

It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents sound fiscal policy as well as good public health policy.

**The Information, Including the Source(s) of Such Information and the Methodology, upon which the Cost Analysis is Based:**

The cost analysis is based on calendar year 2009 State Aid claims provided by municipalities, as currently required by PHL § 618 and 10 NYCRR § 40-1.20(b). An annual summary of State aid is routinely prepared by the Department.

**Local Government Mandates:**

This proposed rule does not impose any program, service, duty or responsibility upon the municipalities that has not already been agreed to and certified by the Department.

**Paperwork:**

The requirements for reporting will remain unchanged.

**Duplication:**

There are no relevant rules and other legal requirements of the state and federal governments, that duplicate, overlap or conflict with the proposed rule.

**Alternatives:**

The alternative is for the Department to take over regulation of radioactive materials as well as regulation of radiation producing equipment in those municipalities that discontinue these programs because they are ineligible for State aid. It is estimated that this alternative would cost the State over \$3,000,000, based on the cost of funding the 22 FTEs currently employed by the municipalities to operate these programs. This number does not include clerical, administrative, and management positions that support the municipal programs. Because of the magnitude of these costs, the Department has opted to reject this alternative and instead propose these regulations to support already existing county programs.

**Federal Standards:**

There is no federal minimum standard that determines whether the State must supply State aid to municipalities that choose to provide these services. However, the federal government does require that these programs be provided throughout the State.

**Compliance Schedule:**

The regulations will take effect upon publication of the Notice of Adoption in the State Register.

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## **REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS**

### **Effect on Small Business:**

The substantive regulations—which relate to regulation of radioactive materials and radiation producing equipment—will apply to county programs that are certified by the Department or that become certified in the future. Currently only Dutchess, Niagara, Westchester, Suffolk counties and New York City have such programs. The proposed regulatory change will result in no additional cost to these local governments.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41 (c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the cost to small business would be at least five (5) times higher than it is now.

### **Compliance Requirements:**

The certified county programs already meet the requirements and comply with the regulations. Facilities inspected will still be required to meet the requirements of Part 16, regardless of whether they are inspected by county inspectors or State inspectors.

### **Professional Services:**

Certified counties do not need professional services to establish or maintain certification.

**Capital Costs and Annual Costs of Compliance:**

There are no capital or annual costs associated with this regulation that are not already realized by the municipalities authorized to operate these programs.

**Economic and Technology Feasibility:**

The proposed regulatory change will result in no additional cost to local governments or impose any new technology requirements or costs.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41 (c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher.

Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the economic cost to small business would be at least five (5) times higher than it is now.

**Minimizing Adverse Impact:**

No adverse impact of implementation has been identified. Failure to implement may result in some county programs dropping certification, which will then require the State DOH to implement these programs.

**Small Business Input:**

No small businesses were surveyed. The proposed changes do not have any direct effect on small business. Failure to implement these changes may result in fee increases for small business.

**STATEMENT IN LIEU OF  
RURAL AREA FLEXIBILITY ANALYSIS**

A rural area flexibility analysis is not required for this proposal because it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. The only municipalities affected by the substantive regulations involving radioactive materials and radiation producing equipment are New York City and the Counties of Dutchess, Niagara, Westchester and Suffolk.

**STATEMENT IN LIEU OF  
JOB IMPACT STATEMENT**

A job impact statement is not required for this proposal because it will have no adverse impact on jobs or employment opportunities. The substantive regulations involving radioactive materials and radiation producing equipment will support counties that continue or wish to adopt these programs.